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DIARY FOR JANUARY.

1. Wednesday..... Circumcision. Taxes to be computed from this day.
5. SUNDAY..... *2nd Sunday after Christmas.*
6. Monday..... *Epiphany.* County Court Term begins. Surrogate Court Term begins. Heir and Devisee Sittings commence. Municipal Elections.
8. Wednesday..... Election of School Trustees.
9. Thursday..... York and Peel Winter Assizes commence.
11. Saturday..... County Court and Surrogate Court Term ends.
12. SUNDAY..... *1st Sunday after Epiphany.*
13. Monday..... Recorder's Court sits. Election of Police Trustees in Police Villages.
15. Wednesday..... Treasurer or Chamberlain of Municipalities to make returns to Board of Auditors.
18. Saturday..... Articles, &c., to be left with Secretary of Law Society.
19. SUNDAY..... *2nd Sunday after Epiphany.*
20. Monday..... Members of Municipal Councils (except Counties) and Trustees of Police Villages to hold their first meeting.
21. Tuesday..... Heir and Devisee Sittings end. Last Day for Notice Chancery Examinations, Toronto.
26. SUNDAY..... *3rd Sunday after Epiphany.*
28. Tuesday..... Members of County Council to hold their first meeting.
31. Friday..... Last day for Cities and Counties to make returns to Government. Day for Grammar School Trustees to retire.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

JANUARY, 1862.

THE MASON AND SLIDELL CASE.

Questions of right and wrong are of daily occurrence between individuals, and attract little attention beyond the circle of those immediately interested. But where the question raised is one between nations, not only the subjects of these nations, but often the whole civilized world, is interested in the proper solution of the question.

Just such a question was lately pending between Great Britain and the United States of America.

A British mail steamer called the Trent sails from Havanna to England. She has on board, among other passengers, two gentlemen called Mason and Slidell. She is intercepted on the sea by a United States vessel of war called the San Jacinto. She is boarded by Captain Wilkes, the commander of the San Jacinto, who takes into custody Messrs. Mason and Slidell and removes them to his own vessel. The Trent is then allowed to proceed. It is believed that these two gentlemen were accredited agents of the government of the Confederate States, and it is supposed they carried despatches from the government of the Confederate States, but the contents of the despatches are unknown.

The question was whether the conduct of Captain Wilkes was justified by international law or the law of nations.

The law of nations is what lawyers term *lex non scripta* or unwritten law. It is not to be found written in any code or set of statutes. It in this respect resembles the common law of England. Its source is the law of reason. Traces of it may be found in the writings of eminent authors of acknowledged international authority. Where these are silent, reference is made to the conduct and practice of nations. Where this fails, reference is made to the principles of natural justice which are common to all mankind, of whatever language, colour or creed.

No court exists for the administration of this law. No tribunal has jurisdiction, unless by consent, to adjudicate upon the jarring interests of contending powers. The decision of such questions is too often left to the god of battles.

War is a great evil. It usually arises between two nations. It sometimes extends to several nations: but at all times there are nations which take no part or lot in the dispute. These are neutrals. The belligerents have their rights and neutrals have their rights. The rights of the one are the obligations of the other.

It is the obligation of a neutral power in all things to show strict impartiality to the belligerent powers. If she actively favor one of the parties to the prejudice of the other, she is no longer a neutral.

But commerce between nations is not to be stopped because two nations are at war. Commerce no doubt may suffer, but is to suffer as little as possible consistent with the rights of the belligerents.

It is the right of a belligerent nation to deprive her opponent of every thing which may enable her to resist or injure. It is her right to intercept every thing relating to war, whether carried by neutral vessels or not.

In order that commerce may subsist in as great a degree of freedom as consistent with the laws of war, there are certain rules to be observed on which most civilized powers appear to be agreed.

One rule is that a belligerent may, on the high seas, intercept goods contraband of war, such as arms, ammunition, timber for shipbuilding, naval stores, and even provisions under certain circumstances. (Vattel, 337; Chitty's Law of Nations, 119, 128.). This is a right fully acknowledged by Great Britain. (*Barker* v. *Blakes*, 9 East. 283.)

The right to intercept necessarily involves the right to search. (Vattel, 339.) A neutral ship refusing to be searched, would from that proceeding alone be held condemned as a lawful prize. (Vattel, 339.)

The visitation must be limited to an inquiry with a view to the seizure of such contraband goods as may be on board, and to ascertain the vessel's neutrality. (Wheaton, 591, note *a*.)

If the vessel violate her neutrality she is liable to confiscation. (Wheaton, 567; Phillimore, 370.)

Of the same nature with the carrying of contraband goods is transportation of military persons or the carrying of despatches in the service of the enemy. (Wheaton, 562.)

Military persons are in the nature of contraband of war. The transportation of a person not upon military service is an innocent act. (6 Rob. 428-9.)

Despatches are defined as "all official communications of official persons in the public affairs of the government.' (6 Rob. 65.) But it is not every despatch that is contraband of war. The right to seize a despatch, if it exists at all, is only to seize when because of its character it is calculated to promote the cause of the enemy. (6 Rob. 457.)

Nor does the mere carrying of despatches, even if hostile in their character, affect a vessel's neutrality. The despatches must be fraudulently that is knowingly carried, or the vessel be specially hired to carry them. (Wheaton, 565.)

What did Captain Wilkes seize? Not goods contraband of war, for there were none such. Not despatches, for were none such discovered. He seized two persons. so far as shown, without any military position in the Confederate States.

The United States has admitted the right in time of war to search their merchant vessels, not only for goods contraband of war, but even for persons in the military and naval service of the enemy; but always denied the right to search for mere subjects on an American ship.

The right which she always denied to others is not one which she could with reason have claimed to herself.

What Great Britain disputed, however, was not so much the right to search as the right to seize. The one was a mere inquiry, the other was an act of judgment. What right had Captain Wilkes to decide upon the liability of Messrs. Mason and Slidell to arrest? Who made him the judge to determine a question involved in so much doubt, and of such international magnitude?

No despatches were found. There was nothing shown to justify a well grounded suspicion. It was said the owners of the vessel knew they were violating international law by carrying these men. If so the veseel should have been seized. The questions involved would in that case have been quietly determined in an admiralty court of competent jurisdiction.

The want of an international court is a disgrace to our present boasted state of civilization. Courts are constituted for the determinatian of questions, both great and small, among subjects of the same state. In this way peace is preserved and society is preserved. But where questions arise between contending states—for the want of a properly constituted tribunal—appeals are made to armies, reason set aside, and society outraged.

Happily, owing to the prudent conduct of the United States government, war between Great Britain and the United States is for the present averted. We are thankful for the result. Instead of upbraiding the government of the United States for its weakness, all friends of peace will admire its firmness. An error acknowledged is a victory won,—a victory none the less glorious because bloodless—a victory which belongs to neither party but to both—a triumph—not of arms, but of reason and justice.

MR. JUSTICE BURNS.

We make room in this number for the admirable address delivered by this learned judge to the Grand Jury at the late Assizes for the City of Toronto.

It is seldom that we find an address so able and so learned delivered on such an occasion. When we do find one such it is a duty which we owe to the profession to preserve it in, and to make it known through, the columns of the Law Journal.

LAW SOCIETY, UPPER CANADA.

EASTER TERM, 1861.

ADMISSION FOR ATTORNEYS.

STORY'S EQUITY JURISPRUDENCE.

1. Under what general heads does Story treat this subject?
2. When is a cross bill proper?
3. What should an answer contain?
4. Give instances of the "Auxiliary" Jurisdiction of Equity.
5. How far does Euity interfere in matters of rent?
6. What exceptions prevail to the general rule, as to parties to suits?
7. What is the right of contribution, and between whom will it be enforced?

BLACKSTONE'S COMMENTARIES.

1. In what does the right of property consist?
2. What are the four chief relations in which persons stand to each other in private life?
3. What are the three points to be considered in construing a remedial statute?

SMITH'S MERCANTILE LAW.

1. To what limitations is the right of an undisclosed principal to sue on a contract made by his agent subject?
2. Upon what does the negotiability of bills of exchange and promissory notes respectively depend?
3. What is an endorsement in full, in blank, a restrictive endorsement, and an endorsement "*sans recours*," and what is the effect of such endorsements respectively?
4. What is a charter party, and a bill of lading.

WILLIAMS ON REAL PROPERTY.

1. What was the effect of a warranty, and how has it been affected by recent statutes?

2. What are the statutory requirements with reference to leasehold interests?

3. How far is a covenant affected by a license once given for a breach of it?

4. What limitations exist with respect to executory interests in land?

5. What are the requisites of a Will of realty?

6. How may estates tail be effectually barred?

7. Give examples of vested and contingent remainders.

STATUTES, PLEADINGS, AND PRACTICE.

1. What statutory provisions exist with reference to the Court of Chancery?

2. When will a discovery be enforced?

3. What old forms of bills have the general orders abolished?

4. Sketch the ordinary proceedings in a suit in Chancery, from the beginning to its termination.

5. When infants are party defendants to a bill, how can the plaintiff proceed against them, notwithstanding their disability?

6. What is necessary in entering an appearance to a writ of ejectment when the defendant intends to set up title in himself?

7. In what cases and at what period of the suit has a court or judge power to refer to arbitration compulsarily?

8. Under what circumstances will an amendment be allowed at the trial in case of misjoinder of defendants?

9. In what cases of replevin is an order of a judge unnecessary before issuing the writ?

EXAMINATION FOR CALL.

TAYLOR ON EVIDENCE.

1. What are the rules relating to secondary evidence, and its reception?

2. Distinguish between evidence, competent evidence, and satisfactory evidence.

3. What exceptions are there to the rule, that communications between attorney and client are privileged?

4. What are the rules respecting the right to begin and reply?

5. What is the effect of judgments, both as regards parties and strangers?

6. What are the proper functions of judge and jury respectively?

STEPHEN ON PLEADING.

1. What construction will be put on the language of a pleading which admits of two constructions?

2. Are there any, and if so what class of pleas which neither traverse nor confess, and avoid the declaration?

4. What is a departure, and what is the first stage in pleading at which it can occur?

ADDISON ON CONTRACTS.

1. How would an ordinary contract and a bill of exchange respectively be affected by the consideration being partly legal and partly illegal? Give your reasons.

2. What will be a sufficient acknowledgement in writing to take a debt out of the Statute of Limitations.

3. Mention any contracts which will be binding if under seal, but not otherwise.

BYLES ON BILLS.

1. In cases of conflict between the English and Foreign law as to bills of exchange, what are the principal rules which are to govern?

2. In what cases may notice of dishonour be excused?

3. What is the general right acquired by the transferee of a bill, and what exceptions exist thereto?

4. When does the Statute of Limitations begin to run in the case of a promissory note payable on demand?

5. If the holder of a bill agrees to renew it when it becomes due, is he bound to do so?

6. How far is a renewal bill affected by the character of the consideration for the original bill?

SMITH'S MERCANTILE LAW.

1. What warranties on the part of the insured are *implied* in a marine policy?

2. When does the right to stop *in transitu* arise? What is its effect on the *property* in the goods seized? and how may it be defeated?

3. What is the difference between a factor, a broker, and a *del credere* agent?

STORY'S EQUITY JURISPRUDENCE.

1. "*Qui priar est in tempore, potior est in jure.*" Is this principle of universal application in Equity?

2. How must trusts be evidenced? and what exceptions are there to the general rule?

3. What difference is there in the nature of a contract at Law and in Equity?

4. Give examples of the jurisdiction of "Auxiliary Equity"?

5. Under what circumstances may a discovery be compelled, notwithstanding a forfeiture or penalty may result therefrom?

6. Mention some of the principles laid down by Story, as to "Equity pleading."

WILLIAMS ON REAL PROPERTY.

1. How may the estate of a tenant for life be forfeited?

2. Explain the effect of the statutes passed in the 13th and 27th years of Queen Elizabeth upon alienations of property.

3. Under what circumstances has a specialty creditor priority over a simple contract creditor?

4. How can an interest in a term of years be surrendered?

5. Wherein does the Law of Canada differ from that of England as to a wife's dower?

6. How far have statutory provisions affected the Common Law modes of alienation of estates.

STATUTES, PLEADING, AND PRACTICE.

1. What discretionary jurisdiction was given to the court of Chancery, by the Act which first established it in Upper Canada?

2. How must a defence to a suit in Equity be set up? and distinguish between the present and the former practice.

3. What jurisdiction has Chancery over infants and their estates?

4. What is the affidavit of production, and what should it contain?

5. In what cases will the Court of Chancery still commit by the writ of attachment?

6. What is the present course (instead of attachment) to enforce an award for payment of money where the order of reference has been made a rule of court?

7. What must be the nature of a debt to be the subject of garnishment?

8. What is the effect of a verdict for the defendant in replevin on the single issue of *non cepit?*

9. What is the effect of withdrawing a record, withdrawing a juror, and the jury being discharged, respectively?

JUDGMENTS.

QUEEN'S BENCH.

Present: ROBINSON, C. J.; MCLEAN, J.; BURNS, J.

16th December, 1861.

Murray v. *Brydges.*—No rule.

Drew v. *Finlayson.*—Rule refused.

Burke, assignee of sheriff v. *Glover and McTavish.*—Rule to stay proceedings on a replevin bond. Rule absolute.

Shedden v. *Worthington.*—Action on a sealed contract to deliver on cars of Northern Railway certain stone, according to specification. Payments to be made monthly. Pleas: 1. *Non est factum;* 2. Did not deliver; 3. Did not deliver as required. Verdict for plaintiff; and rule for new trial, on the ground of verdict being contrary to evidence and judge's charge. The judge was dissatisfied with verdict. Rule absolute for new trial on payment of costs.

Vanwart v. *Carpenter.*—Action on guarantee. Trial at Hamilton, before Hagarty, J. Pleas: 1. *Non assumpsit;* 2. Goods not goods of plaintiff; 3. After goods delivered, agreed that plaintiff should give time to creditor; 4. That creditor delivered bills of exchange, &c., in full of debt. Issue. Rule absolute for new trial without costs.

In re Higginbotham and Moore.—Rule on judge of county court of Wellington for a prohibition restraining him as judge of division court from proceeding on claim not within jurisdiction. Plaintiff did not attend, but instructed counsel to attend trial; and objections were made as to jurisdiction, but overruled by the judge. Plaintiff in division court sued for £2b, abandoning £1 8s. 8d. Before the six days for moving for new trial, judge gave leave to plaintiff to amend his claim, so as to bring it within jurisdiction of division court. The plaintiff's case, as shown by the first statement, showed the action was not within the jurisdiction of the division court. The judge then allowed the amendment. If there was any irregularity in granting the amendment, that is no reason for awarding the prohibition, if case now within division court; and as the defendant has moved for a new trial in the court below, case allowed to go on as it now stands. Rule discharged.

Grey v. *Harding.*—Trespass. Plaintiff was ejected at a time of great severity of weather. The plaintiff's children were driven to take shelter in a barn, totally unfit to shelter them. There was an appearance of great cruelty, on the part of the defendant, in the way in which the plaintiff and his family were treated. Verdict for plaintiff; and defendant moved for a new trial, or verdict for defendant. *Jones* v. *Chapman*, 2 Ex. 203, case in point in favor of the defendant. Rule absolute to enter verdict for defendant on second plea.

Fraser v. *Fralick.*—Ejectment. Trial at Kingston, before Richards, J. Question submitted was, whether deed voluntary or for good consideration. Jury found for plaintiff. Rule absolute for new trial. Costs to abide the event.

Colebrooke v. *Corporation of Township of Brantford.*—Action for not keeping bridge in repair, by which plaintiff's carriage and horses were damaged, and plaintiff's legs broken. Trial at Brantford before Burns, J. Defendants pleaded that they had passed by-laws to keep roads in repair, and had employed overseers for the proper keeping in repair of all roads and bridges in the municipality. The municipality are the owners of the roads and bridges, and are bound to keep them in repair, and are therefore not like trustees or commissioners, who have only charge of such roads and bridges. 337th section of municipal act requires every corporation to keep roads and bridges belonging to them in proper repair, and gives an action for neglect of so doing. The verdict, therefore, allowed to stand. Rule for non-suit or new trial discharged.

Swanston and Trust and Loan Company v. *Strong.*—Ejectment. Defendant defended for whole lots and claimed for improvements, but the plaintiff denied the right, and contended that this was not a proper case for assessment of improvements. The jury found £125 for improvements, and £450 for land, being at £6 per acre. Shown that there was no proper survey. *Per cur.*—The assessment must be set aside, and rule absolute.

Addison v. *Burrell.*—Action of replevin after distress for rent. At the trial the defendant and his witnesses were not present, although subpœnas had been sent through the post office in good time. The letter enclosing them was not received by defendant until 6th November, and trial had taken place on 16th October in its turn. Rule absolute for new trial. Costs to abide the event.

Harmer v. *Gouinlock.*—Trover. Trial at Brantford. Defendant had obtained judgment against Henry Harmer, and sought to attach certain chattels. The plaintiff, his son, Robert Harmer, claimed the goods, and under an interpleader in county court. Verdict for Robert Harmer. After this the plaintiff then brought this action. The interpleader is an estoppel. Rule discharged.

Iler v. *Nolan and Fox.*—Trespass. Motion to enter a non-suit for defendant, or for new trial. The court think the plaintiff ought to be non-suited on the ground that the whole of the lot was granted by the first patent. Rule absolute for non-suit.

McLachlin v. *McHenry.*—Rule *nisi* to set aside judgment and all proceedings thereunder, on ground that judgment signed against good faith, after plaintiff's attorney had said that he would not go on with the suit, and on the merits. The motion was made two years after judgment was signed, and when defendant's lands were about being sold under *fi. fa.* lands. Rule absolute on payment of costs.

Newburn v. *Street.*—Motion on behalf of one Spalding, for leave to appear and defend. Information filed for the forfeiture of certain lands. Rule absolute.

Smith v. *Paisley.*—Action of trespass. Motion on behalf of defendant for new trial on ground of excessive damages, and on law and evidence; and on ground that case was taken in absence of defendant's witnesses, who arrived a day too late, in consequence of not receiving a letter by post in time. Rule absolute on payment of costs. Costs to be paid within ten days.

Cataraqui Bridge Company v. *Holcomb et al.*—Declaration states that plaintiffs were owners and in possession of bridge called the Cataraqui bridge, and that defendants were in possession of steamer Comet: that by great negligence, misconduct and want of care of defendants ran their steamer against the plaintiff's bridge, thereby greatly injured. Defendants contended at the trial that plaintiffs should shew want of care, negligence or misconduct on part of defendants. Plaintiffs contended that it was sufficient for them to shew that defendants' steamer was found drifted against the bridge. Judge ruled that the burden of proof lay on plaintiffs. Plaintiffs took a non-suit; and this term moved to set the non-suit aside. The court think that it was sufficient for plaintiffs to shew that defendants' steamer was found drifted against the plaintiffs' bridge; and that the burden of proof lay on defendants. Rule absolute to set aside non-suit.

Queen v. *Brown.*—Motion for a new trial, on the ground of rejection of material and admissable evidence on the part of the prisoner. Evidence of Dolan ought to have been received. New trial granted.

Present: ROBINSON, C. J.; MCLEAN, J.; BURNS, J.

21st December, 1861.

Wisconsin Bank v. *Commercial Bank.*—Rule *nisi* discharged.

Corporation of County of Lambton v. *Pounsett.*—Stands.

Churchwardens of St. George's Church, Owen Sound v. *Corporation of Grey et al.*—Judgment for plaintiffs on demurrer, with leave to move to amend in one month. Plea held bad: 1st. Because no justification of trespass without a by-law; 2nd. Because county has no power to pass a by-law affecting a road in the town.

M Kay v. *Smith.*—Judgment roll to be amended, and then judgment of verification for plaintiff. Stands as to costs.

Chapman v. *Dubrey.*—Judgment for plaintiff upon demurrer, with leave to move to amend within one month.

Hayes v. *O'Connor.*—Rule absolute to enter verdict for defendant.

Watts v. *Howell.*—Assignment for benefit of creditors. Held bad on several grounds. Appeal dismissed with costs.

Patton v. *Melville.*—Postea to plaintiff.

Aylsworth v. *Paterson and wife.*—Judgment on demurrer for plaintiff. Writ of revivor proper remedy.

Widderfield v. *Metcalfe.*—Appeal from county of Elgin. Dismissed with costs.

Billington v. *Bastedo.*—Action against attorney for negligence. Verdict for plaintiff under 1st count for 1s. Damages to stand Verdict for defendant on second count: also to stand. Rule discharged.

Lucas v. *Gzowski.*—Rule absolute for new trial upon payment of costs. Special jury suggested.

Aust n v. *Snyder.*—Rule discharged. McLean, J., *dubitanet.*

Ruttan v. *Beamish.*—Stands.

Austin v. *Hewson.*—Rule discharged.

Watson v. *Callaway.*—Rule discharged.

In re Portman and Patterson.—Appeal dismissed with costs.

The Queen v. *George Happel.*—Conviction affirmed.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

16th December, 1861.

King v. *Dougherty.*—Postea to defendant.

King v. *Glasford.*—Action on bills of exchange. Declaration contained common counts. Pleas—payment, and statute of limitations. Defendant objected that plaintiff could not proceed on common counts, as writ was specially endorsed for bill of exchange Case was tried at county court, under an order of judge in chambers. Defendant applied at trial to amend his pleading. Judge refused, on the ground that he had not power to do so. Verdict for plaint ff with leave to defendant to move to enter a verdict for him. Rule *nisi* for leave to enter a verdict or for new trial, on ground of misdirection by judge, and on the ground that judge should have amended pleas. Rule discharged. Plaintiff allowed to amend his nisi prius record, and judgment for plaintiff on first count.

Fortier v. *Wilson.*—Judgment for defendants on demurrers. No amendment allowed.

Bank of Upper Canada v. *Thomas.*—Action on note. Plea on equitable grounds, that defendant was surety for A. B., an accomodation maker of note, and that plaintiffs gave time, and therefore discharged defendant. Plaintiffs demurred. Judgment for plaintiffs on demurrer.

Vilaire v. *Great Western Railway Company.*—Appeal allowed.

Jenkins v. *Wilcock.*—Action for amount of stock held by defendant. Defendant demurs to declaration raising several objections: one was that a *fi. fa.* should have been issued against the Company to every county through which their road ran. Judgment for plaintiff.

Brown v. *Osborne.*—Action on covenant in mortgage. Defendant pleaded an equitable plea. Plaintiff demurred Verdict for defendant. Plea bad. Judgment for plaintiff on demurrer. Rule for new trial absolute.

Patterson v. *Thomas.*—Action against sheriff for a false return. Plaintiff demurred to defendant's plea. Plea held bad. Judgment for plaintiff on demurrer.

Dunkin v. *Crombie.*—Postea to plaintiff.

Turnbull v. *Insurance Co. of Johnstown District.*—The rule is strong against receiving affidavits of jurymen. Rule granted for new trial, on condition of defendant paying £400, and costs of former trial and of this application, into court within one month; which plaintiff is to be allowed to take out, and defendant to amend his pleas, by striking out all relating to fraud, and retaining those only relating to value.

Allan v. *Alexander.*—Action on promissory notes, for which mortgage was taken. Defendant pleaded the giving of a mortgage for the debt, merger. Rule absolute for non-suit.

Chisholm v. *Morse.*—On looking at the notes of Burns, J., and Hagarty, J., the court came to the conclusion to make the rule absolute for new trial, costs to abide the event.

Black v *Alcock.*—Action for slander, that death of plaintiff's infant child, a bastard, was caused by the desertion of plaintiff, its mother. The pleader sets out the anguish of mind and loss of character of the plaintiff, but not that plaintiff was subject to a criminal charge for desertion of child, causing its death. Rule for new trial.

Scott v. *Millar.*—Rule absolute for new trial without costs.

Moore v. *McLaren.*—Action against a shareholder. Judgment for defendant.

Healey v. *Crummer.*—Action for seduction. Plaintiff not entitled to recover. Rule absolute for non-suit.

Kerr v. *Parsons.*—Action against executors of Benjamin Parsons. Verdict for plaintiff. Rule to enter non-suit discharged.

Warwick v. *Park.*—Rule absolute for new trial on payment of costs; and if costs not paid by first day of next term, then rule to be discharged.

Wilson v. *Huron and Bruce.*—Application to set aside an award. The affidavits deny notice to the defendants of the publication of the award. It would have been more proper to have shown that the officers making the affidavits had no notice, as notice to them would be notice to the corporation. Per C. J.—I am satisfied that Mr. Wilson and his firm were agents for the defendants' attorney, and had notice of the award. Mr. Wilson as either counsel or agent had authority to make the agreement of 17th August, 1861. *Swinfen* v. *Lord Chelmsford*, 6 Jur., N.S., followed. Rule discharged with costs.

Devlin v. *Bayne.*—Action for injuries sustained by plaintiff, by improper driving of defendant. The jury found for the plaintiff, and that the plaintiff did not turn out. Rule absolute for new trial. Costs to abide the event.

Warwick v. *Park.*—Rule absolute for new trial on payment of costs.

In re—one, &c.—On consulting the master the court discovered that the name of this attorney is not on the rolls, and therefore no rule to strike him off the rolls.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

21st December, 1861.

Brown v. *Wythes.*—Application to enter verdict for plaintiff, on certain issues left to the decision of the court. Verdict should be entered for plaintiff on issues under common counts of declaration for $4,325 05, and for defendants on first count. Rule accordingly.

Morson v. *Hunter.*—Action by the assignee of a mortgage against the original mortgagee, on a covenant contained in the assignment to pay the amount of mortgage money. The declaration set out the facts. Defendant demurred to plaintiff's declaration, on the ground that the declaration did not show that they endeavoured to collect the amount from the original mortgagor, or that the plaintiff had exercised his remedy against the land, and on other grounds. Judgment for plaintiff on demurrer.

Holton v. *Sanson.*—First count—trover; second count—that on warehouse receipt, given by defendant to Clarkson, Hunter & Co., for 500 bushels of wheat, which was endorsed by Clarkson, Hunter & Co. to plaintiff, defendant refused to give plaintiff wheat; third and fourth counts. Verdict for plaintiff for $400. Motion to set aside verdict on ground that it was against law and evidence, and for misdirection, in that the learned judge said that the endorsement of receipt would pass the property. Demurrer to the second and third counts. Judgment for defendant on demurrer to the second count; for plaintiff as to first and third. Verdict to be entered for plaintiff on first and third counts.

Rutherford v. *Stovel.*—Special case. Questions submitted by arbitrator for the opinion of the court. Action on a covenant by defendant to save harmless plaintiff from debts of partnership to a certain amount. Plaintiff says that defendant must pay the whole amount of his indemnity, irrespective of debts due to plaintiff. 1st question by arbitrator—Is this so, or is the defendant only to pay the balance of his indemnity, after deducting the several amounts due him (the plaintiff); that is, is the defendant entitled to the benefits of the debts due plaintiff, or must he (defendant) pay the whole amount of his indemnity — under his (defendant's) covenant—or only balance. Second—Was the $4,000 mentioned in the covenant a penalty or liquidated damages. Judgment of court is — 1st. That defendant had no right to take advantage of debts due plaintiff: 2nd. That the $4,000 is only a penalty. Rule accordingly.

Commercial Bank v. *Wilson.*—Judgment for defendant on demurrer to the replication to the equitable plea.

Holden v. *Jackson.*—Question, whether auctioneer is bound to accept a bid of any one who comes in. *Held*, auctioneer is not bound to do so. Judgment for defendant on demurrer.

Bull v. *Palsgrave.*—Rule discharged.

McLeod v. *Matheson.*—Rule discharged.

Austin v. *Dickson.*—Motion to enter non-suit on leave reserved, on the ground that there was no evidence that plaintiff had possession of any land whereby he would be entitled to the use and flow of the stream in question, or for new trial. Rule discharged.

Austin v. *Shaw.*—Same as last. Rule discharged.

Jones v. *Jones.*—Motion for new trial. Rule absolute on payment of costs.

McNab v. *Howland.*—Rule *nisi* for new trial, on ground that verdict against law, evidence, and the judge's charge; and for excessive damages, and on the ground of the absence of a material witness. Rule absolute on payment of costs by defendant Fitch.

Doan v. *Warren.*—Rule nisi refused.

CITY OF TORONTO ASSIZES.

ADDRESS OF HON. MR. JUSTICE BURNS TO THE GRAND JURY.

I do not suppose that any one will imagine anything new can be said to a grand jury in the way of instructing them in the duties which its members are required to perform, and therefore I shall simply content myself with repeating what I have on various occasions for something more than ten years past said to other Grand Juries. This repetition ought not to be thought wearisome by me, first, because as presiding over the court in which you are called upon to take an active part, you have the right to expect proper legal instructions as respects the part you are to perform, and the interests of society demand it, and it should be always considered a pleasure to discharge a duty, which one filling a public situation owes to his fellow citizens; and secondly, though I myself may know quite well what should be done by the Grand Jury, yet I must consider that I am not always addressing the same individuals; the Grand Jury is always the Grand Jury after the requisite number is obtained and sworn in, but the individuals composing that jury are ever changing and varying, and perhaps some of you were never upon a Grand Jury before and may not be again for years to come.

Nothing tends stronger to preserve the institutions of a country which society has established and built up from time to time for the good government of the whole body, from being destroyed or their efficiency from being weakened in the affections or good sense of the people, than a pure, impartial, speedy and equal administration of its laws. It is the prompt obedience to, and if it be not voluntary it must be the authorization of enforced obedience to the laws by individuals which preserves society at large in the free, mutual and confiding dealings of its different members with each other. This is no new idea, nor has this language been now used for the first time. The principles which it inculcates are as ancient as the existence of civilization itself, and it is a subject we cannot too often have presented to our minds. The present occasion is one of those where we are called upon to put in practice the maxims deducible from the theory.

The first duty of every good citizen is voluntary obedience to the laws. So long as we are imperfect beings, it is vain to expect that we can be so perfect in our legislation as that every law will always in every particular instance satisfy each individual. We must bear in mind also that individual interests must be governed by, and must succumb as circumstances may require for the interests of the whole body, otherwise it would be impossible to unite a mass of individuals into a congregate body. The power of altering any law is vested in the people themselves through their representatives in Parliament, and whenever any particular law is unsuited to the community, or injuriously affects individuals without being beneficial to the body at large, that power should be invoked and the remedy applied, but individual members of the community should obey the law, though complained of whilst it exists.

If voluntary obedience to the laws always took place neither you nor myself would be called upon to occupy this room for the purpose we are now here assembled, but it is the authoritative enforced obedience required, which occasions one in my public duty to call you here as representing the body of your community to assist in compelling obedience. The protection of life, liberty, and property, forms the spirit and genius of our laws, and when individuals, from misconduct of their own, peril either life, liberty, or property, it is because an offence or crime has been committed, and here for the security of society at large, it becomes necessary that the law should be vindicated, that it should stand supreme over all and above all, and that punishment should follow, for the double purpose of correcting the individuals guilty of the offence or crime, and to operate as examples to others not to commit like offences. Our ancestors wisely deemed it of great importance that in the administration of the law the people themselves should take a prominent part. An interest is created in the breast of every good member of the community when he knows and feels that he himself is assisting in the dispensation of justice, to see that it be dealt out with impartiality and justness, for upon that impartiality and justness his own security or the security of those near and dear to him may possibly at some time depend. It has been the object of many, from time to time, while preserving the wisdom of our ancestors, so to modify the use of the people in the administration of justice as that its use should not be abused. Hence proceeds all the enactments upon the subject of juries which have taken place from the Great Charter downward. It is impossible to trace any time when the system can be said to have been introduced into England, for it seems to be of Teutonic origin. Sir William Blackstone says "the truth seems to be that this tribunal was universally established over all the northern nations, and so interwoven in their very constitutions that the earliest account of the one gives also some traces of the other."

In the administration of the criminal law, every accusation against an individual must first be established to the satisfaction of a body of persons selected from the locality within which the jurisdiction to try the accused is assigned, before any one can be placed upon trial. This body is denominated the Grand Jury, and the duty consists in seeing that the accusation made, is, at least, founded upon something which warrants and justifies the accused being tried for the offence of which he is accused. The evidence offered to the Grand Jury is evidence of accusation only; it is to be given and heard in secret as your oath has explained to you. The accused has no right to appear before or be heard by the Grand Jury, either for the purpose of examining his accuser,

or of offering exculpatory evidence. Thus you will perceive that the proper position which the Grand Jury fills is that of being the public accuser. Upon a commitment following your accusation, the accused is deprived of the protection afforded him by an examination of the witnesses offered against him, no depositions are seen, and it is impossible to say in many cases whether the accused is entitled to be bailed. From the secresy with which the evidence before the Grand Jury is clothed doubtless arises many of the objections which have been made to the existence of such a body at all in the administration of justice. There is no doubt that it is open to the objection that designing persons make use of the Grand Jury for their own individual purposes: and I could, if necessary, point to cases within my own observation where the Grand Jury was unconsciously made the instrument of accusation, proceeding from revenge and an unworthy motive of stifling and preventing civil actions and remedies sought to be enforced. Indictments have been obtained upon a supposed state of facts which would not warrant a commitment of a person in any other form. The Grand Jury was not designed to be converted into the instrument of private cupidity or revenge.

I consider it no derogation to borrow from the labors of others in the disquisition of legal subjects and matters connected with the administration of justice any more than on any thing else. That principle is constantly acted upon in all the various business of life. Each one is ready to adopt and apply the inventions or improvements of another whether in science, arts, manufactures or agriculture. So without more I will read you a passage from the report of the Commissioners upon the Criminal Code of the State of New York on the subject of Grand Juries, shewing the extent of the power of that body and in some respects how it may be abused.

"Within the sphere of what they consider to be their duties the Grand Jury is omnipotent. Accusations in which the public are deeply concerned may be dismissed without a question. Indictments may be preferred upon slight evidence or upon no evidence, and the action of the Grand Jury is beyond the reach of the laws. From the abuses of which it is susceptible and which have been too often practised under its unconscious sanction, it is not to be disguised that its moral power is waning. These remarks are made in no unfriendly spirit to the existence of this institution but from a firm conviction that some restraint must be thrown around its action. To effect this the first principle that the Commissioners assume is that the functions of the Grand Jury as an accuser and as a Judge should be separated. It is not proposed to abridge these powers in respect to the inquiry into the commission of crime. These seem to be an inherent element in its composition. But the proceedings which are taken upon them should be essentially different. When the accused is arrested and brought before a magistrate an opportunity is afforded him of answering the charge; a responsible accuser is presented to whom he may look for redress, if the accusation be malicious or unfounded. But where he is accused by the Grand Jury this protection is denied him, and he is dragged before the bar of justice to answer a charge possibly as false in its substance as it may be malicious in the motive by which it is prompted A course of practice which results in this injustice is not to be defended upon any principle sanctioned by the wisdom of the common law. Its theory is that every man shall have a full opportunity to meet an accusation against him, and it is a violation of that theory that he should be subjected to any stage of condemnation without the privilege of being heard in his own defence."

This passage points to what I repeatedly have brought to the attention of Grand Juries, which is this—that in the discharge of their duties in making enquiry into crime, two classes of cases will present themselves, one class where the subject matter of accusation has been inquired into before a Justice of the Peace, and he has exercised a preliminary judgment upon it already, and the matter is then presented again to the Grand Jury that they may make an inquiry whether the accused should further answer and be put upon trial; and another, which has never been before any other tribunal, and which the individuals accused may first hear of when arrested upon the accusation of the Grand Jury. In the first class the Justice of the Peace cannot dispose of the accusation without confronting the accuser with the accused, and hearing fully what the accused has to say. In the second class the Grand Jury may accuse on an enquiry originating in their body among themselves, or upon the representations made by others in secret, behind the back of the accused, and the first time the accused may hear of it is when he is arrested by the process of the Court. He is utterly ignorant of the evidence upon which it is founded, and thoroughly powerless to obtain it. Now, surely there was good and sufficient grounds for my telling Grand Juries, seeing the enormous power with which the body is invested, that upon the one hand it behoved them to act with great care and caution in cases which were presented to them for the first time, to ascertain from what motive prosecutions were prompted, to discover whether society at large was interested in the inquiry, and particularly to understand why it was and for what reason was it that the complaints were laid before the Grand Jury for the first time, rather than being placed before the ordinary channel, that of a Justice of the Peace—and on the other hand, justice and discretion were required in balancing the scale between a proper accusation and innocence, least the Grand Jury should assume the functions which properly belonged to the Court and Jury who were to try the guilt or innocence of the accused. The Legislature, during the last session of Parliament, has interfered and relieved the Grand Jury in a number of cases from being perplexed with the considerations I have just stated. It is enacted by chap. 10 that no Bill of Indictment for any of the offences following, viz: perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault, shall be presented to or found by any Grand Jury, unless the prosecutor or other person presenting such indictment had been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence be preferred by the direction or with the consent in writing of a Judge of one of the Superior Courts of Law, or of Her Majesty's Attorney General or Solicitor General, or of a Judge of one of the County Courts, or Recorder of a city. This enactment came into force on the 1st September last.

In all cases in which you are asked to investigate into crime, the evidence to sustain the charge, whether offered upon a bill of indictment or otherwise, can only be received by you under the sanction of an oath, so that if any false statement be made before you, the person making such, may be punished for it. The oath may be administered by the Foreman of the Grand Jury, but that can only be done during the time the Grand Jury are assembled as such, and the law requires that twelve members should be present for the purpose of any inquiry: and, further, it is required that twelve of your number assent to any accusation. When an accusation is made against any one the first inquiry should be whether the accused be capable of committing crime, and this involves the question whether the accused be of such tender age, or from mental deficiency, that capability of committing crime presupposes an act of the understanding and an exercise of the will to do it. Upon this point, however, it is sufficient for you to draw a reasonable conclusion from the evidence of accusation, leaving the further investigation to the jury who are to pro-

nounce upon guilt or innocence. The next inquiry is into the charge made. You must be satisfied that there is reasonable cause for saying that there has been a violation of the law, and that the evidence points to the accused as the person who has violated the law. The next material subject for consideration is the intent laid or charged against the accused. That should clearly appear either expressly or by necessary implication from the circumstances, acts, and conduct of the accused. Where an unlawful act is proved to have been committed, the legal presumption flowing from that is that the person who is proved to have committed the act intended to do it, and it must be further presumed that no one is ignorant of the law, and it must also be assumed that every one understands the effect of his actions. The result of these presumptions is that it must be cast upon the person proved to have committed an unlawful act, to make out to the satisfaction of those who are to pronounce whether there be guilt, that there was no intention of committing an unlawful act.

You will apply these principles to the cases mentioned on the calendar, and any others which may be presented to your notice, and I think you will have little difficulty in discharging your duties.

Since I last sat here the Legislature has separated the City of Toronto from the United Counties of York and Peel, and constituted the city into a county for judicial purposes distinct from the other. In consequence of the juries being distinct from those of the United Counties, it has been deemed more satisfactory to hold the Assizes for the county at the city, at a different time from the time of holding for the United Counties. Hence the reason for fixing the holding of this Court on the 30th December. The Court for the United Counties will be held at the time fixed by law, viz., the 9th January.

One of the duties asked by the Court to be performed by the Grand Jury is to visit the Jail and report upon its efficiency or otherwise, and in this report the Grand Jury has a right to bring to the notice of the Court any matter connected with the administration of justice. The Jail used for the city is the property of the United Counties, but by the act for the separation of the city from the United Counties of York and Peel, it is provided that all arrangements in existence on the 1st July last, whereby the public buildings may be used for public purposes, shall continue in force until they would expire by their own terms, and after the 1st July the buildings may be used as the public buildings of and for the city, according to any arrangement which may be agreed upon by the Municipal Councils of the two corporations.

Before I leave you to perform your duties, I would, according to an ancient custom, when any unusual occurrences happen, make a few remarks upon the circumstances of the day. During the present year, which is now so near its close, we have seen a large portion of the North American continent convulsed, both as respects the Government of the whole of that portion of this continent, and also as respects the bonds of society, which has hitherto held the individual members of that community together. The destruction of the one and the severing of the bonds of the other, presents a sad spectacle to the world, and affords a vast field for comment and contrast. It is not for us, however, to speculate on the probabilities of the government of the whole becoming again united, or upon the alternative presented, that is of a complete separation into distinct and separate governments. We see the fact that for months past distinct governments, *de facto*, do exist, and that both parties are in deadly strife with each other. So far, we, in this country, have been enabled to keep ourselves free from being mixed up in this strife, and happy will it be for us if this can so remain. But who can answer the question whether this state of things will or can continue, or how soon our hitherto quiet and happy condition may be terminated?

We are an integral portion of the greatest empire the world has ever seen—one upon which the sun never sets. Within the last few weeks we have seen how the North American difficulties may be complicated by injudicious or indiscreet interference with the affairs of the British empire. Whatever England may consider as necessary to be done to uphold her position in dealing with an international question, I am fully persuaded the whole of Canada goes heart and hand with every other part of the empire. Should the time arrive—and if it does arrive, it would be an unfortunate thing for all parties—to evince the feeling by action on our part—there cannot be a doubt the county of York in Canada, within which the city is situate—as well as all other counties no doubt will do—will consider itself as much a portion of the empire as the county of York in England; the one will be as ready and willing to repel a foe as the other, and whatever may be necessary to maintain the integrity of the empire will, beyond all question, or fear of contradiction, be thought of as much interest to the one as the other.

Another matter to be noticed, and I am done. The recent arrivals from England bring us the information that our beloved Queen has met with severe family affliction. It is our duty as good subjects to sympathize sincerely with her Majesty in this her hour of trial. May God grant her health and strength to bear up against her bereavement—that her mind may be calmed to look quietly upon the event as a dispensation of Providence to which others are subject, and to bear in remembrance, that the Almighty never afflicts any of His creatures except for their own good. May she yet live long to reign over the British empire.

The Attorney General of England has refused the judgeship rendered vacant by the resignation of Sir Hugh Hill. The Lord Chancellor has chosen Mr. Mellor, Q.C., and it is said the selection has received the approval of Westminster Hall.

SELECTIONS.

MARTIAL LAW IN THE COLONIES.

(*From the "Law Magazine."*)

In the southern part of New South Wales, in the direct line (it cannot be called road) between the township of Yass and the frontier of Victoria, is a small mining district or gold field, which bears the name of Lambing Flat. It acquired that name, we presume, because it happened to be that part of some squatter's domain where his ewes were wont to congregate at the season of parturition. For some reason or other Lambing Flat became the favourite resort of a number of Chinese, and in the latter end of 1860, or beginning of 1861, certain feuds arose between the Europeans and Celestials, which led to disturbances. A determination on the part of the Europeans to expel the Chinese was evinced at the time we have mentioned, and various steps were taken by the New South Wales Government to protect the weaker party, but without any marked result. In July last the police had arrested a few Europeans who had been unusually demonstrative in their opposition to the Chinese, and they were confined in the lock-up of the police-station. Hereupon an armed organization on the part of the Europeans took place, in order to liberate the accused. The police numbered about fifty, the insurgents about three thousand. The parties came to blows, and five or six of the rioters, or "rowdies," as we find them called, were killed and several wounded, and some three or four of the police were also wounded. This excited the Europeans to a sort of indignation frenzy. A new "organization"

was initiated, the results of which was, that the police abandoned the place and retreated to Yass. This naturally alarmed the Government. Troops were sent from Sydney to Lambing Flat, and to give this little band, numbering it is said not more than 125 men, a degree of moral force beyond the mere military display, the Governor of the colony proclaimed martial law.

This expedient has often been resorted to by colonial governors, especially in the Southern colonies during the last twenty years. Sir George Grey did so in New Zealand, in 1845; Sir Charles Hotham did so in 1854, on the occurrence of certain disturbances at Ballaarat in Victoria; Governor Gore Browne resorted to the same expedients in New Zealand on the occasion of the celebrated Wirimu Kingi's armed resistance of the invasion of his *mana*, or tribal right, or manorial right, or by whatsoever name it may be called, in February, 1860.

This ready resort to the proclamation of martial law, on the part of four of our governors in three of our Southern colonies, seems to be so repugnant to all our constitutional notions, that we propose to devote a few pages to the consideration—not of the policy, but of the legality of the expedient. For this purpose, we have nothing more to do with the merits of the Chinese dispute at Lambing Flat. The land question at Taranaki is equally besides the purpose. The Ballaarat riot—serious enough at the time to frighten a Colonial Secretary from his post, and to generate a batch of colonial State trials—has been forgotten in the subsequent orderly state of Victoria, and the greater practical importance of subsequent events; and we only allude to these little great events—little to us—great, at the time, to the colonies—as an intoduction to the somewhat momentous question upon which we propose to enter. Is the proclamation and exercise of martial law in our colonies legal or illegal?

The governor of a colony exercises a delegated authority. All the power which he weilds and exerts he derives from the Queen. He does not, as we shall see hereafter, exercise all the powers and prerogatives of the Crown, but only such parts thereof as he is authorized to administer. His powers are limited and defined by the instruments by which these powers are communicated to him. Of course the Queen cannot confer upon him powers which she herself does not constitutionally possess. What, then, are the Queen's powers and prerogatives as to the exercise of martial law? because, if she hath none, she can communicate none.

The non-existence of this power in the Crown seems to have been completely settled by the Petition of Rights, (1628;) and on the eve of that great enactment during the injudicious and unpopular Spanish war, (1626,) we find, from a passage in Rushworth, that "the companies of soldiers (who had then recently returned from Cadiz) were scattered here and there in the bowels of the kingdom, and were governed by martial law. The King gave commissions to the lords lieutenants, and their deputies, in case of felonious robberies, murders, outrages, and misdemeanours, committed by the marines, soldiers, and other disorderly persons joining with them, to proceed according to certain instructions, to the trial, judgment, and execution of such offenders, as in time of war; and some were executed under these commissions."—*Rushworth*, vol. i. 419.

It will be observed that these commissions, so far as we can rely upon the authority of "Master Rushworth, a young clerk of the Parliament," were confined to soldiers and marines, who would be subject to the military law in England, and to "other disorderly persons joining with them," who would have been subject to military authority if composing part of the army in the field *flagrante bello* (*Darwin* v. *Keppel*, 2 Wils) Yet although confined to persons under the military law when in the field, and therefore, in that day, having some colour of legality, the commissions for the exercise of martial law within the realm were condemned as illegal by the Petition of Rights. This great bulwark of our liberties, "which every Englishman carries with him to the colonies as part of his birthright," (Chalmers' Opinions,) commences by reciting the "grievance and vexation" of having "great companies of soldiers dispersed into divers countries of the nation," and of the inhabitants "being compelled to receive them against their will." It then recites the statute of Edw. III., whereby it is "declared and enacted that no man shall be prejudged of life or limb against the great Charter and law of the land." It then complains that "divers commissions had issued, giving to certain persons power and authority to proceed within these lands according to the justice of martial law, . . . by pretext whereof some of your Majesty's subjects have been . . . put to death, when and where, if by the laws and statutes of the land they deserved death, by the same laws and statutes also they might, and by no other ought to, be judged and executed." The petition then prays that the aforesaid commissions for proceeding by martial law may be revoked and annulled, and that hereafter "no commissions of a like nature may issue forth, . . . lest by colour of them any of your Majesty's subjects be destroyed or put to death, *contrary to the laws and franchises of the land.*"

To this petition Charles very reluctantly assented, and it became part of the law of the land. Strictly, however, it enacted nothing new. It was declaratory of the law which had been in existence—we can hardly venture to say in force—for centuries, under a succession of Charters (5 Edw. III., c. 9, 25 Edw. III., st. 5, c. 4, 28 Edw. III., c. 3,) which, however, had been habitually violated by succeeding sovereigns, and almost forgotten by the people. This celebrated Act is said to have been drawn by Sir Edward Coke, and, so far as martial law is concerned, it has never been violated since the "Great Rebellion."

There is a curious anecdote connected with the debates on the Petition of Rights, which further illustrates the subject. In a conference between the two Houses of Parliament, Serjeant Ashley, the King's serjeant, advanced the dangerous and unconstitutional doctrine of the existence of a species of law which he called "the law the State," or "the law of State necessity," (as a justification of the obnoxious commissions,) which proceeded not by the law of the land, but by *natural equity*. This doctrine appeared to their lordships so very mischievous, that, upon the motion of the Earl of Warwick, Ashley was ordered into custody for advancing it. Yet he admitted that martial law was not to be exercised in time of peace, *when recourse may be had to the King's Courts*, (Parl. His., vol. ii., pp. 315, 329.) This last sentence really defines the state of war and peace. So long as the King's Courts are open there is no state of war. There may be insurrection—there may be rebellion—but it is not war. But *inter arma silent leges;* and it is said that when a country is completely disorganized by war. and the courts of justice have been violently closed, or cannot possibly continue to sit, the exercise of martial law becomes legal. But what meaning has the word "legal" in the above sentence? During such a state of anarchy, *silent leges*, there is an end of all law. What is called the law of the strongest then must prevail. But this is no law at all; and it is fortunate if force, not law, is so used as to become a tolerable substitute for the law which has been silenced, and afford some protection to the people.

The opinions of the best lawyers in the debate on the Petition of Rights, were decidedly against the legality of martial law. They all assert that the exercise of martial law in time of peace is illegal, and that it is only capable of being exercised out of the King's dominions, over military persons and *flagrante bello*. They also show that the test of war or peace within the kingdom is whether the King's Courts are open or closed, and they lay down the principle that insurrection or rebellion is not war, for if one be taken in rebellion, he must be tried in the King's Courts. The speeches in full will be

found in Rushworth, vol. iii., app 81. Here is an abstract of them:—

Lord Coke said, "I shall maintain *jus belli*. But God send me never to live under the law of conveniency or discretion. Shall the soldier and the justice sit on one bench? The trumpet will not let the crier speak in Westminster Hall. *Non bene conveniunt*. The time of peace is when the Courts at Westminster are open, for when they are open you may then have a commission of oyer and terminer, and when the common law can determine a thing the martial law ought not. Drake slew Doughty beyond sea. Doughty's brother desired an appeal to the constable and marshal's courts, and Wray and the other judges decided that he might there sue. We make no law. We must not meditate *ubi lex non distinguit*. To hang a man *tempore pacis* is dangerous; I speak not of prosecution against a rebel. He may be slain in the rebellion, but if he be taken he cannot be put to death by martial law. (Year Book. 28 Edw. II., M. 13.) When courts of law are open, martial law cannot be executed, (5 Hen. IV., 30 Williamson's case.) The constable and marshal desired an addition to their commissions and they proceeded against some according to that power; but because it was not according to their ancient power it was void, for they cannot do anything according to the additional power, (*i. e.*, power to exercise martial law,) and there was a (writ of) prohibition to stay their proceedings under the additional power. How shall the soldier know how to obey them; they are not under the great seal?"

Mr. Banks said, "We have no time of war when the King's Courts are open;" and Mr. Noy laid down a similar proposition. Mr. Mason, of Lincoln's Inn, admitted that in time of war, when the King's Courts are closed, the common law allows the exercise of martial law when an army is in the field; but he asserted that a rebel taken ought to be tried by his peers. "We have now," (1628,) he continued, "no army in the field. We have no enemy except among ourselves, and it is no time of war, therefore the commission (to exercise martial law) is not fit nor warranted by law." Mr. Rolle, afterwards Chief Justice, followed. "If," said he, "the chancery and Courts at Westminster be shut up, it is time of war: but if the Courts be open, it is otherwise. . . . If an enemy come into any part where the common law cannot be executed, there martial law may be executed; but if a subject be taken in rebellion—not slain at the time of his rebellion—he is to be tried after the common law."

The illegality of martial law, even for the government and discipline of the military, is annually reiterated in the preamble of the Mutiny Act; and every school-boy is taught to lisp this as one of the constitutional safeguards of personal liberty: "And whereas no man can be forejudged of life or limb, or subjected in the time of peace to any kind of punishments within the realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm."

Military law and martial law are sometimes confounded. Military law is exercised by the authority of Parliament, and the Munity Act annually passed, together with the Articles of War framed by Her Majesty, and the printed regulations from time to time issued for the government of Her Majesty's troops. Martial law may, no doubt, be established by an Act of Paliament; but what we are now considering is the authority of the Crown in that behalf. Martial law has been established in Ireland by authority of Parliament, and it has sometimes been proclaimed without such authority. The former is legal, as Parliament is omnipotent—the latter is illegal. Lord Loughborough, in the case of *Grant* v. *Gould*, 2 Hen. Bl. 69, draws this distinction very clearly. "Martial law," says that able Judge, "such as is described by Hale, and such, also, as is marked by Sir William Blackstone, does not exist in England at all. When martial law is established in any country, it is of a totally different nature from that which, by inaccuracy, is called martial law, merely because the decision is by a court-martial; but which bears no affinity to that which was formerly attempted to be exercised in this country, which was contrary to the constitution, and has been for a century (this was said in 1792) totally exploded." Another century has nearly elapsed, and we find the "exploded" expedients revived in a part of the empire considered, perhaps, too remote to be within the reach of the public opinion of the mother country.

Such, then, was the state of the law long before the oldest of the Australian colonies was established. These colonies took the law of England in force at the date of their establishment, respectively, "so far as the same was suited to their circumstances and condition,"—which would include all those guarantees of personal security and freedom which have been, from time to time, wrested from the Crown by the courage, and sometimes by the blood, of our ancestors. The martial law which we are now condemning, and which Lord Loughborough so clearly distinguishes from the military law authorized by Parliament for the government of the army, is similar—nay, identical—with that which is exercised when our armies are in the field in a foreign country, when our armies are in an enemy's country, *flagrante bello*, the troops are governed by the Royal prerogative. In a foreign country we cannot have Courts. But even in this case the Queen's regulations are followed as nearly as possible. In the case of *Barwis* v. *Keppel*. 2 Wils. 314, the Court said, "By the Act of Parliament to punish mutiny and desertion, the King's power to make articles of war is confined to his own dominions. When his army is out of his dominions he acts by virtue of his prerogative, and without the statutes and articles of war, and therefore you cannot argue upon either of them, for they are both to be laid out of the case. *Inter arma silent leges*. We think, as at present advised, that we have no jurisdiction at all in this case."

Martial law has sometimes been proclaimed in Ireland without the authority of Parliament. In America, before the declaration of independence, the governors were empowered so to do by a clause in their commissions, since omitted. From these two precedents it may be concluded that, although no power to exercise martial law in England exists, yet the Crown has such power in Ireland and the colonies, and may therefore still delegate it to lords-lieutenant and colonial governors. Let us examine these two opponent precedents. As to the case of Ireland, what reader of history does not recall to mind the noble conduct of Lord Kilwarden in the case of Theobald Wolf Tone? Tone had been taken in open rebellion on board a French ship of war. He had been tried by a court-martial under a proclamation of martial law, had been condemned to death, and was actually in the hands of the provost marshal, as the military hangman is called. Curran, in breathless haste, rushed into the Court of King's Bench, then sitting, and in Tone's name demanded of Lord Kilwarden a writ of *habeas corpus*. It was at once granted. "But, my lord," urged Curran, "while the writ is being prepared my client dies;" whereupon the sheriff was ordered to repair to the place of execution and command the provost marshal to produce his prisoner. The functionary pleaded the orders of his commanding officer, and refused to obey the mandate of the Court. Upon this being reported to Lord Kilwarden, the commanding officer and the provost marshal, with his prisoner, were ordered to be arrested and brought into Court. Tone thus being saved from the rope of the military hangman, was committed to the custody of the civil power for trial, for there was plenty of evidence against him to justify his detention; and he afterwards anticipated the inevitable result of a trial for high treason, by committing suicide in gaol.

Another case in which the dignity and authority of the King's Courts was nobly upheld against military usurpation,

though not a case of martial law, but rather of the abuse of military law, deserves a place here. In the year 1746, one Lieutenant Frye, of the Royal Marines, had been illegally punished under the sentence of a court-martial lawfully held, the sentence, however, being in excess of the power of the court. He brought an action against Admiral Ogle, and recovered £1,000 damages. In the course of the trial, Lord Chief Justice Willes intimated an opinion that every member of the court was liable to an action for the illegal sentence. Upon this, Lieutenant Frye issued writs against Admiral Mayne and Captain Renton, two of the members of the court, and they were served with the writs as they were returning from another naval court-martial upon Admiral Lestvey. This was resented "as an insult" by the members of the last-named court, and they passed some resolutions highly derogatory to the Chief Justice. These they forwarded to the Lords of the Admiralty, by whom they were reported to the King, George II., who signified to their lordships, through the Duke of Newcastle, "His Majesty's great displeasure at the insult offered to the court-martial, by which the military discipline of the navy is so much affected." But the Lord Chief Justice was not a man to be overawed in doing his duty, even by the frowns of royalty; and as soon as the resolutions were communicated to him, he ordered all the members of the court into custody for their contempt, and was proceeding to uphold the dignity of the Court in a very decided manner, when the whole affair was terminated in November, 1746, by the members of the court-martial signing and sending to the Chief Justice a very ample written apology and submission for their conduct. The paper was read aloud in the Court of Common Pleas, and was ordered to be registered among the records of the Court, where it is still to be found, "as a memorial," said his lordship, "to present and future ages, that whoever set themselves up in opposition to the laws, and think themselves above the law, will, in the end, find themselves mistaken." The proceedings and the apology were published in the *London Gazette* of the 15th November, 1746, and will also be found in the *Gentleman's Magazine* for that year.

As to the case of the old colonies in America, there can be no doubt that the old commissions did contain a clause empowering the governors to exercise martial law, but it was expressly limited to "times when *by law* it may be exercised." But it should be remembered, that before the declaration of independence, wars had frequently been carried on between the "provincials" and the French of New France, without much aid from the parent state; it was, therefore, considered necessary to give to the provincial governors ample powers to levy troops, to command them when levied, and to govern them at all times. Accordingly the governors were clothed with full power and authority to "levy, arm, muster, command, and employ all persons whatsoever residing in our province of ——, and other territories under your government, and, as occasion shall serve, to march them from one place to another, and to embark them for the resisting of all enemies, pirates, and rebels, both at sea and land, and to transport such forces to any of our plantations in America, if occasion shall require, for the defence of the same against all enemies, . . . and to execute martial law in *times of invasion* and other times *when by law it may be exercised.*"

It cannot fail to strike the constitutional reader, that great care has been taken to confine this power within legal boundaries. Can it be supposed that the clause was intended to convey, what it could not convey, powers which the King himself has not possessed since the Petition of Rights? It was meant to authorize the governors to exercise one of the royal functions, which, without authority under the Great Seal, he could not exercise—namely, to raise troops, recruit them, move them from place to place, even out of the territorial jurisdiction, and govern them according to military law—that is, by the articles of war when at home, and by the prerogative when in a foreign colony, and when in the field *flagrante bello.* The commission to General Murray, after the conquest of Canada, contained a similar clause, but it was dropped out soon after the American troubles commenced. Why? Not because it was illegal, as above limited; not because it had been illegally executed; not because the people of America had included it among their grievances; not because it had ever been used to oppress the people; not, indeed, out of any tender consideration for popular liberty; but simply because the jealous policy of the Government of that day deemed it wiser to employ regular troops, and even foreign mercenaries, than to train angry colonists to the use of arms, and teach them the art of war. It was under the authority of this clause that Washington was converted from a district surveyor into a provincial soldier. It was in one of the border wars that he gained his first renown.

The whole language of the clause in the old commissions—which will be found printed at length in Baron Mazère's collection, entitled "Quebec Commissions," 4to., 1772—as well as the mode in which it was interpreted and exercised by the provincial governors, shows that it was not intended to operate—and did not, in fact, operate—beyond the legal powers of the King. But if it were so intended, either wilfully or by misconception, there is no trace of it in any governor's commission for nearly a century. If the King of that day usurped a power in the colonies, the Queen of this day certainly does not.

As the power of proclaiming and exercising martial law is not expressly given to the governors of the Australian and other colonies, have such governors any such authority, irrespective of their commissions?

The extent of the powers of the governor of a colony has been determined by a great number of judicial decisions. He is not the general representative of the Queen. He does not exercise all the prerogatives of the Crown. He can only exercise such powers as are delegated to him by his commission, or in some instance by the charter of the colony, or by some equally binding instrument, under the Great Seal of England, by which alone the Queen can confer powers upon her colonial governors. Beyond the powers thus specifically conferred upon him, he cannot legally travel; and if he exceed them, he renders himself liable to an action at the suit of the party injured, and even to an indictment, if the infraction of his powers amount to a criminal offence. We proceed to support these propositions by judicial decisions.

In the case of *Fabrigas* v. *Mostyn*, 20 State Trials, Governor Mostyn had taken upon himself to arrest and banish the plaintiff from Minorca to the Spanish Main, under an imputation of alleged treasonable practices. The plaintiff followed the Governor to England, brought an action against him, and recovered £4,000 damages. The Court refused to set aside this verdict, and Lord Chief Justice de Grey, in the course of his judgment, observed, that "the governor is the King's servant, his commission is from him, and he is to exercise the powers he is invested with by his commission, which is to execute the laws of Minorca."

The next case to which we shall refer in which this limitation of a governor's power is judicially asserted, is *Cameron* v. *Kyte*, 3 Knapp, P. C. Cases 332. The principle had been laid down by Lord Mansfield in *Campbell* v. *Hall*, Cowp. 210, that the King can make laws for a conquered colony. The Governor of Demerara had assumed that, as the King's representative, he could do so likewise; and he exercised that power by an ordinance increasing the commission of the vendue master, or official auctioneer of the colony. The plaintiff brought an action for the excess of commission levied by the vendue master, and the case came before the Judicial Committee of the Privy Council. The Committee, in deciding that the governor had no such power, said, "The governor has not, by virtue of his appointment, the sovereign authority delegated to

him; and an act done by him on his own authority, unauthorized by his commission, or expressly or impliedly by his instructions, is not equivalent to an act done by the Crown itself, and is consequently not valid." The language of Lord Brougham, in delivering judgment in *Hill* v. *Bigge*, 3 Moore P. C., 476, is to the same effect. "If it be said that the governor of a colony is *quasi*-sovereign, the answer is, that he does not even represent the sovereign generally, having only the functions delegated to him by his commission, and being only the officer to execute the specific powers with which the commission clothes him."

Numerous cases might be cited in which colonial governors have been sued with success in the Courts at Westminster for acts done in excess of the powers conferred upon them by their commissions, or under an erroneous estimate of their own authority. In *Wall* v. *Macnamara*, cited 1 T. R., 536, the plaintiff recovered damages against the defendant, who had been Governor of Senegambia, for false imprisoment, attended with cruelty, the act being in excess of the governor's powers given to him by his commission. The plaintiff, Captain Wall, was afterwards appointed Governor of Goree, and not warned by his own cause of complaint against Governor Macnamara, he punished a soldier under colour of military law, but without any regular trial, so severely, that the man died under torture. Governor Wall, on his return to England, was brought to trial at the Old Bailey for murder, and was convicted and hanged at Tyburn, in 1802. (28 St. Tr. 51.)*

This branch of the subject may be appropriately concluded by an extract from the work of a very able colonial lawyer, written before the two last decisions had placed the subject beyond all doubt.

"I cannot close this paper," says the writer referred to, "without making some observations on an expression which provincial baseness has brought into use, and which is calculated to convey very erroneous notions of the powers of governors to themselves and others. We every day hear the governor called the 'King's representative.' Nothing is more inaccurate than the expression in the sense in which it is used. Constitutionally the King is the fountain of all office, honour, and power, and each officer of the Government, deriving his authority from the King, represents the King in the exercise of his legal powers. This is true as well of the lowest as of the highest officers. It is as true of a constable as of the Lord Chancellor. In no other sense can it be rightly applied to the governor of a colony. None of the peculiar attributes of sovereignity, under the constitutional law of England, are applicable to that officer. The King can do no wrong. Is that true of a provincial governor? The King's powers are original, inherent, perpetual. Those of a governor are derivative, temporary, and dependent on the will of him who conferred them. Constitutionally, the King is responsible to God alone for his acts. The governor is answerable to his royal master. The King is answerable to no human tribunals for the discretion which he exercises in displacing public officers. The governor is answerable to the King's Courts at Westminster for the suspension or removal of any subject of the King holding an office of emolument in the colony. That an expression such as this should have obtained currency is of itself pregnant evidence of the servility of that class of the colonial society, where it has long been, and still continues to be in daily use."—(*On the Functions and Duties of the Governor of a British Province*, by A. Stewart, Advocate, Montreal, 1832.)

The principles which we have endeavoured, and we trust successfully, to establish, may be thus recapitulated:—

1. The Queen of England has no power or authority to exercise martial law either in Great Britain or in the colonies.
2. Within the limits of the Queen's dominions the army and all persons belonging thereto, and under military authority, are to be governed by the Mutiny Acts and the Articles of War.
3. This military law is distinct from, and therefore not to be confounded with, what is called martial law, which is illegal.
4. When the Queen's troops are in the field in a foreign country and *flagrante bello*, they are to be governed by the royal prerogative.
5. These rules do not extend to civil persons not amenable to military authority.
6. The Queen cannot impart to a colonial governor powers which she does not possess, and she has not done so.
7. The governor of a colony is not the general representative of the Queen, and can only exercise the powers lawfully delegated to him by the Queen's commission.
8. Hence:—the exercise of martial law by the governor of a colony is illegal, and would even be so if such power were included in his commission. Not being so included, its exercise amounts to a double usurpation.

* And see *Glynn* v. *Houston*, 2 Man. & Gr. 337; *Wyatt* v. *Gore Holt*, N. P. 299; *Bradley* v. *Arthur*, 4 B. & C. 292; *Oliver* v. *Bentinck*, 3 Taunt. 456.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office

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THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 262.)

CHAPTER IV.

OF THE JUDGE AND OFFICERS.

Legal proceedings in the Division Courts are of a summary kind as distinguished from regular, that is, the intervention of a jury is not essential; but the determination of actions between parties and questions of law and fact in relation thereto, is left to the persons designated or authorized by the Statute to execute the office of Judge.

As we have seen, every Judicial District is separated into from three to twelve Divisions, each Division having a Court of its own. A sole Judge in each Judicial District presides over all the Division Courts therein—not appointed specially to these Courts, but the Act points out who are to be Judges. Sec. 16 enacts that the senior or acting Judge of the County Court of each particular Judicial District (County or United Counties) shall preside over the Division Courts therein, and as Judge, therefore, he possesses the rights and powers incident to the offices—the manner and means by which it is to be exercised, being for the most part specified in the Statute.

Thus the County Judges have acquired two capacities of distinct natures—have two jurisdictions—the one original, embracing their judicial authority in the Courts of Record to which they are specially appointed; the other collateral, which vests in them the power of hearing and determining causes and suits cognizable in the Division Courts, and the doing such things as are necessary to carry out and give effect to the jurisdiction. But though these capacities

centre in the one individual, they remain as distinct as if they were vested in two different persons *

Their qualifications for office, appointment, tenure and functions, as Judges of the Superior Court, do not come within the present design, but some provisions of the law relating to the office of County Judge must be referred to, as an acting as well as a senior Judge is authorized to preside over the Division Courts. Indeed, there are several functionaries allowed to act—first, the Senior Judge of the County Court, or the Junior Judge of the particular County, the right with both of whom is absolute, not depending upon any contingency; then the Deputy Judge of the County, or a Barrister appointed for a limited time to hold particular Courts; and lastly, the Judge of any other County—the last three named acting only on certain contingencies.

One or two Judges may be appointed to each County (Consolidated Statutes, cap. 15, sec. 2.) The second of these Judges may be a Junior Judge, having the same duties, power and authority as the Senior Judge in respect to Division Courts (ib., secs. 5 and 6), or where a Junior is not appointed, the second Judge may be the "Deputy Judge," having like powers as the Senior Judge, in case of the death or illness or absence of the latter. (Ib, sec. 8.) Both Junior and Deputy Judge act under commission from the Crown, and act in their own right, and of course as occasion requires; but the Judge may depute a Barrister to act for him in case of emergency—"the Judge's Deputy," as he may be called—or the Judge of another County may act. Sec. 17 enacts as follows:—"In case of "the illness or unavoidable absence of the County Judge, "the County Judge of the Court of any other County "may hold the Court, or the first mentioned Judge may "appoint some Barrister of the Bar of Upper Canada to "act as his deputy; and the person so appointed shall, as "Judge of the Division Court, during the time of his "appointment, have all the powers and privileges and be "subject to all the duties vested in or imposed by law on "the Judge by whom he has been appointed."

The appointment must not be for a longer period than a month, and notice of it is to be given to the Governor. Secs 18 and 19 contain provisions as follows:—"The "County Judge, or the Barrister so appointed Deputy, "shall forthwith send to the Governor notice of such "appointment, specifying the name, residence and pro-"fession of such Deputy Judge, and the cause of his "appointment." And "No such appointment shall be "continued for more than one month without a renewal "of the like notice; and in case the Governor disap-"proves of such appointment, he may annul the same."

The powers and duties of the Judges acting in the Division Courts are so numerous and of such a varied character. and are moreover so completely interlaced with the proceedings of the Courts, that it would be inconvenient to treat of them in this place. They will be set out in detail and considered in the future parts of this work, under the heads to which they may be appropriately referred and more properly belong. It may be observed briefly, that the judicial authority conferred by the Statute must be exercised in the manner specified and within and yet up to the limits prescribed. *Houldon* v. *Smith*, 14, Q. B. 481.) That where such jurisdiction is given, and the manner in which it is to be exercised not expressed, the manner and means will be implied by law, such as exists at Common Law (2 Roll. Abr. 277—ib. 260; Com. Dig. Justices 1, 1); while in matters of practice the Judges may adopt and apply the general *principles* of *practice* in the Superior Courts of Common Law to actions and proceedings in the Division Courts. (Sec. 69.) That for carrying out the powers entrusted to them by the Act, the Judges are bound to know and take notice of the Common Law and Statute Law of the country, and of the general rules of practice framed under the Act (9 Coke 30 c.; Br. Abr. Trials, pl. 143; Vin. Abr. Trials, F. 9; 12 Mod. 68); and Judges are bound to declare and decide what is the law, and ought not to give a judgment contrary to that, though by consent of parties, nor impose unusual terms between parties, but may fairly mediate an accommodation between them. (Vin. Abr. Judge's D. 8; Vern. 479.) When no rule of law exists (said an able writer) a sense or feeling of general expediency, which is in other words common sense, may fairly be applied; but where a rule of law interferes, these are considerations to which a Court of law is not at liberty to advert.

The subject of the Judge's liability for illegal or improper conduct is beyond the limits of this work, and we would only observe that a Judge acting within his juris-

* The English County Courts and County Courts in Upper Canada have little in common except the name. The County Courts of Upper Canada are Courts of Record of Civil Jurisdiction, and in addition to their Common Law powers to hold plea in personal actions, have an equitable jurisdiction. They have four terms in the year, and sittings after each term for the trial of issues of fact before a jury. Their process mesne and final directed to Sheriffs and Coroners runs to every part of Upper Canada. The pleadings are written. Indeed, the chief difference between them and the Superior Courts at Toronto is a limit in the matter of jurisdiction and a reduced scale of fees to Counsel and Attorney—the practice in both being alike. Our County Courts perhaps more nearly resemble the Court of Common Pleas of Lancaster and the Court of Pleas of Durham. Moreover, each County Judge presides over five distinct tribunals, civil and criminal, besides having an auxiliary jurisdiction in aid of the Superior Courts, and possessing a large special jurisdiction in some cases concurrent with the Superior Courts, in others original, as well as appellate and peculiar. Such reference, therefore, as may be made to English County Court cases must be received with an understanding of the difference between the system of administration here and in England.

diction incurs no liability if he mistakes the law or gives an erroneous judgment, or is guilty of any mere irregularity. (*Dens* v. *Lord Brougham*, 1 In. and Rol. 309.)

We published some time since the report of a case tried in one of the English county courts, where the action was brought to recover the value of a canary bird; and we at the same time referred to it as a proof that the law took cognizance of the smallest matters where justice required that it should do so. We now give below a very long judgment, the subject of which is a cat; and which, apart from the interest which must be felt in it by the owners of tabbies, will be read by our subscribers generally, not only on account of its relative importance, but for the considerable research it displays.

SKIPTON, Friday, October 25th, 1861.

(Before J. J. LONSDALE, Esq., Judge.)

WHITTINGHAM V. IDESON.

Animals "feræ naturæ" reclaimed—Right to kill—Measure of damages.

Reclaimed animals "feræ naturæ" are the subjects of civil remedies for property. Therefore, where the plaintiff's cat strayed from the premises, and was shot at and killed by defendant,

Held, that plaintiff having a property in the cat, an action would lie to recover damages for killing it; the measure of such damages being something beyond the market value of the thing destroyed, if the destruction was attended by circumstances of aggravation.

HIS HONOR. — This is an action brought by the plaintiff to recover damages for the loss of his cat, killed by defendant, a gamekeeper. The cat was intentionally killed by the defendant; and at the time it was killed was off the premises of the defendant about 200 yards from his residence. As regards the facts there is no dispute; but it was objected at the trial that a person can have no property in a cat, or at all events, only a qualified property, so long as it remains in his actual possession; and that the cat in question, at the time it was killed, being off the premises of the plaintiff, he had no property in it at that time, and therefore is precluded from recovering damages for its destruction. As regards the latter objection, taking cats, as some authorities hold, and as was argued by the defendant's attorney to belong to the class of animals *feræ naturæ*, yet as they are reclaimed animals, there can be no pretence for saying that, because the cat in question had wandered 200 yards from the plaintiff's house (being in the habit, as was stated in evidence, of returning home daily), it had, by so doing, reverted to its wild state, and thereby divested the plaintiff of any right of property he might otherwise have had in it; it is therefore unnecessary to consider that objection further. But whether *feræ naturæ*, or as other authorities consider them, *domitæ naturæ*, the point to be decided is, whether cats being, as well as dogs and certain other animals, what the law terms, of a base nature, by reason of their not being fit for the food of man, are or are not the subjects of property. For if they are, there is no doubt that trespass will lie for killing them, since damages may be recovered in that form of action for any injury of a forcible kind done to anything whatever in which a man has property At common law, no animal, with one or two exceptions, such as horses and other beasts of draught, swans, because they are royal birds, hawks and falcons, "on account of their noble and generous nature and courage and as serving *ob vitæ solatium* of princes, and noble and generous persons, and as making them fitted for great employments," is the subject of theft, whether *domitæ naturæ* or *feræ naturæ*, unless it be fit for food. But it does not follow from this that there can be no property in animals which are not fit for food, and that they are not the subject of civil remedies. The reason given by Sir William Russell in his Treatise on Crimes and Misdemeanors why such animals have been held not to be the subjects of theft is "that creatures of this kind, for the most part wild in their nature, and not serving when reclaimed for food, but only for pleasure, ought not, however the owner may value them, to be so highly regarded by the law that for their sakes a man should die." This, no doubt, is the true reason why, in a simple state of society, and when all thefts above the value of a shilling were punished with death, dogs, cats, ferrets and other like animals were excluded from the law of larceny, and not because a person could have no property in them. But what say the authorities on the point? So far as I know it has never been the subject of a judicial decision in any of the courts at Westminster.

The only sources, therefore, to which we can have recourse for information are the text writers of authority; and the only one who supports the view urged for the defendant at the trial, is Mr. Chitty in his work on the Practice of Law. He there lays it down that "Trespass in general lies for taking any animal or bird out of the actual possession of a person who has secured the same; but no action lies for enticing from the premises of the owner, and and afterwards killing or injuring a cat which is not considered of any value in law." He quotes no authority for this statement, and so far as I have been able to ascertain it is wholly unsupported by any. The reason he gives why no action will lie for enticing a cat from the premises of its owner and then killing it is, that it is not considered of any value in law; but if this be so, one does not see why it should be actionable to take a cat out of the actual possession of a person, since the cat must be equally valueless in the one case as in the other. Perhaps, however, by "out of the actual possession" he means from off the premises or out of the manual possession of the owner, and that in those cases the action is really for the trespass against his premises or person, and not for the taking of the cat. If it were not that he gives as a reason why an action will not lie, that a cat is of no value in law, one might infer that he intended that as soon as a cat leaves its owner's premises it ceases to be his property. And this might be good law if cats were not reclaimed animals; but this at all events those authorities who class cats amongst animals *feræ naturæ* allow them to be, so that they cannot regain their natural liberty so long as they have *animum revertendi*, of which the mere fact of their straying from the owner's premises is no evidence to the contrary. This reason given, therefore, by Mr. Chitty for the law as he states it, is not altogether intelligible, at all events it is not clearly expressed. On the other hand, Blackstone, J., in his Commentaries, after remarking that it is not felony at common law to steal such animals *feræ naturæ*, though reclaimed, as "are only kept for pleasure, curiosity or whim, as dogs, bears, cats, apes, parrots and singing birds, because their value is not intrinsic, but depending only on the caprice of the owner," adds, but "it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action." So also in another passage he says:—"As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim or pleasure, though a man may have a bare property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny." It is clear, therefore, that it was the opinion of Blackstone, J, that there may be a property in cats. In Bacon's Abridgment of the Law it is also laid down, that "an action of trespass lies for taking or killing a dog; because as a dog is a tame animal, there may as well be a property therein as in any other animal." This, though dog only is mentioned, is equally an authority for a cat being property; for cats and dogs are always treated as belonging, in law, to the same class of animals, and are held not to be subjects of larceny for one and the same reason. But in addition to this passage there is another, in the same author, which clearly includes cats. It is there said, "If a beast or bird which is *feræ naturæ*, have been reclaimed, this action (trespass) lies for the taking or killing thereof; because there is a property in the beast or bird." Toller in his Law of Executors also says:—"Since the executor's interest is co-extensive with that vested in the testator, the property in all his animals, however minute in point of value, shall go to the executor, as house-dogs, ferrets and the like, or although they were kept only for pleasure, curiosity or whim, as lap-dogs, squirrels, parrots and singing birds." The description in this passage of the

animals which will go to the executor is almost in the words of Blackstone, J., which I have quoted. It is true that it does not make special mention of cats; but there cannot be a doubt they were intended to be included under the expression "and the like." Lastly, the Criminal Law Commissioners, one of whom was the present Wightman, J., and two others, the late Mr. Starkie and the late Mr. Amos, both very learned lawyers, and both of them judges of county courts, and Downing Professors of Law at Cambridge, in their first report in observing upon the reason why animals *feræ naturæ* which are not fit for food are not the subjects of larceny, although reclaimed, say:—"It would seem that the rule upon this subject arose from the circumstance that the animals above specified, viz, bears, foxes, apes, monkeys, pole-cats, cats and dogs, &c., being unfit for food, were not formerly marketable and of a determinate value. But they are all now the subject of a civil remedy for property. With this great weight of authority against Mr. Chitty's single *dictum*, I have no hesitation in giving it as my opinion that a person may have a property in a cat, and, therefore, that an action will lie to recover damages for killing it. There may be circumstances under which it would be justifiable to kill a cat; but it is not justifiable to do so merely because it is a trespasser, even though after game. These facts alone were not sufficient, in my opinion, to justify the defendant in killing it. As connected with the question of property in cats, I may mention that cats were looked upon by our ancestors, the ancient Britons, as creatures of intrinsic value, and the killing or even stealing of them a grievous crime, and subjected the offender to a fine. And if the cat belonged to the king's household, and was kept for the purpose of destroying the rats or mice in the royal granary, it was protected by the following curious law:—"If any one shall steal or kill a cat being the guardian of the king's granary, let the cat be hung up by the tip of its tail, with its head touching the floor, and let grains of wheat be poured upon it until the extremity of its tail be covered with the wheat." As much wheat as would be required for this purpose was the measure of the forfeiture to which the offender was liable.

Being of opinion that this action is properly brought, I have next to consider whether the amount of damages claimed, £2, is warranted by the facts proved in evidence. In actions of trespass, unattended by circumstances of aggravation, the proper measure of damages, where any article of property has been destroyed, is the market value of the article so destroyed; but in the case of an ordinary domestic cat, like the one to which the present action refers, it is very difficult to say what is its market value, such cats being seldom sold. There can be no doubt that as a general rule, even in the case of good mousers, a few shillings would be considered a sufficient price. Was then the killing of the cat in question attended by any circumstances of aggravation? Where the measure of damages is the mere worth of the thing injured, the injury must be unintentional; if wilfully occasioned that would be a circumstance of aggravation, and would justify a jury in giving damages beyond the mere money value of the thing injured. In the present case the killing of the cat was intentional; I must therefore give something for damages on that account, beyond the few shillings which otherwise I should have considered sufficient; but as the defendant may have thought, in the present not very clear state of the law on the subject, that he was justified in killing the cat for the protection of his master's game, I should not go so far as I should otherwise have done or as I should have done if he had killed it to annoy the plaintiff, or to gratify any feeling of spite or revenge. Under all the circumstances I think if I direct judgment to be entered for 10s. I shall do all that the justice of the case requires. Let judgment, therefore, be entered for that amount.

BAILIFF.—We have not sufficient space for the insertion of your letter. The question which you put, divested of irrelevant facts, is, however, easily answered. In effect, you ask if the Bailiff of a Division Court can sue the sureties of the Clerk for fees, on the service of summonses and other process, received for the bailiff by the clerk and not paid over. Our answer is that the bailiff can do so. Our authority is *Cool* v. *Switzer*, 19 U. C. Q. B., 199.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*

THE CORPORATION OF THE COUNTY OF ESSEX V. STRONG.

Treasurer—Appointment—Date of bond—Wild land tax.

A municipal council elected B as their treasurer on the 25th of January, and by by-law passed on the 28th appointed him, and directed that he should enter on his duties as soon as he should have executed the necessary bond. On the same day they passed a resolution accepting his bond, which was dated on the 26th.

Held, that no objection would lie to such bond, as having been executed before his appointment.

Held, also, that the treasurer was clearly liable for defalcations in the wild land tax, being the proper person to receive it.

(T. T. 25 Vic.)

ACTION against defendant as surety for the treasurer of the county of Essex, upon a bond, dated the 26th of January, 1854.

The suit was referred to arbitration at the assizes, held at Sandwich, in November, 1859, and an award made on the 23rd of March, 1860, that defendant was indebted to the plaintiffs in £516 10s. 11d.

This award was upon defendant's application referred back to the arbitrator, with directions to certify certain facts to the court, to enable them to determine questions of law raised under the submission.

Among other information thus required was,

1. The date of all appointments and re appointments of B. as treasurer of the united counties of Essex, Kent and Lambton, of Essex and Lambton, and of Essex, and copies of the instruments or proceedings by which such appointments or re-appointments were made by the councils.

2. A copy of the original bond sued on, with memoranda or any endorsements thereon

3. Copies of the resolution or resolutions (if any) of the counties or county council, accepting or otherwise relating to the bond.

5. The fund to which the moneys in default belonged.

The arbitrator accordingly reported as follows:

1. The corporation of Essex by by-law passed on the 28th of January, 1854, appointed B. treasurer. The by-law recited that the corporation in council had on the 25th of January elected B. as treasurer, and then appointed him, and directed that he should enter upon the duties of said office as soon as he should have executed the necessary bond for the due performance of the office.

2. A copy of the bond sued on was returned, dated the 26th of January, 1854, reciting that B. was required to give security for the faithful performance of the duties of his office, and more especially for the due accounting for and paying over all moneys which might come into his hands by virtue of his office.

3. A copy of the resolution of the council of the 28th January, 1854, shewing that B. handed in his bond, and that it was resolved that a certified copy of it be put in the registry office for safe keeping.

4 The report shewed that the defalcations were all for wild land taxes for the county of Essex.

Prince obtained a rule *nisi* in the Practice Court, returnable in this court, to set aside the award, on the following grounds, among others, 1. That the want of any valid appointment of B. as treasurer for the period during which the defendant was surety, prevented the plaintiffs from recovering. 2. That the defalcations alleged were in funds which the plaintiffs were not entitled to recover against defendant.

Connor, Q. C., and *M. C. Cameron*, shewed cause.

Eccles, Q. C., and *Prince*, supported the rule.

BURNS, J.—With regard to the first objection, the contention on the part of the defendant is that the treasurer should give his bond with surety for his performance of the duties of treasurer after his appointment to the the office, whereas it is contended that in this case he gave his bond with surety before his appointment. The facts are, that the council elected Bullock to be Treasurer on the 25th of January, and appointed him, and directed that he should enter on the duties of his office so soon as he should have executed the necessary bond. The bond bears date the 26th of January. The council by a by-law dated the 28th of January, formally appointed Bullock the treasurer, and by resolution of the same date

accepted the bond, which had been delivered before then, though the particular time is not shewn. Under these circumstances, and with the recital in the bond signed by the defendant, there is nothing in the objection.

With respect to the next objection, the whole of the defalcation has been found to be the wild land taxes. Scarcely any thing was said by the defendant's counsel in support of any objection that this was not properly chargeable against M. Bullock. Indeed there could not be any thing urged that would be available, for the treasurer is the proper person to receive those taxes for all the townships in the county.

With respect to the other objections, they have been discussed in the Court of Common Pleas, in the case of *The Corporation of Essex* v. *Park*, and have been disposed of in the plaintiffs' favour. Therefore we will dispose of them here in the same manner. I have had the advantage of reading the judgment, and I quite concur therein.

The rule must be discharged with costs.

McLEAN, J., concurred.

The CHIEF JUSTICE having been absent during the argument, gave no judgment.

Rule discharged.

AARON McDONALD v. JAMES McDONALD AND ROBERT McDONALD.

Action under Division Courts Act by execution creditor on securities seized—Pleading—Evidence—Security for costs.

In an action on a promissory note, payable to plaintiff or bearer, brought in the name of the plaintiff under the Division Courts Act, sec. 152, by a person who had obtained execution against him in that court, defendants pleaded (among other pleas) that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection.

Held, that it was not indispensable that the declaration should shew the suit to be brought under the statute, but that defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to enable the real plaintiff to shew his right, under the statute, to sue in the name of the nominal plaintiff, the facts should have been specially replied.

It is safer in such actions to aver and prove a judgment to support the execution but *semble* that it is not essential.

The real plaintiff need not shew upon the trial that security for costs has been given as required by sec. 154. If not given defendants may move to stay proceedings, or perhaps may plead it in bar of the action.

Quere, as to the meaning of that clause in the statute.

(T. T., 25 Vic.)

The plaintiff sued on a promissory note made by the defendants, on the 1st of February, 1856, payable on or before the 1st of February, 1859, to the plaintiff or bearer.

The defendants pleaded, 1. *Non fecerunt*. 2. Payment. 3. Set-off, and, 4 That the plaintiff was not the legal holder of the note, and as such holder entitled to sue for the payment.

The defendant James was the father, and the other defendant, Robert, was a brother of the plaintiff.

The declaration was in the common form on a note payable to bearer.

At the trial, at Toronto, before *Robinson*, C. J., it was proved that a bailiff of the division court, having two executions from the court against the goods of this plaintiff, seized this note and other notes in the hands of one Thomas, to whom the plaintiff had delivered them for collection, or, as there was reason to suspect, to put them out of his hands merely for the time.

No evidence was given of judgments to support the executions, nor any evidence that security had been given for costs, in case the action brought by an attorney in the payee's name, but for the benefit of the excution creditors, should fail,

The action was brought under the Division Courts Act, Consol. Stats. U C, ch. 19, secs 151-4.

The defendants objected, 1. That the plaintiff ought to have declared specially, setting forth the particular circumstances of the seizure in execution, and founding his action upon the statute

2. That he should have proved judgments to support the executions, or one of them.

3. That he should have proved that he had given security for costs, as the statute directs.

The learned Chief Justice reserved leave to the defendants to move for a nonsuit on any of those objections, or to enter a verdict for defendants on the fourth plea, and the defendants then went into evidence to prove that in the course of transactions between them and the plaintiff this note had been taken into account, and allowed for by the plaintiff in a settlement, and thus been paid before the bailiff seized it in Thomas's hands, with whom it had been deposited by the plaintiff.

They called the plaintiff to prove that defence, but he failed to satisfy the jury of payment of the note, or of any part of it, and they found for the plaintiff for the note and interest.

Cameron, Q. C, obtained a rule *nisi* to enter a nonsuit or verdict for defendants, relying on the objections stated, or for a new trial on the evidence, contending further that the defendants were entitled to a verdict on the fourth plea, which denied that the plaintiff was the holder of the note when this action was commenced.

Read, Q. C., shewed cause, and cited Chitty's Statutes, Vol. III. p. 502; 1 & 2 Vic., ch. 110, sec. 12, (Imperial Act.)

The clauses of the statute bearing upon the question are referred to in the judgment.

ROBINSON, C J., delivered the judgment of the court.

We think, upon the evidence, the jury cannot be held to have given a wrong verdict, in finding against the defendants upon the plea of payment.

The only question that remains upon the evidence is, whether upon the fourth plea the defendants were not entitled to a verdict. That plea denies that at the time of bringing the action, the plaintiff, Aaron McDonald, was the legal holder of the note. Undoubtedly he was not then the holder in point of fact, for the note had been taken out of the hands of his bailee upon an execution out of a division court, and was held by the bailiff, not for him, but for the execution creditor.

It is unnecessary to set out the other objections, as they will be found in the judgment of the Common Pleas, to which this court conformed.

If the execution under which it was seized had issued from a superior court, or from a county court, then under the Common Law Proc. Act, ss. 261 to 266, the action might have been brought in the name of the sheriff or officer who seized it. That statute, however, does not say that it *shall* be brought in his name, though we take that to be meant, for it is not to be supposed that the payee or endorsee would in general sue on the note for the benefit of the execution creditor and no power is given by that act to the sheriff or any one else to sue in his name. When the note is one payable to bearer, then, under the provisions we are now referring to, the sheriff might sue as bearer, without setting out the special circumstances which entitled him to sue under the statute.

This note is payable to bearer, and being seized under an execution from a division court, by a bailiff of that court, we are to look at the Division Courts Act, Consol Stats. U. C., ch. 19, secs 151-4, for the authority to sue upon it for the benefit of the execution plaintiff By the 151st section the bailiff, or other officer, having an execution to levy, may seize any promissory note or security for money belonging to the defendant. By section 152 the bailiff may hold any promissory note, &c., so seized, as a security for the amount to be levied: "and the plaintiff, when the time of payment thereof has arrived, may sue *in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured, or made payable thereby.*"

By section 153 it is provided, that the defendant in the original cause shall not discharge such suit in any way without the consent of the plaintiff or of the judge; and section 154 enacts that "the party who desires to enforce payment of any security seized or taken as aforesaid, shall first pay or secure all costs that may attend the proceeding;" which I suppose means, what is not stated that the payee or holder of the note, &c., whose name is to be used in the action as plaintiff, must be secured against liability for costs, if the defendant should succeed in the action. It may, however, mean that the real plaintiff shall make the defendant secure as to his costs, in case the action shall fail, for the person whose name is used may be worth nothing, and he is not in fact the real plaintiff; or it may mean that both are to be secured in the costs, for the expression is very general—that the person who desires to enforce payment (who may be either the bailiff or the execution plaintiff.) "*shall first pay or secure all costs that may attend the proceeding.*" The provision has not been carefully

framed, for as the amount of costs can not be known till the suit is at an end, they cannot be *first* paid—that is, before the suit is begun—although they may be secured.

But first, as to the defendants' right to a verdict on the fourth plea. We think he was entitled to succeed on that issue, for in fact the plaintiff was not the holder at the time of this action; and to entitle the execution creditors, or the bailiff, to give the evidence which was given in support of the action in the payee's name, those facts should have been replied which gave the right under the statute to use his name, though he was not the holder of the note; or the special facts might have been set out in the declaration, as the defendants indeed contend they should have been.

As to the other objections, I do not at present think it would be necessary to prove a judgment to support the execution, though it would be safer to aver and prove the judgment in such a case, as the legislature has not dispensed with the necessity.

With respect to the real plaintiff being bound to make it appear upon the trial that security had been given for costs as the statute directs, we apprehend that was not necessary, but that if security had not been given, the proper course would have been to stay proceedings till it had been given. The Common Law Procedure Act, sec. 265, being a provision in *pari materiâ*, though regarding proceedings upon seizure of securities under executions from higher courts, says that the sheriff *shall not be bound* to sue in such cases unless he is indemnified as to costs. Under that act the sheriff clearly might waive security if he chose. The section 154 of the Division Courts Act, it may be urged, means nothing more, but the question applies differently under the two statutes, and in reason the security in such a case as the present may, we think, be insisted upon, and perhaps the want of it might be pleaded, with proper averments, in bar of the maintenance of the action.

This provision, as to costs, furnishes an argument in favour of what has been contended for, that when a security is being enforced under these clauses in the Division Courts Act the record ought to disclose it, in order that both parties to the action may be aware of the special facts, which otherwise they might not be.

Upon the whole, however, admitting that it was not indispensable that the declaration should have set forth the special facts, shewing that this was an action brought under the 152nd clause of the act, yet it was necessary in our opinion, when the defendants denied that the plaintiff was holder of the note, which must mean in this case what the same plea would mean in any other case, that the plaintiff should reply in such a manner as would shew the purpose for which the action had been brought, and which gave authority to use the plaintiff's name without his privity, and not for his benefit.

But as this, so far as we know, is the first occasion that has arisen for discussing the provisions of this statute, we have made up our minds that although in strictness the defendants' main objection is entitled to prevail, we will not conclude the plaintiff, but will direct that a new trial be had on payment of costs by the plaintiff, with liberty to him to amend his pleadings as he may be advised.

Glass, Sheriff, v. Wigmore.

Conveyance of prisoners to Penitentiary.

It is the duty of the sheriff of the county in which a city is, and not of the high bailiff of such city, to convey to the penitentiary prisoners sentenced at the Recorder's Court.

(T. T. 25 Vic.)

This action was brought by the plaintiff against the defendant, to recover a sum of money which the plaintiff alleged the defendant had received for the plaintiff's use, and by consent of the parties, and by order of a judge, according to the Common Law Procedure Act, the following case was stated for the opinion of the court:

The plaintiff is and has been since the first day of September, A.D., 1858, sheriff of the county of Middlesex, and has since his appointment had the care of the jail of the said county, and the appointment of keepers thereof.

The defendant is high bailiff of the city of London, duly and regularly appointed.

There has been a recorder's court established in and for the said city, and a recorder for the said city duly appointed, who presides at the sittings of the said court.

The jail of the said county of Middlesex is used as a jail for the said city, and prisoners are committed thereto by the mayor and other magistrates for the said city, the council thereof not having directed otherwise, and an annual sum is paid for the use of the said jail by the said city of London.

The defendant has, whenever the said court is in session, by the order of the court, taken the prisoners committed for trial at the said court from the said jail to the court, and when prisoners have been sentenced by said court to be imprisoned in the provincial penitentiary, has upon receipt of the commitment conveyed them to the said penitentiary, and has charged and received payment therefor, which has been paid by the provincial government from the fund for the administration of criminal justice.

The question for the opinion of the court is, whether the said defendant had the right to take the said prisoners to the court for trial, and when sentenced to the penitentiary to convey them there and receive payment therefor.

If the court shall be of opinion in the negative, then judgment shall be entered for the plaintiff, and costs of suit.

If the court shall be of opinion in the affirmative, then judgment of *non pros*, with costs of defence, shall be entered for the defendant.

Burns for the plaintiff, cited Consol. Stats U. C., ch. 54, secs. 391, 367, 379, 401, 420; ch. 31, sec. 132 sub-sec. 4; ch. 120, sched.; ch. 127; Consol. Stats. C., ch. 111, sec. 11; *Rex* v. *Weir et al.*, 1 B. & C. 288.

M. C. Cameron, contra, cited Consol. Stats. U. C., ch. 55, sec. 177, *et seq.*; ch. 31, sec. 138.

Robinson, C. J., delivered the judgment of the court,

We are of opinion that while the law remains on its present footing it is the sheriff of the county in which the City of London is, and not the high bailiff, who is to convey to the penitentiary the prisoners sentenced to that prison by the recorder's court of the city.

The legislature would probably, in reviewing the subject, not think it expedient to change this arrangement; but whether they would or not, the Penitentiary Act, as it now stands, ch. 111 Consolidated Statutes of Canada, it appears to us, commits the duty clearly to the sheriff, and the chapter 120 of the Consolidated Statutes of Upper Canada provides that the sheriff shall be paid for such duty, when it is his duty, and when he has done it

The 12th section of the statute, ch. 111, (Consol. Stats. C.) it is true is confined to convicts sent from Lower Canada, but it equally serves to shew the intention of the legislature, for there are local bailiffs in cities in Lower Canada as well as in Upper Canada; and the 16th clause is not confined to Lower Canada, but applies to the whole province, and shews that the legislature intends that the sheriff of the county in which the city is, is the officer who is to have the powers necessary for carrying the prisoners through all parts of the province to the penitentiary.

Our judgment is for the plaintiff.

Judgment for the plaintiff.

The Buffalo and Lake Huron Railway Company v. The Corporation of the Town of Goderich.

Harbour—Assessment—Consol. Stats. U. C. ch. 55, sec. 3.

Land covered with the waters of a harbour is not taxable.

Held therefore, that the Buffalo and Lake Huron Railway Company could not be taxed for the Goderich Harbour.

This was an action brought to recover $254 for taxes collected by defendants from the plaintiffs for the Goderich Harbour, for the year 1860, and a case was stated for the opinion of the court, in substance as follows:—

The Canada Company, under the act of Upper Canada 7 W. IV. ch. 50, acquired a right to improve the Goderich Harbour, so as to make it navigable for vessels, and by that act, on the harbour being so rendered navigable and fit for the reception of vessels frequenting the same, were entitled to exact tolls at certain rates prescribed on all such vessels and the goods contained in them.

That company having made certain improvements in the said harbour, by an indenture bearing date the 14th of June, 1858, made between them and the plaintiffs, under the authority of 19 Vic., ch. 21, agreed to sell the plaintiffs the said harbour and the premises connected therewith, to be improved and held by the plaintiffs on the terms specified in the said indenture, and used by them in connexion with their railway. The plaintiffs by this indenture covenanted that they would not use or exercise any power vested or to be vested in them under the said indenture, or by act of the Provincial Parliament, or otherwise to raise, levy or collect any toll or tolls upon vessels using the harbour, except such tolls as should be necessary for repairs lights, and police, for the period of fifteen years from the 30th of October, 1858, and they have never imposed any tolls on goods or vessels frequenting the harbour, nor have they ever derived any revenue therefrom.

In the assessment of 1860 the corporation of the town of Goderich assessed all the portion of the harbour lying within the limit of the town at the value of $40,000, and the annual value at $2400, being at the rate of six per cent, and rating the tax on the whole valuation at $254, which the plaintiffs have been compelled to pay by distress upon their property.

The plaintiffs contend that the defendants were not entitled to tax that portion of the harbour composed of land covered with water, which they have done, and that they are entitled to recover the same back from them. The parties agree that if the court should be of opinion in the affirmative, then judgment shall be entered against the defendants for $254 and interest, from the 13th of November, 1860, and costs; if the court should be of a contrary opinion, then judgment shall be given for the defendants with costs.

E. B Wood, for the plaintiffs, cited *Great Western R W. Co.* v. *Rouse*, 15 U. C R. 168; *Municipality of London* v. *Great Western R W Co.*, 16 U. C. Q B. R. 500; *In re The Great Western R W Co*, 4 U C. L. J. 23; 7 W. IV., ch. 50; 19 Vic, ch. 21.

Richards, Q C., for defendants, cited *Rex* v. *Birmingham Gas Light and Coke Co.*, 1 B. & C. 506; *Rex* v. *Brighton Gas Light and Coke Co.*, 5 B. & C. 466; *Rex* v. *The Corporation of Bath*, 14 East 610; *Rex* v. *Rochdale Waterworks*, 1 M & S. 634: *Regina* v. *Cambridge Gas Light Co.*, 8 A. & E 73; *Regina* v. *West Middlesex Waterworks Co*, 32 L T. Rep 388; S. C., 28 L J. M. C. 135; *Electric Telegraph Co.* v. *The Overseers of the Poor of the Township of Salford*, 11 Ex. 181; *Regina* v. *East London Waterworks Co.*, 18 Q B 705; *Chelsea Waterworks Co.* v. *Bowley*, 17 Q B. 358; *Regina* v. *Southwark and Vauxhall Water Co.*, 6 E & B. 1008; *Lewis* v. *The Town of Swansea*, 5 E. & B 508; *Regina on the prosecution of the Overseers of Bishopwearmouth* v. *Earl of Durham*, 5 Jur. N.S 1306; S C., 1 L T. Rep. N.S 30

McLEAN, J.—By the Consolidated Assessment Act of Upper Canada, ch. 55, sec 9, it is declared that all land and personal property in Upper Canada shall be liable to taxation, subject to certain exemptions, and by the 3rd section "the terms "Land," "Real Property," and "Real Estate," include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty, and all trees and underwood growing upon the land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to Her Majesty." This I should think must be taken to shew with sufficient clearness that water on the surface of the ground is not considered as part of the realty, and that wherever land is covered with water it is not such "*land*," "*real property*," or "*real estate*" as is declared by the statute to be liable to taxation. The waters of the river Maitland, and of the lake adjoining its outlet, which are constantly flowing in and out of the harbour, must have some *bottom* to support them, which must be called *land* for all purposes except taxation, and I imagine that vessels in the harbour would scarcely be considered *aground* when *floating* in the water ten feet deep *over* the *land*.

The waters of the river and harbour every man has as much right to a the defendants, and they are entitled to be used as a *public highway* by any one who has occasion to enter the harbour of Goderich with a boat or vessel. How then can the water and the land upon which it floats form *a part* of the *harbour*, which all vessels are entitled to use in the pursuit of their ordinary business, and the land be the separate property of the plaintiffs, subject to be taxed by the corporation of Goderich, for whose benefit, amongst others, it is to be improved? In granting the harbour to the plaintiffs, the land and water must necessarily go together, and it would indeed be strange that land which could not possibly be applied to any other purpose but to sustain the water necessary to constitute a harbour, should be separated from the water and looked upon as land only for the purpose of taxation. It is not because the land covered with water is granted to the plaintiffs, and they at some period may derive advantage from the harbour, which must be composed of both land and water, that the plaintiffs should be subject to taxation on land only. It is not for the use of the land that parties may be called upon to pay tolls, but for the use of the land and water together, and the advantages derived from the construction of a commodious harbour where none such existed before.

The cases cited by *Mr. Richards* on the argument do not, as it appears to me, apply to a case like this. The harbour is not of an artificial character, but has existed by means of the outlet of the river Maitland at that particular place, and may be greatly improved by improving that outlet and increasing the depth of water. When that is done a different question entirely will be presented from that to which most of these cases refer, and the question must be how much land have the plaintiffs in occupation in the harbour of Goderich, including all piers, buildings and premises necessarily forming a part of the harbour, but being a part of the freehold.

There is in my mind no doubt whatever that under our present Assessment Act the water-covered part of the land cannot be taxed as part of the land, and cannot be looked upon apart from the Water for the purposes of taxation.

Judgment must be given for the plaintiffs.

BURNS, J —It appears that in the year 1835 the Government leased the water lots around the harbour to the Canada Company, and then in 1837 the legislature passed the act 7 W. IV., ch. 50, authorising the Canada Company to improve the harbor at Goderich, in such manner as should render it accessible to, and fit, safe, and convenient for the reception of such description and burthen of vessels as commonly navigate Lake Huron. The company were authorised to levy tolls not exceeding a certain amount. The legislature also reserved leave to the province to purchase the harbour from the company after the expiration of thirty years.

It does not appear that the Canada Company ever exacted any tolls at all, and during all the time that company has been possessed of the harbour no taxes have ever been imposed upon the harbour as such.

In the deed of the 14th of June, 1859, by which the Canada Company has transferred the harbour to the plaintiffs, under their charter, the plaintiffs are bound to levy no more tolls, either under the 7 W. IV., ch 50, or any act of the parliament of this province, upon vessels using the harbour, except such tolls as shall be necessary for repairs, lights and police, for the period of fifteen years from the 30th of October, 1858.

Now that the harbour has passed into the hands of the railway company, the corporation of the town of Goderich assume the right to tax it for municipal purposes. They have assessed all the land and water lots, wharves, &c., against which the railway company make no complaint, but the company complains of being assessed for the harbour—that is, that part of it which is comprised of water. The question is whether the harbour *qua* harbour is within the meaning and intention of the Assessment Act, ch. 55, of the Consolidated Acts of Upper Canada.

The argument for the defendants' assumption is, that the land, though covered with water is still land, and comes within the meaning of the 9th section of the act, and notwithstanding that the public has an easement in the use of the water covering that land, yet, as the plaintiffs might exercise a right to exact tolls from the owners of vessels, or owners of produce or goods who use the waters, so the defendants may tax that land, taking into consideration the plaintiffs' right to impose those tolls.

My opinion is that the legislature never intended, in the language they have used, to go so far as that They have told us in the third section what the term *land* shall include. First, they say that it shall include all buildings or other things erected upon or affixed to the land, and all machinery or other things so fixed to

any building as to form in law part of the realty. So far the evidence of meaning is plain, that land, with what is upon it, is something tangible. I have no doubt, if the company should fill in a portion of the water and make dry land of it, and erect buildings thereon with machinery, such would become liable to taxation. Then the legislature goes on, and declares that all trees and underwood growing upon the land shall be included within the term, thus carrying out the idea that the term, so far, means something visible and tangible. Then comes the expression, that it shall include all mines, minerals, quarries and fossils in and under the same, except mines belonging to her Majesty. This last shews the desire that lands made profitable in the use for such purposes should be taxed, but still it is all the time carrying out the same idea, that the land intended to be taxed is something that is visible and tangible. I have no doubt if it were discovered that a valuable mineral could be obtained at the bottom of the harbour, and means were devised either to exclude the water in working for it or otherwise it would be subject to taxation, but then that would not be upon the ground that it was land covered with water, but it would be because the mineral was extracted from it, and it would be the mineral which would be taxed, and not the land *qua* land, and it would be so because the legislature has declared that the expression land shall include minerals. I do not think it would make any difference in taking such things from under the surface, whether it came through a body of water or through land, in order to get it to the surface, for the purpose of taxation.

In the present case the land at the bottom of the harbour is not and cannot be used, so far as disclosed, unless it is for the anchorage of vessels. The right to impose tolls is not said to be for anchorage, nor do I suppose such a thing ever entered the mind of the legislature, but the right is given to impose tolls for the use of the harbour by vessels, and we must understand that to mean the use of the water and not the land, unless we go back to the days of the ancients, when they frequently, to avoid storms, or for other purposes, drew up their ships at pleasure upon the land on rollers; or adopt the story of the Argonauts who it is said by some transported their ships by land from the Black Sea across either to the Baltic or North Sea.

The legislature has defined what was meant by land, and there is no necessity for our extending that meaning in any way by the application of legal doctrines. The mentioning of mines, minerals, fossils, &c., convince me the legislature never intended to tax the use of water.

The defendants have acted upon a false principle in supposing they could tax land of no earthly value except to support the water upon it, because that water may be made useful in commerce. Nothing was easier than for the legislature to have said that harbours should be taxed, if it were intended to be so, and if nothing had been said in defining what should be considered as land, the argument might have been much stronger in the defendants' favour.

I think that judgment should be entered for the plaintiffs.

The Chief Justice, having been absent during the argument, gave no judgment. Judgment for the plaintiffs.

COMMON PLEAS.

Geroux v. Yager.*

Costs—Final judgment without a trial—Order for full costs—Jurisdiction.

Where final judgment is obtained without a trial a judge in Chambers has power to make an order for full costs.

Quere—Should the order be *ex parte?*

Where a cause is decided by the award of an arbitrator, the cause is one proper for an application of the kind.

The order may be made unless it appear that the cause was one which the plaintiff was bound to sue in an inferior court.

A plaintiff in order to bring his cause within the jurisdiction of an inferior tribunal is not bound to give credits. It is a privilege to do so, but there is no legal obligation upon him to do so.

Wallbridge, Q. C., obtained a rule *nisi* to set aside an order made in this cause by McLean, J., for the taxation of full county court costs to the plaintiff, and that the taxation should be revised and the defendant be allowed his costs against plaintiff, pursuant to the statute in that behalf—the debt sued for in this action being within the jurisdiction of the division court.

From the affidavits filed on both sides it appeared that this action was brought in the inferior jurisdiction for an amount claimed by the plaintiff, as amounting to upwards of £36, the principal item of which was thirty seven weeks' board and washing amounting to £22 6s. 3d. The residue was made up of small charges for hay and grain, day's work, use of team, pasturing, &c.

The defendant advanced a set-off, in which he claimed £61 16s. 5d.; the largest items being a promissory note, £10 15s. 9d.; nine head of cattle and six sheep, £10 6s. 3d.; a stack of hay, £7 10s. The residue of the charges were similar in character to those made by plaintiff.

The action was referred to arbitration by a judge's order, made 1st March, 1859: costs of the action to abide the event of the award; costs of reference and award in the discretion of the arbitrator.

The arbitrator awarded that the defendant should pay the plaintiff £4 11s. 7d. in full satisfaction of the plaintiff's claim, being the balance due him after deducting the defendant's set-off, and that the defendant should pay the costs of the award and of the reference after taxation of the same, and £7 10s. arbitration fees, and £1 for drawing award.

On the 11th July, Burns, J., made an order to tax a counsel fee of £5 to the plaintiff on the proceedings before the arbitrator.

On the 23rd July, McLean, J., made the order complained against, as follows:—"Let the master tax to the plaintiff in this cause full county court costs.

The defendant in his affidavit swore that the plaintiff's account was what is usually called a trumped up account, such as charging day's work done by farmers, when the same had, in fact, been returned. That this being the nature of the plaintiff's account, when such items were proved they were struck out. It was further sworn that the order for county court costs was granted without notice to the defendant, and that the costs originally were taxed at £37 5s. 4d.

The plaintiff put in a sworn copy of the notes of evidence taken before the arbitrator, by which it appeared that each party gave, apparently, all the evidence in his power to prove the various items in his respective account; each seemed to have given in evidence that which had been settled or paid for by the other side.

But the plaintiff and his attorney swore, and the notes of the evidence gave support to their statement, that the defendant endeavoured to make it appear that the promissory note held by him was given for a balance due, after all the plaintiff's demand had been allowed for, against the rent of the premises of which plaintiff was tenant, and that plaintiff was obliged to prove this payment of the residue of the rent, £50 per annum, exclusive for which the note was given; and then to shew his account, otherwise proven, was independent of any claim for rent due to defendant, so that in effect the plaintiff was obliged to give evidence of the account, and of the payment of the greater part of the rent as his side of the account.

J. B. Read shewed cause.

Draper, C. J.—Upon the merits I do not see any ground to warrant our determining that the plaintiff should not have county court costs.

The amount stated to have been taxed certainly appears large. The arbitrator's fees, however, and the charge for award amount to £8 10s., and a judge's order for a counsel fee of £5 was made, which indicate that in his view at least it was not a division court case; and from the notes of evidence it appears the arbitration occupied two days, and that nine witnesses were examined for the plaintiff. From the expression in the affidavit "originally taxed" there has probably been a revision, at all events it is not the *amount* of costs that is in question, but the *scale* by which they are to be ascertained; and so far as the merits are concerned, I am not prepared to differ from my brother McLean in ordering county court costs.

Then the only question is as to authority.

The jurisdiction of the division court extends to all cases of debts, accounts, breach of contract, covenant, or money demand,

* We can find no report of this case among the cases reported in the authorized series of the Common Pleas Reports. Probably the reporter did not consider the case of sufficient importance to publish it. But knowing that it is often referred to, though long since decided, we have with the permission of the taxing master of the court, procured a copy, and now give it to our readers.

when the amount or balance claimed does not exceed £25; but any plaintiff having a cause of action above £25, on which a suit might be brought in the division court, if the demand were not above £25, whenever he shall claim or demand only the balance or sum of £25, may, on proving his case, recover to that amount only.

I regard this as a privilege conferred on a plaintiff, and not a right granted to defendant to insist that the plaintiff shall give credit for any set off which the defendant may or may not choose to advance, and to submit to the judgment of the court.

The 78th section of the Division Court Act (13 & 14 Vic. cap. 53) enacts that if any action be prosecuted in any county court or superior court for a cause which might have been entered in a division court, and the plaintiff shall obtain judgment for a sum within the jurisdiction of the division court, no more costs shall be taxed against the defendant than would have been incurred in the division court, unless the judge who presides at the trial of such action shall certify in open court, immediately after the verdict is recorded, that it was a fit one to be withdrawn from the division court and commenced in such county court or superior court, with a provision for taxing the costs of defence, and allowing them to be set-off against plaintiff's costs in such cases.

This case, from the fact of the reference to arbitration, does not fall within the foregoing section. There has been no trial before any judge of either of the superior courts, in the inferior jurisdiction of one of which this action was brought.

Rule No. 115 of Trinity Term, 20 Vic., orders that in any action of the proper competence of the county court, in which final judgment shall be obtained *without a trial*, and in which the papers shall not be marked "inferior jurisdiction," no more than county costs shall be taxed without the special order of the court or a judge.

This rule became necessary in consequence of the statute 13 & 14 Vic. cap. 52, which gave plaintiff a right to institute actions within the jurisdiction of the county court in the superior courts, at the costs allowed in the county court, provided the papers were marked "inferior jurisdiction"

If, therefore, this case be within the jurisdiction of the county court, it is properly brought in the inferior jurisdiction of the Court of Common Pleas; but as the papers are marked "inferior jurisdiction," the order granted is not within the meaning of this rule.

The rule No. 168 of Trinity Term 20 Vic., orders that in all cases unprovided for by statute or rule of court, the practice as it existed in the superior courts before the passing of the C. L. P Act, 1856, shall be followed. But I find no rule of practice as to the allowance or disallowance of division court costs where final judgment is obtained without a trial, and where the action being of the proper competence of the division court, has been brought in the superior court, and the papers marked "inferior jurisdiction." So that as far as I perceive the only rule touching the case is No. 154 of Trinity Term, 20 Vic., which provides that the practice of the courts and the services to be allowed for in all proceedings in the taxation of costs, shall be governed in all cases not otherwise provided for by the established practice of the Court of Queen's Bench in England.

There is, strictly speaking, no established practice in England upon a question like the present; but some analogy may be found to exist in interpreting our own acts. Thus, under the English statute 9 & 10 Vic. cap. 95 sec. 129, by which if any action shall be commenced in any of her Majesty's superior courts of record for any cause other than those lastly hereinbefore specified in sec. 128, "*for which a plaint might have been entered under this act*," and the plaintiff shall recover less than, &c., the plaintiff shall recover no costs unless the judge who tries the cause shall certify. Under this section the Court of Common Pleas in *Bailey* v. *Robson* 5 C. B. 934, held that in order to deprive the plaintiff of costs, the defendant must shew affirmatively that the plaintiff was bound to have recourse to the inferior jurisdiction, and not simply that he might have sued thereon

The words of the Division Court Act are exactly similar depriving the plaintiff of costs in actions brought in the county court or superior courts for a case which might have been entered in a division court; and adopting the decision just referred to as a safe guide, we may ask if the defendant has shewn that in the present case the plaintiff was *bound* to bring his action in the division court? If not, then he certainly *might* bring it in the county court or at his option in the inferior jurisdiction of either of the superior courts.

Looking at the affidavits and the evidence given before the arbitrator, I think it does not appear the plaintiff was under any such obligation. Nay, I am not satisfied that if he had so brought it he would not have failed by reason of the necessity of going into an inquiry exceeding the jurisdiction; and I have already said I do not think that if his evidence shewed a claim beyond the jurisdiction of the division court, he was compelled to abandon the excess, or to give credit for a cross demand of the defendant in order to bring the case within the division court.

Admitting, therefore, that it may be doubtful whether, in the first instance an order to tax county court costs could go on an *ex parte* application, for want of a statute or rule of court such as there is in regard to actions apparently of the proper competence of the county court, but brought in the superior court, I think the plaintiff was, on the facts shewn, entitled to have county court costs taxed to him, and therefore that the rule ought to be discharged.

Per cur.—Rule discharged.

McINNES v. HAIGHT.

Assignment for benefit of creditors—Registry—Execution.

Where an execution is placed in the Sheriff's hands against the goods of a debtor after an assignment made by him for the benefit of creditors, before its registry, though within five days, the execution is entitled to prevail.

Feehan v. *Bank of Toronto*, 10 U. C. C. P. 32; *Shaw* v. *Grant*, *Ib.*, 236; upheld.

Where the Court of Common Pleas exercises an appellate jurisdiction, it will decide according to its own view of the law, notwithstanding an adverse decision in the Court of Queen's Bench.

This was an appeal from the decision of the Judge of the County of Elgin.

The decision and the facts upon which it is grounded are reported in 8 U. C. L. J. 104.

HAGARTY, J.—This case, as far as this Court is concerned, turns on a simple point. If we uphold our own judgment in *Feehan* v. *The Bank of Toronto*, 10 U. C. C. P. 32, the decision in the Court below must be reversed.

Taking secs. 1 & 8 of the Con. Stat. U.C. cap. 45, by themselves alone, they would well warrant the conclusion that the registry of the assignment at any time within the five days allowed by the act would make it valid from the beginning, and would therefore cut out any execution delivered to the Sheriff within the five days.

In deciding what was the intention of the Legislature, we must look at the whole course of legislation on the subject, to the repealed acts as well as to those now in force.

The act of 12 Vic. cap. 74, declares these conveyances void against execution creditors, &c, unless registered. No time was fixed for the registry, and the Courts held that if registered before an execution was placed in the Sheriff's hands against the goods of the assignor, the assignment would still be valid.

I do not think there can be any doubt that, under that statute, if the Sheriff received an execution against goods which if the owner had not given a mortgage on them would have been liable to be seized under the writ, they would be held so liable if the mortgagee had not registered his mortgage until after the Sheriff had levied on and taken possession of the goods.

Such a view would be quite consistent with the intention of the legislature, that the mortgage should be void unless registered. Not being registered until a new writ attached by the placing the execution in the Sheriff's hands, it would be void as to such creditor.

Then did the Legislature by the act of 20 Vic. cap. 3, intend to give to the holders of these bills of sale and mortgages any advantages they had not previously possessed. They had before them the experience of several years and the decisions of the courts. The whole scope of that act, so far from facilitating the taking security on or the transfer of property by means of these instruments, was intended to make it more difficult. They were undoubtedly viewed with disfavor by the Legislature.

I cannot therefore come to the conclusion that, by requiring it to be registered within five days from the execution thereof, they intended to give an advantage to the holder of such an instru-

ment over what he had before, but rather, being void during that period as against creditors having executions lodged in the Sheriff's hands, they intended to make it absolutely null and void against creditors if it was not registered within the five days mentioned, though it might be registered afterwards.

In this view, I think the judgment of this Court in *Feehan* v. *the Bank of Toronto* correct.

I cannot say that I am free from doubt, but I think this view best accords with the intention of the Legislature.

In the judgment of the Court of Queen's Bench, in a suit between the same parties, 19 U.C. Q.B. 474, that Court arrived at a different conclusion; and assuming that the Legislature intended that these instruments should be valid from the beginning, and should only be void after five days, and if they were then registered that they should be valid thenceforward, their judgment is correct. I have not been able to bring my mind to this conclusion.

In my opinion, the judgment of the Court below should be reversed and the appeal allowed.

I do not think *Marples* v. *Hartley*, 8 L. T. N.S. 474, makes any difference, that being undoubtedly in accordance with the English Act, and with the view I should probably take of our own Consolidated Statute if we had had no previous legislation on the subject.

This being a case in appeal, we are bound to decide according to our view of the law, notwithstanding the judgment of the case in the court of Queen's Bench.

DRAPER, C. J.—I continue of the opinion expressed in *Feehan* v. *the Bank of Toronto*, and concur in reversing the judgment of the Court below.

Per Cur.—Judgment reversed.

IN CHAMBERS.

TYRRELL ET AL. v. WARD.

Arbitrators' fees—Proof of payment.

Where the Master refused to tax against the unsuccessful party an arbitrator's fee upon proof only that a promissory note had been given to the arbitrator for the amount, a Judge in Chambers refused to interfere.

(November 8, 1861.)

On taxation of the bill of costs in this cause it appeared that there had been an arbitration between the parties, followed by an award in favour of plaintiffs, and that the sum fixed by the arbitrators as their fees was $160.

Before allowing the arbitrators' fee as against the defendant, the Master of the Court of Common Pleas required proof of payment.

There was no evidence of actual payment, but it was sworn that one of the plaintiffs had given his promissory note to the arbitrators for the amount of their fees.

Upon this it was contended that the Master was bound to tax the fee against defendant. The Master refused to do so.

R. Moore applied for a summons for a revision of taxation of costs in this taxation in this particular.

DRAPER, C. J., refused the summons.

McINNES v. WEBSTER

Indigent Debtor—Custody in several causes—Discharge for non-payment for weekly allowance—Costs of former application.

Where a defendant is arrested and has the weekly allowance ordered in several causes, he is under sec. 4 of Cons. Stat. U. C., cap. 26, entitled to one sum of 10s. a week but in default of payment of that sum, he can properly claim to be discharged in all the causes.

The fact of non payment of the costs of a former application to be discharged from custody, which was dismissed with costs is no reason for refusing a second application made upon proper and sufficient materials.

(December 1, 1861.

This was an application to discharge defendant from custody for non-payment of weekly allowance, payable by order of Mr. Justice Burns granted on the 11th February last, or to supersede him because not charged in custody in due time,

Defendant was arrested in this cause and in one in favour of *Kerr et al.* on mesne process in December last.

On the 16th March last he obtained orders for the payment of the weekly allowance of ten shillings in each of these suits; he was regularly paid the allowance of 10s. a week under these orders until the 27th day of May last.

On the 1st June he was charged in execution in the suit of *Kerr et al.* against himself. No application was afterwards made for the payment of the weekly allowance, and no allowance was afterwards paid.

On the 25th July last the defendant applied for his discharge from custody for non-payment of the weekly allowance, and the summons was discharged and costs ordered to be paid by defendant. These costs were not paid.

Jackson for plaintiff objected that defendant was not entitled to his discharge for non-payment of the weekly allowance, because subsequently to his obtaining the order for weekly allowance, he was charged in execution at the suit of Kerr. He also objected that the defendants did not show sufficient cause for his being superseded.

A. Cameron, contra.

RICHARDS J.—If the defendant had been paid the weekly allowance of 10s. by *Kerr et al* after they had charged him in execution, the plaintiff in this action might contend with a greater show of reason that defendant could not properly be discharged because the weekly sum of 10s. was still paid him. But the facts clearly show that defendant has not been paid the weekly allowance he was ordered to receive in this cause, nor has he been paid the 10s. a week, since the 27th of May last, in any cause in which he was confined

The 5th section of Con. Stat. U. C., cap. 26, seems to me to provide that where a defendant is arrested and has the weekly allowance ordered in several causes, he is only entitled to one sum of 10s. a week, but in default of payment of that sum, he can properly claim to be discharged in all.

On the point raised I therefore think defendant entitled to the order discharging him from custody.

Though he has not paid the costs which he was ordered to pay on discharging a former summons, I still think he is entitled to his discharge, for the Legislature does not seem to contemplate that a party should be kept in custody for non-payment of costs only, and certainly not for such a trifling sum as the costs of discharging a summons.

It is not explicitly shown in the papers produced before me when the order directing the payment of the weekly allowance in this cause was served; I assume, from all the affidavits, that it was served long ago, and it was probably filed in chambers on the application made by defendant for his discharge in July last

The affidavit filed on behalf of the plaintiff clearly admits the orders were obtained in this suit and the suit of *Kerr et al* against the same defendant, and the payment of 10s. weekly under the orders until the 27th of May last, and that the payment then ceased and has not since been made. This sufficiently shows the orders were made and the default in the payment required under them.

I think the order directing defendant's discharge should go.

CLARK v. IRWIN ET AL.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-law.*)

2 W. & M ch. 5, sec. 4.—Treble damages and costs—Right to, how affected by reference to arbitration—"Recover."

A reference to arbitration disentitles a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under the statute of 2 W. & M. ch. 5, sec. 4. The word "recover" used in the statute meaning "recover by the verdict of a jury."

This was an application to revise the costs taxed on the part of the plaintiff, and to disallow the plaintiff treble damages awarded to him by the master under the following facts:—

The plaintiff, on 21st January, 1857, commenced an action against the defendants, under the statute 2 W. & M. ch. 5, sec. 4, and declared therein, on the 4th March, 1858, for the rescue of certain goods seized as and for a distress for rent. The defendants pleaded to the declaration on the 7th March, 1858.

On the 1st December, 1858—by the consent of parties, a judge in chambers made an order of reference, ordering the action and

all matters in difference therein between the parties to be referred to the award of the Judge of the County Court of the County of Wellington, and that the costs of the cause should abide the event, and that the costs of the reference should be in the discretion of the referee.

On the 5th of December, 1859, the arbitrator made his award, finding all the issues in the plaintiff's favour, and the damages to be paid by defendants to plaintiff in respect thereto and the matters in difference therein at the sum of £16 2s. 11d. The master in taxing the plaintiff his costs allowed the plaintiff treble costs in the usual manner and multiplied the amount awarded by three and allowed the same to the plaintiff.

O'Brien for plaintiff. ——— for defendant.

BURNS, J.—I find there is a difference in the practice between the 4th and 5th sections of the act 2 W. & M. ch. 5, with regard to the manner of computing and awarding the increased damages

The 4th section enacts that the person grieved shall in a special action upon the case for the wrong thereby sustained "recover his and their treble damages and costs of suit against the offender." and the 5th section enacts that in case of a distress and sale for rent pretended to be in arrear and due, when in truth no rent is in arrear or due, the person bringing the action "shall recover double of the value of the goods or chattels so distrained and sold together with the full costs of suit."

All the books of practice state and the authorities cited bear out the allegation that in an action on the 4th section the court order, if necessary, and in entering judgment the master as a mat er of course adds twice the full amount of the verdict to that found by the jury, thus trebling the damages; but in an action on the 5th section the court of Common Pleas laid it down that the double value should be found by the jury, and that the jury should be directed in case of finding for the plaintiff that their verdict should be for double the mount of value of the goods. See *Masters* v. *Farris*, 1 C. B. 715.

The point now raised is whether an award made under a reference by consent of parties is a recovery within the meaning of the statute 2 W & M. I am of opinion it is not such a *recovery* as the legislature contemplated. At the time the statute was passed an award of itself was no recovery of a debt or sum of money, but required to be enforced by action or an attachment for disobedience of an order of court to pay the amount. It is only since the passing of the C. L. Pro. Act and other recent statutes that awards may be enforced by the same process as the finding of a jury upon the matter referred.

Besides the general question whether in any case of compulsory reference, an amount awarded by a referee can be said to be a recovery within the meaning of the statutes, because the newer sta utes have placed the facilities of enforcing payment of award upon the same footing with a verdict, and as respects which I should say the legislature never intended by the more recent enactments to do more than facilitate the remedy of enforcing payment of the sum awarded there is this consideration in the present case that it was not a compulsory reference, but one made by consent of the parties. Indeed no compulsory reference could have been made of the matters, and though the reference was made after issue joined, yet the recovery by the award cannot be said to have been the consequence of, or the result of the process of the court in the sense meant as a recovery *in inbitum* as when used in the old statutes.

The order therefore must be made for revision of taxation of the costs and disallowance of the addition of treble damages.

COUNTY COURT CASES.

(In the County Court of the County of Essex, before His Honor Judge LEGGATT.)

WADE V. THOMPSON ET AL.

The plaintiff Wade, as tenant of Thompson, one of the defendants, occupied a house for some six years, during which period he paid his landlord's taxes.

Held, that plaintiff could not in his action deduct the taxes so paid out of the last quarter's rent under the 26th clause of the Assessment Act, although there was no agreement as to payment of taxes between him and his landlord.

LEGGATT, Co. J.—By the 26th clause of the Assessment Act, Con. Stat., U. C., page 655, it is provided that an occupant may deduct from his rent the amount of taxes paid by him, if the same could also have been recovered from the owner unless there be a special agreement between the owner and the occupant to the contrary.

It is admitted that there was no agreement between the defendant Thompson, the landlord, and the plaintiff as to payment of taxes, and the only question is whether the tenant, the plaintiff, can, under the facts stated, deduct the taxes which he paid from year to year during the continuance of his tenancy out of the last two quarters' rent accruing due to the landlord, having failed to deduct the taxes from the current year's or quarter's rent as it fell due.

The English Land Tax Act, as quoted in *Thibbs* v. *Parsons*, 3 B. & A., 516, is the same in effect as our Assessment Act with reference to the deduction of taxes by the tenant. It is not stated in either the English Land Tax Act or our Assessment Act what rent the taxes are to be deducted from. In *Thibbs* v. *Parsons* it was held that the tenant under the English Act is required to deduct the taxes from the rent due or accruing due at the time the taxes are paid. The 26th clause of our Asse-sment Act may be construed in the same way as to the particular rent the taxes are to be subtracted from. If that construction is adopted, then at the same time the plaintiff paid his landlord's taxes for the years 1856, 1857, 1858, and 1859, the last quarter's rent for which defendant, Thompson, distrained was neither due nor accruing due, and the plaintiff cannot now be permitted to deduct the taxes for those years out of the rent distrained for, whether the tenant can or cannot recover the taxes paid by him in an action against his landlord for money paid to his use.

I think there can be no doubt that the payment of taxes by the plaintiff during his occupancy, as admitted, cannot now be looked upon as payment to the landlord under the Statute.

The defendants are clearly entitled, I think, under the authorities quoted, to the *postea*. See *Thibbs* v. *Parsons*, 3 B. & A., 516; *Sprague* v. *Hammond*. 4 Moore, 481. See also notes to *Lampleigh* v. *Braithwaite*, Smith Leading Cases.

Postea to defendants.

(In the County Court of the County of Elgin, before His Honor Judge HUGHES.)

MCINNES V. BENEDICT.

Assignment for benefit of creditors—Registry—Execution—Conflict between Queen's Bench and Common Pleas.

Where an assignment for the benefit of creditors is filed within the five days allowed by law, it relates to its date so as to prevent the effect of an execution placed in the sheriff's hands within the five days.

When the Courts of Queen's Bench and Common Pleas are at issue on the construction of an act of Parliament, the duty of a county judge is to decide according to his own view of the law.

Remarks on the anomalous state of the law regulating appeals from county courts so far as the questions involved in this case are concerned.

This was an interpleader issue, brought to try whether certain goods were, on 30th August, 1860, the property of the claimant, McInnes, or of J. Stephen, the assignor.

The issue was tried at the December sittings of the county court.

The assignment was put in and admitted. It was dated 28th August, from J. Stephen to D. McInnes.

Peter Murtagh, sworn: — I am Clerk of the County Court; I produce a duplicate of an assignment from Mr. John Stephen to D. McInnes, Esq.; I received it on the morning of the date on which it is filed; I filed it at the regular hour of opening the office; it came into my actual possession at the Post Office, about 9 o'clock; it might be before 9; I think it was before 9; I did not come direct to the office; I came to the office about half-past nine; I cannot positively say whether or not I did any business on that morning; I did not enter any judgment in any case that morning before filing this; the execution may bear date that morning; I occasionally give blank executions to the professional gentlemen who require them; I think the sheriff did not open his office that morning until 10 a.m.; I believe his hours are from 10 to 3.

Cross examined: — If my name is to the execution, it was signed that morning or before it; Mr. Horton got the execution that morning.

Donald McInnes, sworn:—I was in plaintiff's employment last August; I recollect John Stephen making an assignment on the 28th August of the goods described in the stock book produced; I had been here previously; I got instructions to come to St. Thomas immediately, and take possession of Mr. Stephen's store; I left on the evening of the 28th, and I came over on the morning of the 29th; I drove up from the cars about 8 a.m., and reached Thompson's Hotel at 20 minutes past 8; I had breakfast there, and went immediately to the store and took possession, to the best of my belief, I think, before 9 a m.; it was, I am certain, before half-past 9: Stephen was in Hamilton; his brother slept in the store, and I got possession from him of the keys of the store; from that time I remained in the store the whole time, until the goods, stock, &c., were disposed of, and thenceforward John Stephen exercised no acts of ownership over the goods, stock, &c.; there was no concealment made use of; did not, that I know of, say anything about it from that time; and I remained in possession of the goods continuously, until I had disposed of them for McInnes.

Cross examined:—I left Hamilton on the day the assignment was executed—*i. e.*, the 28th; the sheriff was not there when I reached the store on the 29th; he came in on the morning of the 30th, and told me he had an execution; he did not ask me, as far as I recollect, whether he was in possession of the goods for any but himself; I was not placed in possession of the goods for the sheriff on the morning of the 29th; the sheriff did not ask me to keep possession of the goods for him before that time; I did not tell the sheriff on the morning of the 29th or 30th that I had nothing to do with the goods, in so far as I recollect; I did not try to conceal about the assignment; I might have spoken to Mr. Murtagh; I found fault with Mr. Murtagh for telling Mr. Horton; I was blamed throughout the town for telling; I did not give out that I was in charge of the property.

Re-examined.—I was sent up expressly to take possession of that property; the sheriff had been previously in possession of the goods on an execution of one Lorimer, which I paid previous to the assignment; I was not aware of the seizure under the *fi. fa.* of the Bank of Montreal.

This closed the plaintiff's case.

Sheriff, Colin Munro, sworn:—The execution of *Benedict et al* v. *Stephen*, came to my possession about half-past nine in the morning; I received it in Mr. Stephen's store; I had a previous execution under which I seized the goods, under a *fi. fa.* from the Bank of Montreal, which came into my hands on the 16th July; I told Mr. Stephen of the seizure and left him in possession; it was on the 29th August or on the morning of the 30th that I seized again, under the execution of *Haight* v. *Stephen*, and under that of Haight I seized again, and kept the goods, and subsequently under the *fi. fa.* of Benedict & Vann; I considered that I held the goods under the *fi. fa.* of the Bank of Montreal on a previous seizure, as that *fi. fa.* was not paid till some time after; I sold some goods under the Bank of Montreal execution; I saw McInnes, the last witness, there on the morning of the 30th; I asked him if he was there in charge of the goods under McInnes, and he said that he was not; I then put him in charge for me, under the execution: he agreed to take charge, and to let no one take the goods away without my knowing it; I think young Stephen was present; I am not sure that he heard the conversation; I had previously seized under Haight's execution; I looked at my watch at the time, it was half-past 9; the Benedict execution is tested on the 30th day of August, 1860, and would have been issued that morning; my office hours are from 9 to 4; the reason of my being in the store that morning was, that Messrs. Stanton & Warren, the evening before—*i. e.*, on the 29th, came to my house, and said that I had better seize, as things were not all right, and I had better look after the goods; I went round that same evening as early as 9 o'clock.

Cross examined:—When I seized in July for the Bank of Montreal, I told Mr. Stephen of it, and I left Mr. Stephen in possession; that execution has since been settled, McInnes did not tell me what he was up for or of the assignment; so far as I know he was not aware that I had an execution for the Bank of Montreal against Stephen.

After reading the statute, the learned judge told the jury there were two points for their decision.

First. Was there an immediate delivery, followed by a continued change of possession of the goods assigned or sold, and if there was, there was no need of a writing or registry at all; that the immediacy of the delivery was to be governed by the circumstances in which the parties are placed; so long as there are no executions in the sheriff's hands, every man had, before the statute 22 Vic. cap. 26, sec. 18, was passed, the control of his property, and could legally dispose of it as he thought right for the benefit of his creditors; since that statute he can only make an assignment for the benefit of his creditors generally, or continue to dispose of them in the usual way until an execution comes in. That if he exercise the discretion an arrangement for the benefit of all his creditors, the sale or transfer may be in one place, and the delivery in another, so soon—*i. e.*, as immediately as the delivery can be accomplished; but, if before the delivery is accomplished, the sheriff steps in and makes a seizure, or if, before it comes to the assignee's hands, the execution will take the goods And upon this point he submitted the following questions, viz.:—

1st. Was the delivery effected before the *fi. fa.* reached the sheriff's hands?

2nd. Was that delivery followed by a continued change of possession?

If yes on both these points, to find for the plaintiff.

Second. Upon the point of the registry of the instrument of assignment, he told the jury he thought it being registered within five days of its execution would protect the goods against all other claims; that the sheriff could only seize the goods and chattels of J. Stephen under his execution; and then the question arose whose were the goods that the sheriff seized under Benedict's execution: the goods in question had undoubtedly been the property of J. Stephen, but had that property in them been legally changed? That he thought that property might be so changed if, upon a valid and good consideration o carry out an honest purpose, the debtor making away or transferring his goods to pay his debts, provided it be done in a way that the badge of fraud, such as the act declares shall be a fraud, does not attach to the transaction, and provided the sale and delivery be completed before the sheriff receives the execution in his hands to satisfy the judgment of some *bona fide* creditors, or provided a bill of sale be registered within five days of the execution of the instrument. He also told the jury that it was of no moment that the goods were already in the sheriff's hands to satisfy previous executions, because a subsequent execution would take the goods subject to the previous ones, and would attach so soon as they were satisfied; that in the same way the judgment debtor, Stephen, might make a valid sale of the goods, subject of course to the incumbrance existing against them.

Upon the first question submitted to them, *Mr. Sadlier* contended that if an execution be placed in the sheriff's hands between the date of the bill of sale and its filing, though within five days, it is not entitled to prevail.

Mr. Horton objected to the charge, and contended—

1st. That the sheriff holding executions in his hands, and holding the goods under seizure under those executions, that no act of Stephen could take possession of the goods from the sheriff until those executions were satisfied.

2nd. That the possession of the goods could not be given to the plaintiff until the *fi. fas.* then in the sheriff's hands were satisfied, and entirely out of the sheriff's hands: *Potter* v. *Carroll*, 9 U. C. C. P. 442.

3rd. That no act of Stephen, nor of any other party, could give possession until the executions had been satisfied, as they were in *custodia legis*.

4th. That there was no evidence to show that the witness McInnes was authorised to take possession of the goods, and no authority from Stephen or from the plaintiff was shewn whereby he took possession.

The jury found a general verdict for the plaintiff.

During the following March term *Horton* moved to set aside the verdict on the points reserved at the trial, and on affidavits.

Abbott shewed cause.

Horton for the defendants.

HUGHES, Co. J.—The material question between the parties, irrespective of that raised by the affidavits filed, is the same as that between *McInnes* v. *Haight*, in which I gave judgment in April term last.

I charged the jury the same in both as to the effect of the 4th section of Consolidated Stat. of Upper Canada, cap. 45, according to my construction of it; and the same objections were urged by the respective counsel for the defendants in both cases; and in this it was mutually agreed, after my charge to the jury, that, irrespective of the verdict, the question of law might be disposed of by the court in term.

In the argument in term, however, in this case, the defendant's counsel took a ground, which I shall advert to in the next paragraph, that was not urged in the argument of the case.

I must give the same decision in this which I did in the other, and refuse a new trial, as I think the verdict for the plaintiff upon this point should stand undisturbed, and judgment be given for the plaintiff upon the points reserved.

My reasons for doing so are the following, viz.:—

1st. That I do not see any analogy between this statute and the 44th section of that for the Registry of the Titles to Land, (Con Statutes of U. C., cap. 89,) because there is nothing in the 44th section of the last named statute which leads one to suppose that *five* or any number of days are specified or given, within which to register a deed or conveyance to land, in order to hold a title against the claim of a subsequent purchaser or mortgagee. Were such words as "within five days" introduced after the words "unless a memorial thereof be registered," instead of the words "in manner hereby directed, &c.," there would no doubt be a complete analogy between the two sections of the respective statutes. I doubt much, however, if a subsequent purchaser or mortgagee's title would be considered good for much, or if he would not be at some hazard in taking a title to land until the lapse of the specified number of days within which the first purchaser might register.

2nd. In the case of a will under the 46th section of the statute for the registry of titles to land, it is sufficient to register the devise within 12 months after the death of the devisor, and a registry within that time is as valid as if it had been recorded immediately after the death Now between that section and the 4th section of the Chattel Mortgage Act there is, in my opinion, some analogy because there is time given within which to register in both cases. The title under a will dates from the death of the devisor, by relation, and not from that of the registry An innocent purchaser of land from an heir whose executor devised the estate to another person, could, therefore, never be considered as holding a valid title against the devisee, under an unregistered will, within 12 months of the death of the testator, although the provisions and object of the Registration of Deeds Act is to secure registry of all titles, in or to spare and protect innocent and *bona fide* purchasers for value from loss of title being made to others under conveyance previously executed.

3rd. It was never necessary to register a conveyance of lands in Upper Canada in order to complete a title or make it a valid conveyance, in the same way as it is necessary in England to complete a title to land by enrolment. Nor is registration intended to supply the place of enrolment, but simply to guard against a subsequent purchaser of the same lands obtaining the lands by prior registry, (*See* 47th sec of stat. of U. C., 4 Wm. IV., cap, 1; *Doe Stafford* v *Brown*, 3 O. S. 92; *Doe ex dem Adkins* v. *Atkinson*, 4 O. S., 140.) and if no such registration in the case of lands be necessary to complete a title, I am at a loss to understand why it is so in the case of goods which may be conveyed by a simple writing not under seal.

4th. I think the right to these goods became absolute in the bargainee at the time of the execution of the bill of sale, subject of course to be held void and fraudulent, as against creditors and others, if the bargainee did not register within five days; and that having so registered, his title became effective by relation. In *Vaughan ex dem Atkins* v. *Atkins*, 5 Bur. 2787 the court are said to have expressed themselves thus:—"There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." The substantial, *i. e.*, the part which affected the parties to the instrument in this case, and the claim to the goods under it, was all performed when the bill of sale was executed, and provisional upon its registry, it was good against all the world: the registry was to affect other parties, when registered according to law; all provisional considerations, and the claims of those other parties were shut out absolutely; if it had not been registered according to law the claims of those parties would prevail.

5th. My other reasons are set forth in my judgment in *McInnes* v. *Haight*, which is reported in the 7 U. C. L. J. 104, and to which I still adhere.

6th. With regard to the other questions, *i. e.*, that there was a general verdict whereby the jury found that there was an immediate delivery accompanying the sale, followed by a continual change of possession, which rendered the registry of the bill of sale unnecessary. I must say I was not quite satisfied with the verdict, because from the evidence of the sheriff and the clerk of the county court, the testimony of young McInnes was rendered somewhat questionable; but as there is quite substantial ground enough to sustain the verdict, irrespective of this, I think it should not be disturbed, although had the plaintiff's claim to the goods rested solely upon the immediate delivery accompanying their sale, followed by the necessary continual change of possession, so as to make a bill of sale unnecessary, I might, in the exercise of the discretion which I possess, have ordered a new trial upon payment of costs, because this case is distinguished from the cases of *Woodruff* v. *Campbell*, 5 O. S. 805; and *Elmslie* v. *Wildman*, 8 Taunt. 286, whereon I grounded my refusal of a new trial in the county court case of *Cochrane* v. *Shepard*. The evidence of young McInnes being, as shewn by Mr. Horton's affidavit, contrary to expectation ("I do not think it was what is technically called a case of surprise;") but I do not deem it necessary to speak decisively upon how I might have disposed of this question under other circumstances, because the exercise of that discretion now would be manifestly unjust, when there are other substantial grounds to uphold the verdict.

I therefore order the verdict shall stand for the plaintiff; that defendants' rule be discharged; and judgment entered for the plaintiff upon the points reserved and the questions raised at the trial.

The foregoing part of my judgment was written for delivery last term, but neither of the parties having appeared to hear it read, it was not delivered. Since that I find that my judgment in *McInnes* v. *Haight* has been reversed by the Court of Common Pleas (ante p. 20).

If there were only one court of appeal from the judgments of the county courts, or if only one of the two courts of appeal had given judgment on the subject discussed here, it would be my obvious duty to give my decision in harmony with that of the Court of Common Pleas in *McInnes* v. *Haight*, and to bow to that judgment without further words on the subject; but the unrevised judgment of the Court of Queen's Bench, *Feehan* v. *Bank of Toronto*, compels me either to adhere to, or give, a judgment contrary to my own convictions of what is right.

I think it, therefore, my duty to adhere to what, after unusual care and thought, I have concluded to be the fittest judgment to give in the premises. After reading the reasons given by the Court of Common Pleas for revising my judgment, I think it proper to say—

1st. I do not consider that the legislature had any intention to put a stop to the taking or making bills of sale and chattel mortgages. The old system, sanctioned by the common law, of allowing them to be taken and made and kept secret, was undoubtedly viewed with disfavor. Then the first statute passed (12 Vic. cap. 74) declaring these conveyances void against execution creditors, unless registered, it is right to assume that the keeping them secret, and not the taking security by means of them, was the mischief intended to be cured. It was the secrecy intended to be made difficult, and not the taking or making of them. For if the Legislature had wished to remedy more than the secrecy, I must suppose they would have effected their intention more certainly and readily by making all such instruments illegal.

2nd. I regard the course of legislation on the subject to have been this: The common law said to a creditor, provided the transaction be an honest one, you may take a bill of sale upon your debtor's goods, and keep it in your pocket so long as you like, until you are paid your debt, and you need not let the rest of the world know anything about it. Then the Legislature interposed and said, you shall do this no longer; secrecy is prejudicial to the public; and henceforward if you wish to take such a security, not only shall the transaction have a *bona fide* purpose, but if you wish to hold such a security upon your debtor's goods, you shall not keep the bill of sale concealed, nor shall you keep the transaction close between yourself and your debtor; you shall register it; at the same time expose as much of the nature of the subject as shall be necessary to make an assurance and guarantee that it is not fraudulent or made to delay creditors; you may register your security when you please, but it shall have no force until it is registered; and you shall register it every year at least and show that the debt you intended should be secured is still subsisting. This is what I take to be the effect of 12 Vic. cap. 74. Then the Legislature interposed again, and said you shall not have such a length of time within which you may register your security as heretofore; you shall have no option or discretion as to when you shall register; after the first five days from the date of the instrument you shall have that time to register in, and no longer; if you fail to register within those five days your security shall be void against subsequent purchasers and creditors; your keeping secret the existence of your bill of sale, as you might previously do, will be now effectually put a stop to, and your option of registry beyond the five days curtailed; so that whilst it is still lawful for you to take such a security, it is unlawful for you to keep it a secret beyond five days; and as you may require that time to reach the registry office and perfect the papers, you have five days for purpose of registering.

3rd. I think, too, that the five days was intended to limit the time within which the holder might register, and the remedy was intended to prevent the bargainor or mortgagor from getting further credit on the strength and apparent ownership of goods in his possession, whilst an unregistered bill of sale might be kept secretly over them by some creditor which might have force for months. Under 12 Vic. cap. 74, a debtor might execute a bill of sale to his creditor to secure a debt of £500, less or more, on goods in his possession to the value of £500, his other liabilities might be another £500, whilst all he would be worth if brought to sale would be perhaps £500; he might purchase other goods at three months' credit from persons entirely ignorant of the existence of the chattel mortgage to the value of £250, more or less; failing to pay for these goods, he might be sued and judgment recovered, but before execution the chattel mortgage might be registered, so that there would be nothing left for the judgment creditor to seize upon to satisfy his execution, but the remnant or unsold portion of his own goods. I think this was the mischief intended to be avoided by the last act of the Legislature on the subject, that is *secrecy* beyond five days, and not that it was the purpose to make it more difficult to take security by means of these instruments. If the security afforded by them was the mischief of the statute, a much shorter enactment and more effectual words would have been employed. The Legislature is omnipotent and would probably have exercised its supremacy over the subject in the way best calculated to meet its behests.

4th. Were it otherwise, the creditors being at a distance more remote from the place where the debtors reside, or their goods are, would be placed in a position of less advantage for registering within five days than those being less remote would be in; and when we read an act of Parliament, I think it fair, if it be possible to do so, so to construe its language and its intentions, and endeavour to give effect to it in such a way that it may effect and be made available by, and equally advantageous to, all persons alike, so far as their circumstances will permit.

5th. Fixing the five days within which to register was curtailing an advantage formerly possessed; for as the law stood under the now repealed statutes, the bill of sale might be kept in abeyance and unregistered, until the debtor might find himself getting so embarassed in circumstances, when it might be an advantage to himself to keep off some pressing or importunate creditor by telling the mortgagee to register his security.

6th. The debtor would always know if a judgment was likely to be recorded against him and execution issued against his goods, and then in order to bring the judgment creditor to terms, the bill of sale might be presented for the first time to his notice. In this way the bill of sale kept secret might be a snare on the one hand to the judgment creditor, and a positive advantage to the debtor on the other, although at the time of its execution it might be perfectly honest and *bona fide* and otherwise unexceptionable in point of law.

Lastly. As the matter now stands, I find myself awkwardly placed, whichever way I decide this case there will be an appeal.

The case of *McInnes* v. *Haight*, was decided by me in accordance with a decided case of one of the Superior Courts. The Court of Common Pleas have, however, ruled that although it was so it was wrong to do it. If I now give a judgment contrary to what I did in that case, and as I made up my mind to do in this, last term, it will be contrary to my own convictions. My own two judgments would be inconsistent the one with the other, and the Court of Queen's Bench would probably send me down an order to revise my judgment — new trials being granted in both by different courts—I should have at the next trial sittings a rule from each court giving directions diametrically opposite to each other. In the one case I should be required to charge one way upon the law, and in the other case in an opposite manner, which would be an incongruity that I must avoid by adhering to my former decision.

UNITED STATES LAW REPORTS.

U. S. CIRCUIT COURT.

The Washing Machine Co. v. Earle.

Disintegration of Patent Rights.

This was a bill for injunction; the case being as follows: Goodyear was the patentee of what is known as Vulcanized India Rubber; an invention of undoubted originality, and which had been applied by him to a vast number of useful purposes. Among these were the following:

1. Making "wringers" for different kinds of washing machines, now exclusively used in hotels, public laundries, &c; the office of these "wringers" being to press water, starch or other liquid out of clothes, after they had been washed.

2. Making hose, pipe and tube; now extensively used for carrying water to fires, gardens, streets, mills, &c.; though used for many other purposes, as to convey sound, &c.

Not having great capital of his own, Mr. Goodyear, or persons who had bought his patent, had parcelled out the invention among many licensees; granting to one person the right to use it for one purpose and to another the right to use it for another. To the complainants in this case, the Washing Machine Company, he had granted the exclusive use of it in its application "to or in combination with all wringing, washing and starching machines," while to a company, called the Boston Belting Company, he had granted the use of it for making "hose, pipe and tube," and "*no further*;" the hose, pipe and tube described in one part of this deed of license being described, in another, as "*conduit* hose—pipe and tube."

That part of the washing machines above referred to as "wringers," were in fact iron shafts covered with India rubber. "The rubber"—to use the language of one of the workmen, "is constructed in rolls of a certain length, with an opening through the whole length for the metalic shaft, but much smaller than the shaft, so that the rubber, when the iron shaft has been forced through it, gripes and clings to it, and turns *with it*, instead of turning upon it; thus wringing the clothes as they are passed between the two rollers The smallness of the aperture through the rubber, and the consequent force and closeness with which it clings to the iron, make the shaft and the rubber, in effect, one entire solid roll."

The Boston Belting Company, whose right to make and sell "hose, pipe and tube," was not disputed, did not attempt to make

"wringers." They made hose, pipe and tube alone. But a firm named Colley & Co., who had a patent of their own for making washing machines, bought this hose, pipe or tube, and out of it they made "wringers" for their washing machines, by cutting the hose into short pieces, running iron shafts through the pieces and fastening them to the iron with cement. The result was that the firm of Colley & Co., made wringers nearly as good, out of hose, as the Washing Machine Company could out of rubber expressly prepared for the purpose; good enough at any rate to undersell the Washing Machine Company, who were bound to Goodyear three cents a pound for the right of using the vulcanized rubber in making *wringers*, while the Belting Company had the privilege of making *hose* for two.

The Washing Machine Company now filed this bill, Goodyear being co-complainant, against certain agents or vendees of Colley & Co., praying a preliminary injunction against the sale of any washing machines of which the wringers were made by the use of hose.

Mr Jenks for the complainants, cited great numbers of Dictionaries of the English language, from Johnston down to Webster, and Dictionaries of Science, both Latin, French, and English, to prove that each of the words "hose," "pipe," and "tube," meant essentially the same thing, and but one thing; st. a long *hollow* body, generally and in common parlance, cylindrical, and in the nature of a conduit for fluid; though neither of these qualities was of the essence of pipes or tubes. They might, he admitted, be of any substance, clay, wood, glass or what not, but that they should be hollow, and not solid, was of the essence of hose, pipes and tubes alike; and this point he abundantly made out on the authorities which he cited, with great research and learning This being so, he admitted that as long as the fabrics of The Boston Belting Company were used for any purpose for which hose, pipes or tubes could, in their proper nature, be used—that is to say, so long as they were left hollow and as conduits, whether for water, air, steam or any other substance or element capable of transmission through them—neither Goodyear, Colley & Co, nor the Washing Machine Company nor any one else could complain. But there was an abuse; they take tubes, and permanently filling them up with an iron axis larger than the hollow of the pipe, and so stretching them, make them solid bodies. The case states that in the wringers of all washing machines, "the shaft and the rubber form, in effect, on solid roll." Can a man purchase one kind of patented articles, cut them up—in fact *destroy* their identity and nature—and then use the fragments in a way never contemplated in regard to the whole things while in a perfect state, and in a way which directly interferes with the reserved rights of the patentee, or with those to whom he has granted them? In the present case the expression is, "*conduit* hose, pipe and tube," which shews plainly that the words "hose, pipe and tube," were used in their strict sense, as pipes or channels for the conveyance of fluid.

Mr. Grifford for the defendant.—The use of vulcanized rubber for making *conduit hose, pipes* or *tubing*, was conveyed by the strongest terms; there is no restriction on the use of them; and therefore the grant carries a right to use them for any purpose to which they are applicable. The grant conveys the right for conduit. The word conduit is a noun, and is defined by Lexicographers to be "a conducting pipe or tube." The conveyance, therefore, does not stop with granting a right to *conducting pipe*, but after doing that, by the well-selected term "conduit," it goes on and conveys also the right to *hose, pipe* and *tubing;* showing that the intention was to convey the right to that form of rubber for all the uses to which it is applicable. The complainants, to avoid this result, are driven to the necessity of distorting the language by a violation of common rules of grammar, and calling the word "conduit" an adjective which in English is a noun, and was never anything else. But the complainants contend that the rollers in the wringing machines are not tubes; let us look at that.

1st. The complainants substitute in their treatment of the subject the aggregate thing, to wit: the roller in which the tube is used, and then ask whether such aggregate thing is a tube. A waggon is not a wheel, but a wheel was used in its construction, and such was a proper use of the wheel, and it is none the less a wheel because it forms a part of the waggon. So with a roller of the wringing machines. It cannot be called a tube in the aggregate, but nevertheless a tube was used in the construction of it, and does not cease to be a tube because it forms a part of the roller.

2d. A tube is *cylindrical*, and that is the form which is required in the wringing machines. It has this form before being used in that machine, and it retains that form when in and part of it.

3d. A tube has a *caliber*, and a *caliber* is indispensable to put the iron rod through in its use in the wringing machine, as much as it would be to conduct water.

4th. It is therefore plain that the use of a tube or pipe to put the iron rod through to make a roller, is a direct and proper use of it, employing all the functions of a tube, and continuing to employ them, and without those functions no such use could be made of it.

5th. The roller is composed of the *tube* of rubber and a *rod* of iron, and neither, after their union, ceases to be what it was before. The *rod* of *iron* is still a *rod* of *iron*, and the *rubber tube* is still a *rubber tube*, and in the aggregate they are a *rod* of *iron* through a *rubber tube*. When the man makes the roller, by putting the rod of iron through the tube, he is simply using, and in a useful and proper way, a rubber tube, and no other form of rubber would answer his purpose. He is not *destroying* the tube and using the material of it for some other purpose; on the contrary, he is *using* the tube by filling it with iron, which is as legitimate a use as if he were to fill it with water.

But the complainants say that in using the tube as a part of the roller, the tube is more or less *stretched*. If this be so, then it is simply a *stretched tube*. The tube is not destroyed. If filled with water it might be stretched; but who would contend that for that reason it had ceased to be a tube? Where a party has a license to make and sell an article of a certain form and function, if the purchaser, instead of using that form and function, *destroys* such form and function, and uses the material, to wit, the vulcanized rubber, to make a rubber article of different form and function, and for which the form of the article purchased was not adapted, a very different question arises from any question in this case, and one which, it is submitted, is not necessary for the court to trouble itself with in deciding this case. To illustrate. If a man purchase India Rubber *boots* of a party having a license only to use vulcanized rubber for boots, and after so purchasing them, instead of using the function of a boot, were to *destroy* that function by cutting them up in strips and using them for springs, or to make shirred goods out of, the question then would be, whether he would have a right to *destroy* the licensed form and function of the rubber instead of using that form and function, and to make some other form of a rubber article out of the material. But in this case there is no such question; the tubular form of the rubber is not *destroyed*, but it is *used*, and necessarily used, and continued in use; and such form and function is indispensable for the use to which it is applied.

The opinion of the court which goes upon grounds not taken by either counsel, was given by

GRIER, J.—The right of the Boston Belting Company to manufacture pipes or tubes is not disputed. They pay a certain tariff per pound for the right to use the patented process: the material thus manufactured by them belongs to them, and not to Goodyear. Any covenant between them and him that they will not manufacture certain articles, may be valid as between the parties, but it does not run with the rubber, like a covenant on land. Colley & Co., when they purchased their tubes are absolute owners of them, and may convert them into rolls for wringers to their washing machines, or put them to any other use. They might have bought belting or overshoes, or any other article made by the licensees of Goodyear, and converted the material to any purpose that suited them. I may purchase a tobacco pipe made of this material, but I am not bound to smoke with it, and may convert it into an inkstand. The agreement between the licensees that A shall make all the pipes, and B all the inkstands, gives neither of them a right to the interference of a chancel or to compel me to smoke my pipe, or to put ink alone in my inkstand. They cannot oblige me to use, in subservience to their arrangements, that which has become my property.

But, says the complainants, although it is true that a "tube" is defined to be a hollow cylinder, yet it is generally used to convey water, and is called a water pipe In addition, the Boston Belting Co. pay a tariff of but two cents; whereas, the complaining corporation pay three cents, and therefore ought to have a monopoly of making rollers.

The perfect answer to this is, that the complainants have no patent or exclusive monopoly of making rollers of vulcanized rubbor. Goodyear, by virtue of his patent, might have manufactured it all himself, and sold it for such price as he could get; but his patent gives him no power to control the use which persons who purchase may make of it. Vulcanized rubber may be applied to a thousand purposes, from a tube to a steam engine, but this patent gives no power to the patentee to parcel out his one monopoly into a thousand monopolies. He may make any covenant he pleases with his licensees, and by that means may dispose of his special licenses to great profit, but he cannot compel the public to notice or regard such agreements, or the rights conferred or reserved by them. If his licensees do not perform their agreements, his remedy is by action against them on his covenants, and not by recourse to a chancellor to restrain third persons who have purchased vulcanized rubbers from his licensees from using it, when it is their's, for any purpose they please.

The bill does not complain that the machines sold by defendants are made out of rubber purchased from one who has perverted the patented process, but that the manufacturer who made them did not buy them from the complaining corporations on whom Goodyear assumes to have the power of conferring a monopoly to apply his rubber to that purpose. But the patent conferred no such power on him or them. Every person who pays the patentee for a license to use his process becomes the owner of the product, and may sell to whom he pleases, or apply it to any purpose, unless he bind himself by covenants to restrict his right of making and vending certain articles that may interfere with the special business of some other licensees. The contrivance of the patentee to destroy competition may be valid, but the covenant binds only the parties to it. If a stranger purchase the product from one licensed to use the process, he need look no further, and may use use it for his own purposes, without inquiring for or regarding any private agreement of licensers not to compete with one another.

In conclusion, the right of the Boston Belting Company to use the process in their manufacture of belting, packing, hose, pipe and tubing, is admitted. Consequently that company may sell their manufactures to whom they please, without inquiring the purpose of the purchaser, or imposing any condition on him as to how he shall use his own property.

As a corollary from these propositions, it follows that Colley & Co. may convert any of those articles, when purchased by them, into rollers for their wringing machines, without infringing the rights of the complainants, whose arrangements to create a monopoly cannot affect the right of Colley & Co. to do as they please with that which is their own.

Injunction refused, with costs.

GENERAL CORRESPONDENCE.

Master and Servant—Misconduct of Servant.

To the Editors of the Law Journal.

Gentlemen,—Magistrates in new counties being frequently at a loss for advice upon questions pertaining to their duty, may I take the liberty of asking your opinion upon the following case, which came before us:—

A. summonses B. to appear before magistrates. In evidence it appears that A. was engaged by B. to work for five months for a stipulated sum. A. serves a portion of the time, and then, without leave, absents himself from the employment of B. Is the contract violated? and is B. bound to pay A. for the term of time he has served?

I am, Gentlemen, yours respectfully, C.

Southampton, 23rd Dec., 1861.

[Upon the facts stated by our correspondent, we are of opinion not only that A. has no right to recover against B. for the portion of time mentioned, but that, under sec. 4 of Consol. Stat. U. C., cap. 75, A is liable, upon complaint of B., to be punished for leaving B.'s service before the expiration of his term of engagement.—Eds. L. J.]

Re Copyright—10 and 11 Victoria, chapter 28.

To the Editors of the Law Journal.

Dear Sirs,—I believe your informant is in error. The Provincial Act 10 & 11 Vic., cap. 28, was not disallowed, and is rightfully incorporated in cap. 31 of Con. Stat., Can. There can be only two sources of *good authority* as to the disallowance of an Act—a Proclamation, or a Message to the Provincial Parliament. In this case there is neither. But there is, in the Appendix to the Journals of the Legislative Assembly for 1849, letter N, a despatch from Lord Grey of 7th July, 1848, about this Act, wherein his Lordship says he "hopes the Legislature of Canada will adopt the same principle of justice towards British authors as the Legislature of New Brunswick," &c. This was done by the 13 & 14 Vic., cap. 6, (sanctioned by the Queen in Council, 3rd May, 1851) under which a duty is levied on reprints of British works, and the proceeds remitted for the authors. But the 10 & 11 Vic., cap. 28, remains in force for those British authors who choose to avail themselves of it, by printing their works in Canada, and so getting the benefit of our Copyright law, instead of the protection of the duty on Foreign reprints, under 13 & 14 Vic., cap. 6. This latter may be generally preferred on account of the obligation to reprint in Canada, in order to obtain the former; but it is easy to conceive that cases might arise where the right given by 10 & 11 Vic., cap. 28, would be more valuable and effective.

I am, dear Sirs, very truly yours,

G. W. Wicksteed.

Quebec, 27th Dec., 1861.

[We thank Mr. Wicksteed for his communication. He is certainly at issue with the gentleman who gave us the information upon which our remarks in our last number were based. We shall be glad to hear from that gentleman in reply to Mr. Wicksteed's communication.—Eds. L. J.]

MONTHLY REPERTORY.

L. C. & L. L. J. *Feb. 9.*

Life Association of Scotland v. Siddall.

Cooper v. Greene.

Express trust—Trustee de son tort—Reversionary interest—Length of time—Acquiescence.

A trustee *de son tort* is an express trustee, and the lapse of more than twenty years does not bar a *cestui que trust* of a fund which has been misapplied, of his remedy against such a trustee.

A *cestui que trust* whose interest is reversionary, is not bound to assert his title until it comes into possession.

The mere knowledge and non-interference of a *cestui que trust*, particularly while his interest is reversionary, does not amount to such acquiescence in a breach of trust as will release the trustee from liability.

M. R. BUCKLEY v. HOWELL. *March* 19.

Will—Construction—Trustees—Power of sale and exchange—Mines—Sale of land excepting the minerals under it—Improper exercise of power.

A testator by his will devised to trustees certain manors, lands, tenements, hereditaments and premises, with the mines, and quarries, and appurtenances thereto belonging, upon trusts in strict settlement; and he empowered them, at the request of the person or persons for the time being entitled to the actual possession of the rents and profits thereof, to sell or convey in exchange, all or any part or parts of the manors, lands, tenements, hereditaments and premises thereinbefore devised, and the inheritance thereof, and hold the lands purchased or taken in exchange upon the same trusts.

Held, that under this power, the trustees could not sell the land with an exception or reservation of the mines and minerals under the same, but that the land and minerals under it must be sold together

COMMON LAW.

C. P. BELL v. MIDLAND RAILWAY CO. *April* 23.

Railway—Private branch—Obstruction to right—Evidence—Injury to reversion—Damages.

The plaintiff having lands adjoining defendants' railway under a clause in their special act acquired the use of a siding which he used as a coal wharf. By agreement with the plaintiff, the defendants used to supply engine power for conveying plaintiff's coal to the wharf. Disputes arising, the defendants refused to convey the coal any longer, and also denied the plaintiff's right to use the siding; and with the intention of preventing his doing so, obstructed the entrance to the siding by a line of carriages constantly kept there, and by other means. Plaintiff did not try to exercise his right of conveying trucks on to the siding by means of engines of his own, nor did he put himself in a condition to do so by complying with certain regulations prescribed by the act.

Held, sufficient evidence to go to jury of an obstruction of the plaintiff's right.

Part of the wharf was let to tenants at a minimum rent, to be increased by a royalty of so much per ton of coal sold beyond a certain amount.

Held, a present interest in the plaintiff on which he could maintain an action.

Semble (*per* WILLES, J.) that the obstruction was sufficiently permanent to give the plaintiff a right of action as reversioner, and that he had a right of action on the ground that his tenants had determined their tenancies in consequence of the wrongful act of the defendants.

Held, *also*, that this was a case where the jury might give exemplary damages.

C. P. FREEMANTLE v. THE L. & N. W. RAILWAY CO.

Negligence—Sparks from locomotive engine.

In an action against a Railway Company for injury done to plaintiff's land by sparks emitted from their locomotive engine, the evidence for the defendants was to the effect that the engine was of the best known construction. The plaintiff's witnesses gave their opinion to the effect that with the engine in question the risk of causing mischief by sparks was not improbable, and that the engine was so constructed as to be dangerous without a precaution of some kind.

The judge left it to the jury to decide whether they believed either the plaintiff's or defendants' witnesses on this point; and also left to them to consider whether each set of witnesses might not have been mistaken in the degree of excellence or of defect imputed to the engine, and if so, it was evidence for them to decide either for the defendants, that no further precaution would be with reason required, or for the plaintiff if it were in reason requisite.

Held to be a proper direction.

REVIEWS.

LOWER CANADA REPORTS. Edited by M. LeLievre. Publisher, Augustus Cote, Quebec.—Nos. 3 & 4 of vol. XI. are received. It contains some very important decisions. Among these may be mentioned *Grant* v. *The Ætna Insurance Company*, in which the law of insurance on property is investigated at great length. There are eleven other cases in the number, the majority of which are of interest only to our *confreres* in Lower Canada.

THE NORTH BRITISH REVIEW. New York: Leonard, Scott & Co.—The November issue of this well known quarterly is received. The contents are, "Pascal as a Christian Philosopher;" "What is Money?" "Plato and Christianity;" "Spain;" "Poets and Poetry of Young Ireland;" "Edmund Burke;" "Scottish Humour;" "Comets;" "Mott on Representative Government."

THE EDINBURGH REVIEW (same publishers) is also received. Contents: "Macaulay's History of England (5th vol.);" "Montalambert's Monks of the West;" "Lavergué on the Agriculture of France;" "O'Donaghue's Memoirs of the O'Briens;" "Cunningham's Church History of Scotland;" "The Story of Burnt Nial;" "English Jurisprudence;" "Thiers' Revolution of the Hundred Days;" "The Works of Elizabeth Burrett Browning;" "Dr. Hessey's Bampton Lecture;" "The Disunion of America."

BLACKWOOD for December (same publishers) is also received. Contents: "Clutterbaste's Campagne;" "Augustus Welby Pugin;" "Chronicles of Carlingford;" "Wassail;" "A Word from a New Dictionary;" "Flunkeyism;" "Fletcher on Hamlet and Othello;" "A Month with the 'Rebels;'" "Some account of both sides of the American War."

THE ECLECTIC, for January, 1862 (New York: W. H. Bidwell), is received. It opens with two plates—the one "The Wife of Bunyan interceding for his release from prison;" the other "The Battle of Bunker's Hill"—both engraved by Sartain, and possessing the peculiar combination of softness and brilliancy for which that artist's engravings are celebrated. The contents are various, including "Life and Times of Cavour;" "The Genealogy of Creation;" "Kings and Queens of Diamonds;" "Meeting of the British Association;" "Revolutions of English History;" "The Constable of the Tower;" "Fire-doomed Cities."

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

JOHN BELL GORDON, of Goderich, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted December 28, 1861.)

ROBERT SMITH, of Stratford, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted December 28, 1861.)

TO CORRESPONDENTS.

"BAILIFF"—Under "Division Courts."

"C."—"G. W. WICKSTEED"—Under "General Correspondence."

DIARY FOR FEBRUARY.

2. SUNDAY ..... *4th Sunday after Epiphany.*
3. Monday ..... HILARY TERM commences.
4. Tuesday ..... Chancery Examination Term, Toronto, commences. Last day for Notice for Sandwich and Whitby.
7. Friday ..... Paper Day, Q. B.
8. Saturday ..... Paper Day, C. P.
9. SUNDAY ..... *5th Sunday after Epiphany.*
10. Monday ..... Paper Day, Q. B.
11. Tuesday ..... Paper Day, C. P. Last day for Notice of Chancery Examination Term, Chatham and Cobourg.
12. Wednesday ..... Paper Day, Q. B. Last day for service of writ County Court.
13. Thursday ..... Paper Day, C. P.
15. Saturday ..... HILARY TERM ends.
16. SUNDAY ..... *Septuagesima.*
18. Tuesday ..... Chancery Examination Term Sandwich and Whitby commences. Last day for Notice for London and Belleville.
22. Saturday ..... Declare for County Court.
23. SUNDAY ..... *Sexagesima.*
25. Tuesday ..... Chancery Examination Term Chatham and Cobourg com.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

FEBRUARY, 1862.

NOTICE.

The attention of Subscribers is drawn to the fact that all desirous of saving One Dollar in the Subscription Money of the current volume must pay before the issue of our March number. The Subscription is only $4 if paid on or before 1st March in each year, but $5 otherwise. Subscribers in arrear are requested to settle without further delay. The amount due by each Subscriber may be ascertained upon reference to the cover of his paper.

PAYMENT OF CROWN WITNESSES.

Nothing more tends to the healthy administration of criminal justice than the hearty good-will and support of the people.

Whenever in the course of time a law is found to be opposed to public sentiment, it either becomes a dead letter or is expressly repealed by the representatives of the people in Parliament assembled.

So, when a law is by experience found to be defective, an effort should be made to amend it so as to meet the wants of the people.

Crown witnesses in Upper Canada receive no pay for loss of time—no compensation for necessary support. They are dragged from their homes to the assize town, at the risk of imprisonment, and compelled day after day at their own expense to await the pleasure of Crown officers and the convenience of the Court.

This is felt to be a grievous wrong. It is universally acknowledged to be so. Grand Jury after Grand Jury present it as such, and yet nothing is done.

The question arises, why should not something be done? Some say that the attendance on courts of justice to give evidence against criminals is a duty which every man owes to society. But is not every man in society as much interested in the suppression of crime as those who happen to be eye witnesses? Why should the circumstance that a man is accidentally the witness of a crime render it necessary for him, whether he can afford it or not, to give up much of his time and expend much of his money without any compensation from society? Is there any such principle established as this,—that all who are called upon to aid in the administration of the laws for the good of society shall do so without compensation from society? Quite the contrary. Are not jurors paid for loss of time and outlay? Are not judges, crown counsel, crown attorneys, clerks, criers, and bailiffs, all paid for their services? What is the difference between the duty which a man owes to society to serve as a juror, and that which he may happen to owe to serve as a witness? There is no solid difference. The obligation of the one is identical with the obligation of the other. And yet society compensates the one and does not the other. The truth is that whenever society requires any *special* service to be performed by one of its members, for the good of the whole, that service should be requited. This is the rule. We do not say that there can be no exception to it. But we do say that to make that exception in the case of crown witnesses is mischievous, unwise, and unjustifiable.

Crime is sometimes the attendant of want. The eye witnesses are frequently those of the humbler classes of society—those who can ill-afford to lose a day without its pay. All experience proves this, and it is especially true of crown witnesses in this colony. Often and often have we known the laborer or mechanic constrained to leave his family in want, we might say of its daily bread, in order to give evidence under recognizance many miles from his home. And this is not the worst of it. He finds himself in a city or town of strangers. He receives no hospitality from society or any of its members. He is obliged to pay for his bed and his board, perhaps in a town of small population, where the assize day is a long looked-for harvest to hotel and boarding-house keepers. All in attendance on the court are looked upon as fair game. They come only twice a year, and are accordingly plucked without compunction of conscience. The mechanic or laborer is earning nothing and at daily outlay, and all for the good of society!

True, if a man is prepared to swear he is a pauper, he

may under the present law of Upper Canada receive a pauper's allowance. But how many men are there, sturdy and healthy in daily employment if left at home, who would scorn the idea of branding themselves as paupers in any town or city? The remedy is worse than the disease. The law as it stands is well calculated to bring the blush to the cheek of many an honest man, and is worse in some instances than no law at all. It encourages deceit and fraud. It either compels a man to suffer the effects of straitened means, or to describe himself as a pauper when he is not one, and so cheat society of that which society should willingly give.

Then what is the general effect of such a state of the law? Men, instead of hastening to disclose what they know of crime, are deterred from so doing out of regard to themselves and families. When society, so far from rewarding them for such services, beggars them, the services are not likely to be performed. Men, instead of volunteering for the service, are much more likely under these circumstances to keep their peace or to hide themselves in holes and corners. In this way many scoundrels escape justice unwipt and society is with impunity outraged.

What is the remedy? We answer—a reasonable compensation to crown witnesses. The experiment is worth trying. The demand is not without precedent.

We are not of those who make invidious comparisons between Upper and Lower Canada for the sake of political capital, but on the present occasion must refer to the laws of Lower Canada as being much in advance of ours as regards the subject here discussed.

By an ordinance of Lower Canada, passed in 1839, it is enacted "that in the case of every person subpœned on behalf of the Crown, or bound by recognizance to give evidence in the Courts of King's Bench, Courts of Oyer and Terminer and General Gaol Delivery, and General Quarter Sessions of the Peace, touching any felony or misdemeanor, it shall and may be lawful for any of such courts, or for any judge or justice of any such court, in which any such person shall appear by virtue of any such subpœna or under any such recognizance, to give evidence as aforesaid, to order the sheriff for its district to pay out of the monies which shall and may be advanced to such sheriff as aforesaid for the purpose out of any unappropriated money in the hands of the Receiver General of the Province, by warrant of the Governor, Lieutenant Governor, or person administering the government thereof, to every such person, such sum of money as the court judge or justice thereof shall think reasonable, not exceeding the expenses he or she was *bona fide* put unto, making also a reasonable allowance for his and her trouble and loss of time; which sum the sheriff aforesaid, upon the production of the said order, shall respectively forthwith pay, and the same shall be allowed and sustained in the respective accounts of the said sheriff, any statute law or usage to the contrary notwithstanding." (Ord. Lower Canada, 2nd Vic. cap. 55.)

The laws of Lower Canada, as to the administration of criminal justice, are *said* to be the same as the laws of Upper Canada. Why are they not *in fact* the same? Why should this provision exist in regard to Lower Canada and not as to Upper Canada? If it is necessary there it is necessary here. Few are aware of the precise terms of the Lower Canada enactment. We have now published it, and hope that during the ensuing session of the Legislature some effort will be made to extend its operation to Upper Canada, or to pass a statute on the subject equally applicable to both sections of the province.

Some, perhaps will urge that such an enactment is likely to be abused. But is the probable abuse a valid argument against the reasonable use. Let any such enactment be surrounded by wholesome checks. The enactment of Lower Canada is not without checks. It expressly provides that "no such Court, Judge, or Justice, shall make any such order, unless the Attorney General, Solicitor General of the said Province, or other prosecuting officer on the part of the Crown, shall have certified upon the account made by such person for his or her trouble and loss of time as aforesaid that the charges therein contained are reasonable, and unless such person claiming the amount of charges stated in his or her account in the behalf aforesaid shall make affidavit before such Court, Judge, or Justice, that the said charges are true and correct, and that unless the same are paid he or she will sustain loss."

The checks against abuse are, therefore, two—first, the oath of the party receiving the money; secondly, the certificate of the Crown prosecutor. These, are also the checks we believe required in the case of pauper Crown witnesses in Upper Canada, and we have not heard of their being ineffectual. We have not heard of these checks being ineffectual either in Upper or Lower Canada. But if ineffectual, surely others can be devised. Experience will point out all that is necessary for the purpose. If a Parliamentary committee were appointed to make enquiry as to the working of the Lower Canada enactment, much useful information could be obtained and much good might be done.

What we complain of is the stolid inaction of the Provincial Government and Legislature in the matter. The evil is general and the mischief apparent to all concerned in the administration of criminal justice in this section of the Province. Not a Court passes but attention is drawn to the subject, and it is allowed to pass as the idle wind. We believe our Judges forward the presentments to the

Government, but there the matter drops, chilled and lifeless. Now, this should not be so. Governments are designed for the good of the people, and should not turn a deaf ear to their respectful requests.

One reason that the subject has been so long neglected is, that there is no unity of action on the part of those who desire the proposed amendment. If Sheriffs require a modification of the laws regulating their offices, they combine, and the end is attained. So with Clerks of the Peace, Crown Attorneys, and other public officers. Railway companies have not been an exception to this rule of conduct. Indeed, of late years, we fear that our Legislature has given too much consideration to Railway projects, and too little consideration to the social wants of the people.

We trust that on this occasion we call attention to the necessity for some provision for the payment of Crown witnesses for the last time. We are on the eve of a session of Parliament. That Parliament is a new one. It contains many members fresh from the body of the people, and emulous of distinction. The man who shall take up the subject of these remarks—stick to it—and push it through, will earn for himself well-merited distinction.

SELECTIONS.

ON FRAUDULENT TRADE MARKS

BY JOHN MORRIS, ESQ.

The Trade Marks Bill, which passed the House of Lords in the last session of parliament, was withdrawn by the President of the Board of Trade when it came into committee in the Commons, with notice that it would be re-introduced "the first thing next session, and referred to a select committee."

The object of this paper is to indicate some of the points to which attention will have to be directed in dealing with any bill to be hereafter introduced in lieu of that so recently withdrawn.

The late bill dealt with two very distinct offences—the first relating to fraudulent trade marks; the second to false labelling. At first sight the two may appear to be, if not identical, at all events intimately connected, but upon closer examination the principles applicable to each will be found to be widely different.

Trade marks refer wholly to ownership, or to that property which arises from manufactures. False labelling includes many cases in which no question of trade mark or peculiar ownership is involved; as, for instance, the false marking of goods as to *quantity* or *length*. For reasons which I shall afterwards explain I would limit the offence of false labelling to cases in which there is a false indication as to *quantity*, *length*, or the *name* of the manufacturer or owner.

Trade marks are not confined to the name of the manufacturer or owner, but extend, as we shall presently see, to the use of signs and marks of every conceivable kind, as to the right to use which there may be, and often are, disputed questions.

There can rarely be any dispute as to the right to use the name of the manufacturer or owner, where it is the name of a living person actually engaged in the production of the article; and, therefore, in such cases, I would put the name under the same protection as the quantity and length, because so far as the fraudulent use of the *name* is concerned (which will include most of the flagrant offences in this class of cases) you thereby get rid of many of the difficulties which arise as to trade marks.

The distinction between cases of false labelling and of trade marks is most important: the former is an offence against the public, and may, therefore, come under the head of the criminal law, while the latter partakes of the nature of a civil wrong; the former can be dealt with at once by legislation, but before the latter can be made the groundwork of criminal proceedings you must, by registration or otherwise, provide for settling preliminarily the two essential questions, what is a trade mark? and who, in any given case is entitled to its exclusive use?

Whether it will be wise to deal with both these subjects of false labelling and trade marks by one Bill may be open to question.

A trade mark is a species of private property, and there certainly seems no more reason why that should be protected by the criminal law than copyright, patents, or designs.

On the other hand, no one doubts the propriety of checking the false marking of goods as to lengths or quantity, or as to the name of the manufacturer or owner.

I will now proceed to examine in detail some of the provisions of the late bill; and first, as to false labelling:—Section 6 applied to cases where there should be "any false indication, statement or description of the quantity, quality, measure, substance, or material of such chattel or article or any part thereof, or of the manner or place in or at which, or of the person by whom, such chattel or article was made, manufactured, produced, or was, or is, dealt in."

The words "quality," "substance," "material," "manner or place," are (thus applied) all objectionable. They are not required to meet any admitted mischief, while they will give rise to all sorts of disputed questions, like the one now often raised—what is paper? Can carpets known as "Brussels" be sold under that designation when it is notorious they are not made at Brussels? What are "superfine," "firsts," "seconds," and all such terms applied to quality? Now, the mischief complained of is not that the public are misled by the use of any such terms as these, because as to them purchasers can and should exercise their own judgment; the real cause of complaint is, that the public are misled by misrepresentations as to quantity, length, and the name of the manufacturer or owner, as to which no skill or care on the part of a purchaser can protect him.

But even in those cases of false labelling to which I have said the criminal law might be properly applied, there is a clear distinction which should always be borne in mind between the case of the *maker* of goods so falsely marked and the *vendor*—the latter may innocently sell a reel of cotton marked 100 yards and containing only fifty; but the manufacturer cannot innocently make and mark it. It is impossible that the dealer can test the lengths aud quantities of a large mass of articles dealt in, such as cotton, ribbons, lace, &c. Such articles are necessarily sold to the public in precisely the same state in which they leave the manufacturer's hands. Some protection, therefore, should be extended to the innocent vendor of falsely-labelled goods. This might be done by requiring proof of *knowledge and intent to defraud*, while in the case of the maker (the source of the mischief) less stringent provisions as to proof might be required.

A marked distinction is made by our law between the manufacturer and the dealer in the case of gold and silver wares having forged or counterfeited marks; such marks are *well known*, and if in any case the dealer ought to be held responsible for what he sells, it should be in that case,—yet, while the maker is liable to transportation, the dealer escapes

with a fine, and even that he can get off from by given up the name of the manufacturer. (See 7 & 8 Vic. ch. 22, ss. 3. 4.)

In order to protect the innocent vendee from vexatious charges under any Act to be passed, some provision should also be made for a preliminary notice before commencing proceedings, where the selling or exposing for sale complained of shall take place at the shop or warehouse of the alleged offender; the same being his usually known and established place of business. This will not, of course, prevent immediate proceedings in the case of those who have no settled place of business, and who would use any protection of this kind as a means of escaping altogether from the operation of the law; while, on the other hand, if some protection, such as is here suggested, be not thrown round the innocent vendor, traders will be liable to be dragged before magistrates by evil disposed persons, and it need scarcely be observed that the right to an acquital is not all the protection which is required. If a new class of cases like this is to be made subject to the criminal law, protection must be taken against its being abused, or the Act will become a nuisance instead of a benefit. Any protection of the kind suggested should provide for vendors being at liberty, on receiving the preliminary notice, to give up the name of the manufacturer or person from whom they purchased; and if the prosecutor should after this proceed against the vendor it should be at the risk of costs, if not also of a penalty in case he failed. This will protect innocent vendors, and at the same time facilitate the reaching of the real offenders—the manufacturers of the falsely labelled goods.

These remarks apply to false labelling. I now come to the trade marks portion of the late Bill.

By admitting that the fraudulent use of the *name* of the manufacturer or owner may be punished criminally, quite apart from any question of trade mark, much difficulty which would otherwise arise under this head is got rid of. The objections to this part of the late Bill cannot be better stated than in the words of a petition against the Bill from wholesale houses in Manchester, which alleged as follows:—

"That the said Bill defines a trade mark as including 'any *name, word, letter, mark, device, figure, sign, seal, stamp, label, or other thing lawfully used by any person to denote any chattel;* and makes the sale, or exposure for sale, 'of any chattel or article, together with any counterfeited trade mark, or any fraudulent addition to or alteration of a trade mark, or with any imitation of a trade mark so resembling such trade mark as to be likely to deceive; or with any trade mark, *whether the same be a genuine trade mark or not,* which shall have been applied without lawful authority or excuse, *the proof whereof shall lie on the party accused,*' a misdemeanor, and renders the guilty party liable to imprisonment for 'two years, with or without hard labour, or by fine or both, as the Court shall award.'

"That your petitioners deal in goods which are so variously marked that it is utterly impossible to ascertain, in most cases, whether any trade mark, or alleged trade mark, is interfered with, or even whether the mark is intended as a trade mark or not; and yet, at the instance of interested or malicious persons, your petitioners might be subjected to criminal proceedings, not only before the person claiming the trade mark has publicly established his right to use it, but, contrary to the principles of English law, with the proof of the non-infringment thrown upon the accused.

"That, in the opinion of your petitioners, no proceedings ought to be taken under this Bill until the person claiming an exclusive right to use any trade mark has publicly established and notified that right; and that the persons against whom criminal proceedings ought to be directed are those who are guilty of the overt act of fraudulently counterfeiting such mark, or falsely marking or labelling any article, and not the vendors of such articles, who may have purchased them in the ordinary course of business."

Even if the criminal law should be applied to trade marks generally, still the whole principle on which that part of the late bill was founded must be reconsidered in order to frame provisions which, while correcting the admitted mischief, shall not vex and harass trade.

The difficulties of registration I admit and have always seen. From the nature of the "marks," the number and complexity, it would be impossible, even with the aid of photography, to enable traders to be kept informed by means of an index of the registered marks, which would extend in number to thousands; but the difficulties in that direction would be lessened by requiring a preliminary notice of the trade mark claimed before making a party liable to criminal proceedings for infringing it. The idea of such a preliminary notice was suggested by the present Attorney-General, on the occasion of a deputation to the President of the Board of Trade on the subject of the late Bill. Such preliminary notice should contain a reference to the serial number in the register, and if the *right* to register be disputed, it would, of course, be open, to any party receiving the notice to take steps to question such right, as is now done in the case of copyright, &c.

This, and perhaps nothing but this, would afford protection against unfounded and malicious prosecutions in the case of trade marks.

It may be urged that any preliminary notice is inconsistent with a criminal offence. In answer I may draw attention to the fact that in Prussia, where there is no over sensitiveness about imprisonment, the vending of a forged trade mark is for the first offence punishable by fine only, and it is only *in case of repetition* that it is made liable to imprisonment. See Mr. Ryland's paper on "Trade Marks," p. 232, of the Transactions of the Social Science Association, 1859.

In France trade marks are, *by a recent law,* protected by registration; and the exclusive enjoyment of a mark thus established is limited to fifteen years, but it is renewable.

What is entitled to the protection of our law as a trade mark is a delicate and difficult question in disputed cases—so delicate and difficult that the Court of Chancery rarely ever grants an injunction until the legal right to the trade mark has been established by an action or issue at law.

As the law at present stands long *and exclusive* use is an essential condition to the establishment of a trade mark.

What construction would be put on the words, in the late Bill, "*lawfully used,*" taken in connection with the words which followed in the interpretation clause, it is impossible to say. Taken literally several persons at the same time may *lawfully* use any given mark whilst none of them is entitled to the *exclusive* use of it.

It may be said that no one would venture to take criminal proceedings in cases of disputed right.

I am not so sure of this. It is easy to deter traders from dealing in particular goods merely on the *threat* of civil proceedings for an infringement of a patent. Still more will this be the case if the alleged offence be made a criminal one, against which no indemnity, as in a patent case, can protect them. A preliminary notice in such cases would (without registration or some other means of settling disputed rights) operate as a snare rather than a protection—it would legalise the threat of criminal proceedings which, from the small interest they may have in any particular case, would deter, parties from dealing in the goods in question, entirely apart from the question of right; so that the practical effect of the notice of threatened proceedings would, in such cases, be to put in the power of any particular manufacturer to get a monopoly to which he may not be legally entitled. Wholesale houses, dealing in thousands of different kinds of goods, will not run risks of civil, much less of criminal, proceedings, and into the *merits* of disputed questions of legal right *they* have neither time nor inclination to enter.

It has been said that magistrates will not grant summonses

against houses of high standing unless previously satisfied that there is a *primâ facie* a good case. To this doctrine I take entire exception. Houses, however high their standing, *ought to be* exposed to the equal operation of the law, and the remark, if it has any value at all, is a strong argument against this part of the late Bill; whereas if proper protection were inserted in the Bill against vexatious proceedings it would make the law all the more potent against the real offenders.

It has been said, again, that any one is exposed to be charged with stealing, say a pocket-handkerchief, and it is argued that therefore traders should not complain of being liable to be charged even falsely with the offence in question; but there is no analogy between the two cases. A pocket handkerchief is tangible property and easily identified, whereas a trade mark is a claim rather than a right, and should itself be legally established before it is used for the purpose of a criminal prosecution.

First establish the right to a trade mark, and then the suggested analogy may apply, *but not before.*

Having said this much on the subject of applying the criminal law to trade mark cases generally, and the difficulties which arose thereon under the late Bill, I now suggest whether such cases ought not to be left to the civil courts.

In the discussion on Mr. Ryland's paper before referred to, Mr. Thomas Webster, the well-known patent lawyer, said that "the true remedy for the frauds complained of was to give *a copyright in trade marks.* He advised mercantile men to unite in obtaining an Act for this purpose rather than any criminal enactment." (See p. 270 of the Social Science Transactions, 1859).

The following is an extract from an opinion of Mr. Alfred Wills, of the Midland Circuit, on this part of the late Bill:—

"After all, however, the best corrective would be to turn the clause creating the *offence* of selling, &c., an article with a counterfeited stamp into one giving a *penal action*, such as is given in the case of patented articles by 5 & 6 Will. 4, ch. 83, s. 77, because then the party charged is a competent witness for himself, and in a case bordering so closely as this must often do either upon a mere civil infringement of right or upon a mere accident even the question of *intention* is all important. I remember very well a case tried at Warwick under that section, in which had it been framed upon the penal basis of clause 3 of the bill in question, two respectable men in a good way of business might have had a most narrow escape, if they would not have been convicted; but where their own evidence satisfied the Court, and everyone who heard them, that what was complained of had been done most innocently."

He afterwards wrote further thereon as follows:—

"When I mentioned the case tried at Warwick, in the remarks I wrote two days ago, I forgot to mention one of the most instructive parts of the case, which was, that the plaintiffs in that action had employed a firm in London to order from the defendants the goods stamped in the very way which they thought would bring them within the Act of Parliament, and having as they thought, caught them in a trap, they then sued them for penalties; and it turned out that the defendants were actually ignorant of the very existence of the patent of which they were charged with counterfeiting the designation."

If it still be thought that the criminal law shall be applied to check and punish flagrant offences, then I suggest that the first offence as to trade marks might be made liable to a penal action, and a repetition of it the subject of criminal punishment. This would assimilate our law to that of Prussia. In the penal action any disputed question of right could be tried and settled before any question of criminal liability could be raised.

In conclusion I would suggest—

1st. That false labelling as to quantity, length, or name of manufacturer or owner be punished criminally in the case of the maker, and that the vender be also criminally responsible if he sells or exposes for sale, *knowing of the false labelling and with intent to defraud.*

2nd. That the fraudulent use of trade marks, not coming under what I have defined as false labelling, shall be made liable to a penal action, and that if it be made subject to the criminal law at all, then that for the first offence it be made liable to a penal action, and for any repetition thereof, after judgment shall be recorded against the defendant in the penal action, it shall be subject to criminal punishment.

3rd. That proper provisions be made for conventions with foreign countries upon this subject.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office.

All other Communications are as hitherto to be "The Editors of the Law Journal. Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 14.)

CHAPTER IV.

Of the Officers.

THE COUNTY CROWN ATTORNEY.

The County Attorney (or local Crown Attorney) in each judicial district is appointed by the Governor, and holds office at the pleasure of the Crown (U. C. Consol. Stat. cap. 37), his fiscal duties as receiver of fee-fund monies being imposed upon him by chapter 20 of the Consolidated Statutes of U. C., and the 7th sub-section of section 1 of "the Local Crown Attornies' Act" requiring him to perform all such duties and services as the Governor by regulation in council may prescribe "for carrying out the provisions of any act imposing duties upon County Attorneys."

He is in some sort an officer of the Division Courts, being receiver of the fee fund monies collected by the several clerks, receiving and examining their periodical returns, and defraying the disbursements required on account of the Courts; of which receipts and disbursements he is required to render half yearly accounts to the Minister of Finance (U. C. Consol. Stats. cap. 20, secs. 1, 2, 3, 4); and in case of the resignation or removal of a clerk, and neglect to pay over monies remaining in his hands, in addition to any other proceedings, the County Attorney is authorised in his proper name, or by his name and description of office, to sue for and recover the same from such clerk and his sureties, with costs of suit, in any court of record having competent jurisdiction (U. C. Con. Stat. cap. 20, sec. 7); and so in the case of the death of any clerk while in office, he may in like manner proceed against the personal representatives of the deceased clerk (U. C. Consol. Stat. cap. 20, sec. 10).

It may be briefly observed in respect to accounts required to be rendered by clerks, that if not duly delivered to him after the usual quarter days, or, as allowed by order in Council, within the ten days thereafter, and the monies collected paid over, the County Attorney should promptly report the default to the Judge, as well as to the Minister of Finance, and, if occurring at the period when the half yearly accounts are to be made by him (U. C. Consol. Stats. cap. 20, sec. 3), he is not to delay rendering them because all the returns have not been delivered, for the act is imperative that the accounts shall be rendered to the Minister of Finance at the times stated, and the monies, if a surplus, paid over within ten days to the Receiver General.

The fee fund monies coming into his hands "shall by the County Attorney be applied to defray the *disbursements required on account* of the County and Division Courts," &c., as well as the Judge's salary and allowance (U. C. Consol. Stats. cap. 20, secs. 3 & 5). What would fall under the head of "disbursements required," &c., it is not easy to determine, nor does it appear that any general order in Council has been passed to define. The words no doubt are sufficiently large to embrace all the current expenses of the Courts, but the County Attorney would probably not feel justified in acting on the large construction suggested, without an order in Council or special directions from the Crown Law Department.

THE CLERK AND BAILIFF.

The chief operative part of the Division Court system is carried on by the Clerks and Bailiffs, and on their fitness, fidelity and activity, the advantage to the public from these courts must in a large measure depend. To this end no doubt it is made the duty of the Judge to appoint officers, that he in the exercise of his duty may by previous scrutiny ascertain their qualifications.

Sec. 31 of the Act provides that for every Division Court in a Judicial District there shall be a Clerk and one or more Bailiffs, and the right of appointing to the office of Clerk or Bailiff is vested in the senior or the acting Judge of the County Court of the particular county in which the courts are respectively situated (sec. 23). No qualification for the office of Clerk or Bailiff is prescribed by the act, so that the choice is discretionary, subject only to the following restrictions, viz., the *Clerk or Bailiff* must be a British subject (sec. 21); and no County Court clerk, practising barrister, or solicitor, shall be appointed *Clerk* (sec. 22).

But the Judge's right of appointment is subject to common law qualifications, that is, to the appointment of such persons as are qualified by common law; and no doubt also it would be subject to the law relating to the sale of offices, and forfeited by persons infringing its provisions.—(Mosley's Courts, 12-52.)

As a general rule, all persons of a sound mind are by common law capable of holding office; the only disqualification which need be referred to being want of skill and ability, and the holding of some other office incompatible therewith. Want of skill is either implied by law as in the case of women and infants, or is apparent in fact.—(*R.* v. *Stubbs*, 2 Term Rep. 406.)* Persons under the age of 21 years are presumed by law incapable of the skill necessary to the proper discharge of the duties of an office. Whether such presumption be arbitrary and conclusive need not be considered, for Clerks and Bailiffs are required to give security by executing a covenant, as well as a bond for the due performance of these duties, before they can enter thereupon (secs. 24, 25, 26, 27); which instruments minors have no capacity to execute, and so they are clearly disqualified from holding such office.

Skill and ability in fact is a matter for the determination of the Judge, with reference to the nature of the particular office. The Clerk ought to be a person of good education, having a fair acquaintance with book-keeping and the mode of transacting business in the country. The Bailiff should be able to read and write correctly, and have some knowledge of accounts, besides possessing the necessary bodily ability; and it need scarcely be added that probity should in every case be considered amongst the elements of fitness for office. In our mixed population, the knowledge of another language may be desirable, as there are many settlements of Gælic, French, or German speaking people, who know only their mother tongue, and to them at least it would be a greater advantage to be able to transact business directly with the officers of a court without an interpreter. All these are considerations for the Judge in the exercise of the important discretionary power of selecting Clerks and Bailiffs.

CORRESPONDENCE.

To the Editors of the Law Journal.

IN THE 10TH DIVISION COURT OF THE UNITED COUNTIES OF YORK AND PEEL.

This was an action brought by a Mr. Wilkson, against William Elliott and John Howell, sureties for the late John Cool, bailiff of said division. The grounds of the action were as follows:—On the 13th of November, 1858, an execution was issued on behalf of said plaintiff, and placed in the hands of said bailiff for collection, and no return was made

* In respect to women it is said that the implication of law as to the want of due skill to exercise a ministerial office is not arbitrary, so as to utterly incapacitate them, but the Court will judge in its discretion whether an office be of such a nature as a woman can perform (*R.* v. *Stubbs*, 2 T. R. 406); but it is not at all probable that any woman in Upper Canada would be found sufficiently "*strong minded*" to take the opinion of a Judge as to her skill and ability for a Division Court officer.

till November, 1859, and returned no goods. On the 1st of December, 1858, Cool put in fresh sureties.

The defence to the action was, that the above defendants were not responsible, on the ground that their liability ceased before the time allowed for the return of the execution expired.

For the plaintiff it was urged that the defendants were liable, on the ground, that when the execution was put into his hands they were his sureties, and upon their responsibility he, the bailiff, was trusted with the execution.

Your opinion, in the next *Law Journal*, is asked, as to which of the sureties are responsible for the misconduct of the late bailiff.

Yours, &c., &c.,
A SUBSCRIBER.

[We assume from what is said, that the action was against the bailiff's sureties, under the 148th section of the act which provides, that "if any bailiff neglects to return any execution within three days after the return day thereof," an action may be maintained against the bailiff and his sureties. The right of action in the above cause would be complete, say on the 16th of December, (supposing it to be the third day after the return day of the execution) and his sureties then, were not the defendants. Could the bailiff be sued on the 1st of December? Certainly not—he was not then in default, and had till the 13th (the expiration of the writ, we assume,) to execute it and could have done so in fact.

We have no doubt that the defence urged will be held good, and that it is good in law. The defendants, in our judgment, are clearly not liable.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law.*

REEVES v. THE CORPORATION OF THE CITY OF TORONTO.

Improper construction of drain—Liability of Corporation—Damages.

In the city of Toronto the corporation take upon themselves the construction of drains required to lead from the houses into the main sewers. The plaintiff gave notice in the usual way to the committee of the council forming the board of works, that he wished a drain made, and paid the sum demanded. The drain was constructed under the superintendence of the city engineer, by the contractors with the city, but so unskilfully made that it would not carry off the the water, and in times of flood the water and filth from the main sewer flowed back through the drain into the plaintiff's cellar, putting him to much inconvenience, which he had endured for several months without being able to obtain redress.

Held, that an action would lie against the corporation, and that $325 damages was not excessive.

Held also, that a by-law to authorize the making of the drain was unnecessary.

(T. T., 25 Vic., 1861.)

The plaintiff complained in his declaration, that his premises were flooded by means of a drain being unskilfully and improperly made by the defendants, and their officers, and servants, to lead the water from his dwelling house to the main sewer on Queen Street, stating various injuries arising from the alleged overflowing.

The complaint was, that the drain from the cellar was laid too low, so that the water from the sewer frequently flowed back by private drain into the plaintiff's cellar.

There were three counts. In the first, the plaintiff complained that the defendants wrongfully and improperly caused a drain to be dug and made from their main sewer upon Queen street into the plaintiff's cellar, which cellar was deeper than the sewer, whereby the foul water in the sewer flowed and was forced back through the drain into the plaintiff's cellar.

The second, charged in substance, that the plaintiff and other proprietors were allowed to have drains from their cellars to the main sewer, paying for the making of such drains, which were to be constructed under the direction of persons employed for that purpose by the defendants: that the plaintiff did pay for a drain from his cellar, which the defendants procured to be made, but which was so improperly made that the water ran through it from the public sewer into the plaintiff's cellar.

In a third the case was stated in a manner somewhat different but the same in substance and effect.

The defendants pleaded not guilty, and to the second and third counts they pleaded that the plaintiff did not pay for making his drain, as stated in those counts.

At the trial, at Toronto, before *Robinson*, C. J., it did not appear that the corporation had passed any by-law for the regulation of the manner in which private drains might be constructed for draining the houses and premises of proprietors, by drains opening into the main sewers; but there was, it appeared, a committee of the city council, forming a board of works, through which matters of that kind were managed, and it was proved that a system of proceeding had been established, which was generally understood and conformed to. When any party desired to have his premises drained by a ditch entering the main sewer, he applied to the board of works, and made his wish known, stating such particulars as would enable the proper officer to compute the cost of the drain. The proprietor then paid the amount required, of which a memorandum was given to him, and the corporation had the drain made under the inspection of the city engineer, by contractors who had undertaken to perform all such works for the corporation.

The plaintiff in this case made his application, and was referred to the secretary of the board of works. He was told that $19.59 was the sum he must pay, and on the 26th of March, 1860, he paid it to the city chamberlain, and obtained his receipt. The defendants then took their own course for making the drain, through their engineer, superintendent and contractors. The plaintiff's house, which he was building, and was desirous of having drained, was on Queen-street. The cellar, which he was excavating, was open to examination and inspection throughout.

A person employed by the city went to it, and placed a pipe in the wall of the cellar, which was to form the commencement of the drain, and then the city contractor went to work, and made a drain into the main sewer. The plaintiff found, when all was done, that the pipe was not only too high to take off the water from the cellar, but that the fall from the cellar wall to the surface of the water in the main sewer, which is a distance of forty-four feet, was so small—only an inch, or at most an inch and a half in the whole distance—that the drain did not carry off the water, and whenever, during heavy rains, the water rose in the main sewer, a great quantity of water and liquid filth from the sewer flowed out of the sewer by the private drain into the plaintiff's cellar, causing an intolerable nuisance and inconvenience, and interrupting his business of baker, to his great damage.

He represented this to the chairman of the board of works, to the city inspector, and to the engineer, complaining throughout the summer of the damage he was suffering. In November, 1860, after the premises had been inspected and examined, he petitioned formally for redress to the common council, and the petition was referred to the board of works who reported that the drain should be cut off and made good at the expense of the corporation, and that Mr. Reeves should be paid back the money received from him for making the insufficient drain. The city council, however, though they had the drain cut off, declined to refund the $19.59, and the plaintiff in consequence brought this action.

It was proved that the ordinary rule was to allow an inch fall, or more, in every twelve feet in such drains, according to which rule there should have been a fall of five inches instead of one, made in the plaintiff's drain.

The jury found a general verdict for the plaintiff, and $325 damages.

Cameron, Q.C., obtained a rule *nisi* for a new trial on the law and evidence, and for excessive damages. He cited Consol. Stats. U. C., ch. 54, sec. 297, sub-sec. 18; *Mayor &c., of Lyme Regis* v. *Henley*, 2 Cl. & F. 331; Grant on Corporations, 283, 284, note *f.*

Robert A. Harrison shewed cause and cited *Farrell* v. *The Mayor and Town Council of London*, 12 U. C. Q. B. 348; *Brown* v. *The Municipal Council of Sarnia*, 11 U. C. Q. B. 87; *Alston* v. *Grant*, 3 E. & B. 128; *McDonald* v. *Cameron*, 4 U. C. Q. B. 1; *Robertson* v. *Meyers*, 7 U. C. C. P. 423; Mayne on Damages, 347.

ROBINSON, C. J., delivered the judgment of the court.

The corporation would have done better to have paid the small sum which had been charged to the plaintiff, and received from him for making a drain, which was much worse than useless, and I have no doubt the jury thought that their conduct in the matter had been unreasonable. In declining to return the money they acted on the advice of their engineer, who it seems to us, took too rigid a view of the matter.

The corporation acts judiciously, we think, in insisting on having these drains made under the direction of their officers, and by their own workmen and contractors, instead of the private proprietors, for it would not do to allow all persons to break into the main sewer, and make drains at their discretion. Besides the inconvenience, the health of the community would suffer from such a course, for the nuisance occasioned by defective drainage may often give rise to a wide spread evil, injuring many more than the persons on whose premises the cause of the nuisance exists. It seems a necessary policy therefore in the corporation to keep the matter in their own hands, for the welfare of the community, and no doubt that is their only reason. But then, as they do for good reasons prevent proprietors from making the drains they require, and oblige them to have it done by the city engineer and contractors, it is manifestly just and necessary that the corporation should see that the thing is done as it ought to be.

No person can consider the evidence in this case, we think, without being satisfied that there was in this instance an entire want of that attention to the purpose which the drain was to answer, and to its perfect construction, which was necessary to the due performance of the work. In fact no one seemed to concern himself about it while it was going on, for the purpose of ascertaining whether it was being rightly made. All was left to the labourers, who declared they knew nothing themselves about the comparison of level between the sewer and the cellar, and had no instructions or information given to them about it. It was proved that there was a collection of sediment in the main sewer ten inches deep, and the water which flowed over that in times of flood from rains or melted snow, would so raise the level of the top of the water in the sewer that the water and stuff in it must be, as they were, thrown back into the cellar. The evil was in this case by no means trifling or imaginary, but was very serious.

An attempt was made to prove that the plaintiff brought the mischief on himself by digging his cellar too low, especially in the back part of it, and it was insisted that he should have taken care that he did not make the cellar so deep that the pipe which had been placed in the wall would be above the bottom of the cellar, and so would not carry off the water. But we cannot say that the jury did wrong in not holding the plaintiff responsible for the evils he complained of. The engineer, or some one employed by him, should have seen that the drain was not being blindly carried forward. All was open to inspection. If the back part of the cellar was a few inches lower than the front, and too low for the pitch of the sewer, the consequence of that would be that the water coming from the surface or from springs into that part of the cellar would not find its way into the sewer; but that circumstance could not account for the filth coming up from the sewer by the pipe which the defendant's engineer had inserted in the wall.

Those witnesses who were best able to judge, such as the acting City Engineer, Brunel, the Chairman of the Board of Works, the City Inspector and others, gave evidence which strongly supported the plaintiff's case, and shewed that no proper attention had been given to the work.

As to the damages, we are not sure that they were excessive. The plaintiff suffered much injury and inconvenience.

Then as to any legal question, it does not appear to us that the case affords room for any. There was no necessity that the defendants should pass a by-law on the subject, certainly not in regard to every small drain that was to be made, though it would seem right and proper that there should be a general by-law upon the subject, laying down a certain system of proceeding.

That the corporation did in fact, through their servants, make the drain complained of is plainly proved, and the question whether the work was badly done, and occasioned the damage complained of, was also clearly resolved by the evidence in favour of the plaintiff. What is complained of is negligence. The action is founded in tort, and it cannot be held that every complaint of that kind must be founded on some by-law, or must grow out of some act or contract under seal, and in that way binding upon the defendants.

The defendants do not deny by their pleas that they undertook to make this drain, and did make it; they only deny that they were guilty of negligence in their manner of doing it. That and a denial of the plaintiff having paid them the money they required, which it is certain he did pay, are the only defences they set up. That the defendants need not have made the drain unless they had chosen, is no defence that can be urged by them so long as it is admitted that they did make it, and exacted and received the charge they imposed for making it.

A case very lately decided in England, of *Cowley* v. *The Corporation of Sunderland*, to be found in the *Weekly Reporter* of the 8th of June of this year, page 668, is in point to shew that an action of this kind will lie against a corporation in consequence of their illegal or negligent conduct, though they may not have imposed any such duty upon themselves by a contract or resolution under their seal.

We refer also to the case in our own court of *Farrell* v. *The Corporation of London* (12 U. C. Q. B. 348).

We think this rule must be discharged.

Rule discharged.

PORTMAN v. PATTERSON.

County court—Title to land in question—Jurisdiction—Practice.

The declaration was for wrongfully converting to the defendant's use the plaintiff's goods and chattels: to-wit, one dwelling house, with the doors and windows, &c., thereto belonging. Defendant pleaded that the goods were not the plaintiff's.

At the trial in the county court it appeared that the plaintiff claimed as assignee of a mortgage of the land on which the house stood, and that the dispute was whether the house in question was part of the fre-hold A verdict having been rendered for the plaintiff was afterwards set aside, on the ground that the title to the land came in question, and that the case should have been stopped upon the plaintiff's evidence.

Held, that this was right, and the judgment below was affirmed.

M. T., 25 Vic., 1861.

Appeal from the County Court of Middlesex.

The declaration complained that defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods and chattels—that is to say, one dwelling house, together with the doors, windows, and window frames thereto belonging. And that the defendant wrongfully detained from the plaintiff certain goods and chattels of the plaintiff: that is to say, one dwelling house, together with doors, windows, and window frames thereto belonging.

Defendant pleaded—1. Not guilty. 2. That the said goods and chattels were not, nor were any or either of them, the plaintiff's as alleged.

At the trial it appeared that the plaintiff claimed as assignee of a mortgage, which he proved, executed by one Scott, of the land on which stood the house in question, which he contended was a fixture, and therefore part of the freehold.

It was objected, among other things, that the title to land came in question, and therefore that the court was ousted of jurisdiction. The learned judge reserved leave to move for a nonsuit, and allowed the case to proceed, when the plaintiff obtained a verdict of £25.

A rule *nisi* having been obtained, in pursuance of the leave reserved or for a new trial, SMALL, Co. J., delivered the following judgment:

"Upon the authority of the cases cited, and particularly the able article in the *Law Journal* of 1860, page 145, and the cases there referred to, I am of opinion that the moment the question arose at the trial upon the evidence the court was ousted of jurisdiction, and that all that subsequently took place was null and void; and consequently that the verdict must be set aside, and the parties stand in relation to each other as they stood at the close of the plaintiff's case.

"The rule is therefore made absolute for setting aside the verdict without costs."

From this judgment the plaintiff appealed.

Robert A. Harrison, for the appellant. First. The title to land was not brought in question. The statute enacts that "The said

courts shall not have cognizance of any action where *title* to land is *brought in question*" (Consol. Stats. U. C., cap. 15, sec. 16). It has been held that the title must be *bonâ fide* in question, and it may be so either on the pleadings or evidence. Here the learned judge thought it was upon the evidence, but unless title to the land was an *ingredient* in the trial and material to the decision of the case, it did not come in question (*Morton* v. *The Grand Junction Canal Company*, 6 Weekly Reporter, 543). *Title* is not necessarily *in question* because the subject of dispute is a house claimed to be a freehold or part of a freehold. Here defendant did not *question* plaintiff's *title* to the freehold. The only dispute was whether the house *formed a part of the freehold*. This was a question as to which the county court had jurisdiction. Defendant did not dispute plaintiff's title to the land. His contention was, that admitting the freehold to be plaintiff's, the house sued for was no part of the freehold (*Eversfield* v. *Newman*, 4 C. B. N. S. 418).

Secondly. The house here was clearly part of the freehold as between vendor and vendee (*Bunnell* v. *Tupper*, 10 U. C. Q. B. 414; *Bald* v. *Hagar*, 9 U. C. C. P. 382); and if so, plaintiff had a right to follow it (*Harris* v. *Malloch*, 21 U. C. Q. B. 82). But if not part of the freehold, it still belonged to the plaintiff, for the mortgage under which he claims was not only of the land, but of all buildings, &c., thereon.

Thirdly.—Even if the title to land did come in question, the judgment in the court below cannot be supported, for the court was then ousted of jurisdiction, and had no power to make the rule appealed from (*Lowford* v. *Partridge*, 1 H. & N. 622; *Powley* v. *Whitehead*, 16 U. C. Q. B. 589; *Campbell* v. *Davidson*, 19 U. C. Q. B. 222).

Burns, contra.—If the rule was a nullity, as seems to be contended on the other side, then there can be no appeal, and if there can be an appeal the judge had power to interfere, and set the proceedings right. He is the person to judge whether title to land came in question, and his decision on such a point is not the subject of an appeal (*Trainor* v. *Holcombe*, 7 U. C. Q. B. 548). If the article in the *Law Journal* referred to by the learned judge states the law correctly, his decision is certainly right. The only ground here on which the plaintiff claims this house is that it is part of the land, and if it be, then as the title to the house is in question the title to the land must be in question as well. The plaintiff can only succeed by proving his title to the land, which he does through a mortgage of the realty.

[Robinson, C. J.—Your argument amounts to this: that evidence could not be received to prove his title to the land, and that through such evidence he must derive his title to the house.] Yes! The moment the plaintiff began to prove his title to the house he had to prove title to the land, and then he was out of Court. [Robinson, C. J.—Suppose the plaintiff had chosen to set out his title to the house, that he was the owner of the land to which it was attached, and that defendant removed it, and defendant had pleaded that though the plaintiff owned the land, yet the house was not part of it. How would it have stood then?] There would then have been an admission on the record, which might have dispensed with plaintiff's proof of title, but there is nothing which could have that effect here (*Gooderham* v. *Denholm*, 18 U. C. Q. B. 298; *Carscallen* v. *Moodie*, 15 U. C. Q. B. 304; *Cleaver* v. *Culloden*, 1b. 582; *Gasco* v. *Marshall*, 7 U. C. Q. B. 198; *Walton* v. *Jarvis*, 14 U. C. Q. B. 640).

Robinson, C. J., delivered the judgment of the court.

The county courts have not jurisdiction where the title to land is brought in question. In this case the title to land was not, for all that appears on the record, brought in question by the pleadings. Then was it by the evidence upon the trial?

The plaintiff had never been in possession of the house, and his claim to it was as assignee of a mortgage (we assume in fee) on which the house had stood, being built on posts set in the ground, and not itself set in the ground.

We do not see the mortgage. The plaintiff as assignee of the mortgage had never entered; a great part of the mortgage had been paid, and the whole debt was not yet due. We infer, however, from the evidence that the mortgagor was in default, and if so, the plaintiff had a right to enter. Being in that position, he sees that the house in question had been taken off the premises and was being removed by a person to whom the mortgagor had sold it, as he swore, because he never meant to pay any more money on the mortgage.

The plaintiff naturally was inclined to oppose this as diminishing the value of his security, and so brought this action in the county court, the value of the building being small. Could he have his right tried in that court? Defendant pleaded that the house was not his.

So far as that might depend on the question whether it had been a fixture or not while it stood on the mortgaged land, that would be a question in one sense regarding title to land, for if a fixture it was part of the soil, and it could only be in that view that it could be the plaintiff's property. Then the plaintiff would have to shew his title to the land in order to make out his title to the house, and the court would have to try and determine upon that right.

We think the learned junge rightly held that he had no jurisdiction, and so could take no proceeding in the cause after he saw that title to land was brought in question.

Appeal dismissed.

Standing v. The London Gas Company.

Contract—Corporation—Sub-contract—Liability.

One T. contracted with the defendants, a corporation, to construct certain work for them, and on the same day the plaintiff agreed with T. to do a portion of it for $900, subject to the same conditions which bound T. in his contract with the defendants, one of which was that 20 per cent. of the price should be retained until three months after completion of the work, and then paid upon the certificate of the manager that it had been performed to his satisfaction. T. on the same day by letter authorised defendants to pay the plaintiff for his work up to the amount of T.'s contract with him, and defendants in answer agreed to this, provided the plaintiff should carry out his contract with T., and perform his work to the satisfaction of the manager, on whose certificate alone any money should be paid. Defendants paid the plaintiff all but the 20 per cent. as the work progressed, but the manager refused to certify, complaining that it was improperly performed. It was proved, however, that he had verbally agreed to pay the men who had worked under the plaintiff $100, if they would discharge the Company. *Held* (reversing the judgment of the court below), that the plaintiff had no right of action against defendants, for there was no contract between them, and at all events they would not be liable without the manager's certificate.

(T. T., 25 Vic.)

Appeal from the County Court of Middlesex.

Action for work and materials, money had and received, account stated, &c.

Plea, never indebted.

The facts out of which this suit arose appeared to be as follows: one George Taylor, by contract entered into with the London Gas Company, dated the 20th of June, 1859, agreed to construct certain works for the defendants. By the contract the defendants covenanted to pay Taylor from time to time as the work progressed by semi-monthly payments eighty per cent. of the work performed, retaining twenty per cent. until three months after the completion of the contract, when the same was to be paid upon the certificate of the manager that the contract was fully executed and performed.

On the same day, 20th June, 1859, Taylor sub-let a portion of the work—namely, the construction of the tank and dry well for the gas works, to the plaintiff for the sum of $900. The plaintiff covenanted with Taylor to do the work precisely in the manner indicated in Taylor's contract with the company, the provisions of which contract were to be as binding on the plaintiff as if he was the original contractor with the company. Taylor covenanted with the plaintiff for payment as follows: "To pay him from time to time as the work progresses, by semi-monthly payments, say on the fifteenth and thirtieth days of July and August next, eighty per cent. of the work so performed, retaining twenty per cent. until three months after the completion of this contract, when the same is to be paid upon the certificate of the manager of the London Gas Company that this contract is fully executed, the puddle perfectly water-tight, and the whole work properly and satisfactorily performed."

On the same day, 20th of June, 1859, Taylor addressed a letter to the plaintiff in these words:

"With reference to our understanding relating to the payments mentioned in the contract entered into this day, for the excavation and puddling of the tank and dry well for the London Gas Company, I beg to say that I am willing, and I do hereby authorize

the company to pay into your hands at each time of payment the amount of each certificate you may be entitled to, to the full amount of your contract with me, above alluded to, amounting in all to ($900) nine hundred dollars, which the said company will charge to my account, and deduct the same out of my contract prices with them."

On the 30th of June the plaintiff enclosed the foregoing letter to the defendants, requesting their acceptance of it. The manager of the company, on the 28th of July, replied to the plaintiff as follows.

"Your letter of the 30th June last was duly received, enclosing Mr. George Taylor's letter to you, dated 20th of June, 1859, and requesting the company to accept its terms. In answer, I am instructed to inform you that the London Gas Company are willing to comply therewith, provided you fully comply with your agreement with Mr. Taylor, and strictly according to the plans, specifications and conditions which bind Mr. Taylor with this company; and on the express condition that your portion of works with Mr. Taylor be done to the satisfaction of the manager of the London Gas Company, on whose certificate alone shall any money be paid."

As the work progressed the defendants paid all of the $900, except $180, being the twenty per cent. to be retained, and which was to be paid upon the certificate of the manager, after the work was completed to his satisfaction. The manager never did certify and complained of the manner in which the work was done, and that it had sustained injury by the well not being properly puddled. The defendants appeared to have settled with Taylor for all the other works contracted for, leaving this matter open.

The plaintiff gave verbal evidence by men who worked for him, and by other persons, that the manager of the company was willing to pay the men something, and would divide among the parties to whom the plaintiff was indebted as far as $100 would go, if they would discharge the company, but this seemed to have ended in nothing. The plaintiff brought this suit against the defendants seeking to make them his debtors for the balance due on his work $198, and obtained a verdict for $180.

A rule *nisi* obtained for a new trial was afterwards discharged.

The following extract from the judgment given in the court below, will show upon what grounds it proceeded:

"The question in my opinion was for the jury, whether the defendants accepted the plaintiff's work and labour in lieu of Taylor's under his contract, and if they did, did they do it without objection during its continuance, and not only use it ever since, but upon several occasions promised to pay. These being questions for the jury, and having by them been found to the plaintiff, ought I to disturb their verdict? I think, upon the authority of the case cited from 17 U. C. Q. B., *The Great Western R. W. Co.* v. *The Preston and Berlin R. W. Co.*, pages 486 and 488, where Robinson, C.J., remarks: "We may, however, take it to be clear that, in case the works for which the plaintiffs are seeking to recover was done upon the defendants' railway" (gas works) "at their request, and had been accepted and used by them, they would be bound to pay for it according to its value, notwithstanding the want of any undertaking by them under their corporate seal to pay for it."

And again he says: "We think the defendants should be held to have accepted the work and materials of the plaintiffs, when they saw and approved" (did not object) "of the work going on, and expected to derive profit from the use of it; and besides it is permanently upon their land." There is no doubt the verdict of the jury in this case was correct. The cases are so similar I can see no distinction, except that in the one the defendants were a railway company, and in the other a gas company.

From this judgment the defendants appealed.

Becher, Q.C., for the appellants, cited *Morgan* v. *Birnie*, 9 Bing. 672.

M. C. Cameron, contra, cited *Gross* v. *Bricker*, 18 U. C. Q. B. 410; *Cocking* v. *Ward*, 1 C. B. 868.

McLEAN, J.—It is quite clear that the defendants never assumed to pay the plaintiff for his work any thing except what Taylor would have been entitled to for that portion of the work, according to the terms of his contract, had he performed the whole of the work himself. The consent given by the manager in his letter of the 28th July, 1859, that the plaintiff might look to the gas company on the conditions stated therein, could not entitle the plaintiff to sue that company for work and labour, as if the work were being done for them, instead of under a contract with Taylor. I cannot understand how the plaintiff can be allowed to waive his contract with Taylor, and look to the defendants as if they were answerable for the work done under that contract, without a single condition contained in it being performed by the plaintiff.

If the learned judge told the jury that the plaintiff had made out no case in law, as stated in the motion for a new trial before him, I think he was quite right in so telling them; but I am quite at a loss, if he did so direct them, how he could also tell them that "they were to deal with the whole case upon the evidence as they thought right." Juries are too often in the habit of setting up their own ideas of right when they are told that no legal claim has been established against a defendant by the evidence; but it is the duty of the courts not to encourage that disposition, and to see that, as far as they can, the laws of the land shall be purely and correctly carried out. If the mere will of a jury were allowed to over-ride the law of the land, great danger of injustice and great uncertainty would be introduced into our courts, which would have a tendency to sap the foundations of justice altogether.

The witnesses who spoke of the offers to pay specific sums for the work as it had been done, did not, as the learned judge seems to suppose, establish an indebtedness or any admission of such indebtedness on the part of the defendants. They had a certain amount in their hands coming to Taylor, which they were authorized to pay to the plaintiff if he had fully completed his contract with Taylor, and produced the certificate of the manager of the gas company to that effect, but they were under no obligation to pay to the plaintiff; and even if the manager's certificate had been produced, they were not bound to pay to him as for work and labour done for them at their request. He is still bound to Taylor, and his surety also, if the contract with him has not been carried out according to its spirit. If it has, then Taylor is answerable to him for any balance due, but the defendants cannot on any ground be made liable in such an action for anything.

The fact of taking the work into their possession does not affect the matter; they were entitled to do so at the time appointed for the completion of the contracts, and were not bound to submit to injury by the failure of a man who, according to the testimony of one of the witnesses, was not a day sober while he was engaged in the work. The testimony shows that the work was not done according to the contract with Taylor, and that it was badly done, and under any circumstances there is not any ground whatever on which a verdict can be maintained against the defendants.

The judgment of the learned judge must be reversed, and the verdict set aside, and a new trial granted without costs.

BURNS, J.—What was the learned judge's charge to the jury we are not told by the appeal papers, further than this, that the rule to set aside the verdict and for a new trial, expresses that "the jury were told by the judge that the plaintiff had made out no case in law, and that they, the jury, were to deal with the whole case upon the evidence as they thought right." If such a direction as that were given, it could not be sustained; for if the plaintiff had made out no case in law to charge the defendants, the judge should have directed them to find a verdict for the defendants.

In giving his judgment on the application of the defendants for a new trial, the learned judge has based his opinion, in refusing the application, upon the case of *The Great Western Railway Company* v. *The Preston and Berlin Railway Company* (17 U. C. Q. B. 477). The case was one turning upon two questions; first, whether the plaintiffs were engaging in the construction of works *ultra vires*; and, secondly, whether the defendants were liable, not having entered into any contract under their corporate seal. In the present case the defendants did enter into a contract under their corporate seal with one Taylor, for the construction of the work, the remainder of the price of which is sought to be recovered in this action, and Taylor subcontracted the work to the plaintiff. The questions upon all that took place were, first, whether the defendants were at all liable to the plaintiff as debtors to him for the work done, and, secondly, whether the defendants had not a right to insist

upon the condition of the plaintiff having fully executed the contract to the satisfaction of the manager. The plaintiff expressly covenanted with Taylor to that effect; and the defendants, in their letter to the plaintiff, say they were willing to pay the plaintiff on the express condition that the plaintiff's portion of the works with Taylor should be done to the satisfaction of the manager, on whose certificate alone should any money be paid.

Neither of these questions seems to have engaged the attention of the learned judge, though urged upon him by the defendants' counsel. There should be a new trial, without costs. The judgment of the court below must therefore be reversed, and the cause remitted back with such direction.

The Chief Justice, having been absent during the argument, gave no judgment.

Appeal allowed.

Regina v. Powell.

The proper proceeding to reverse a judgment of the Court of Quarter Sessions, is by writ of error, not by *certiorari* and *habeas corpus*.

(M. T., 25 Vic.)

The defendant was tried at the quarter sessions for the county of Middlesex, upon an indictment under Con. Stat. U. C. cap 91, sec. 8, and being convicted was sentenced to be imprisoned *for two years in the common gaol*

By statute, cap. 99, Con. Stat. U. C. sec. 100, it is enacted that "whenever any offender is punishable by imprisonment, if it be for life, *or for two years, or any longer term, shall be in the Provincial Penitentiary.*"

The defendant, meaning to contend that the sentence passed upon him by the quarter sessions was illegal, moved for and obtained a writ of *habeas corpus* and a *certiorari* to remove the record; and upon their return *M. C. Cameron* moved for his discharge. He cited *Rex* v. *Ellis*, 5 B. & C. 395; *Leonard Watson's* case, 9 A. & E. 731; *Ex parte Lees*, 1 E. B. & E. 828.

R. A. Harrison showed cause, and cited *Rex* v. *Bourne*, 7 A. & E. 58; *Ex parte Newton*, 4 E. & B. 869; *In re Newton*, 16 C. B. 97; *In re Smith*, 3 H. & N. 227.

Robinson, C. J., delivered the judgment of the court.

The proper proceeding to reverse a judgment of the Court of Quarter Sessions is by writ of error, not by summary interference of this Court upon a return to a *certiorari*, as in cases of summary convictions, in which no writ of error will lie.

And if the prisoner shall bring error in this case, then, under the Con. Stat. U.C. cap. 113, a proper sentence may be passed.

We must remand the prisoner to the proper custody in the meantime.

COMMON PLEAS.

Reported by E. C. Jones, Esq., *Barrister-at-Law.*

In the matter of George Michie and the Corporation of the City of Toronto.

Held—1st, That an ordinary lease, containing the words "and to pay taxes," covers a special rate created by a corporation by-law, as well as all other taxes.
2nd. A by-law should state a day on its face when it shall take effect, and should not require extrinsic evidence to be looked for to ascertain that fact.
3rd. The Municipal Institutions Act authorizes the clerk of the Council to "examine and finally determine" whether petitions are in conformity with the provisions of that act; and a certificate being given by the clerk, the court has no power, except in a case of fraud or *mala fides*, to interfere.

In Easter term, *R. A. Harrison* obtained a rule calling on the Corporation of the City of Toronto to show cause why their by-law No. 292 should not be quashed, on the grounds: 1st, That the by-law does not name a day, in the financial year in which the same was passed, when it is to take effect. 2nd, That the debt created by the by-law is not made payable in twenty years at furthest from the day on which the by-law took effect. 3rd, That the debentures issued, or to be issued, under the by-law, are not made payable in twenty years at furthest from the day on which the by-law took effect. 4th, That the by-law is based on a petition of less than two-thirds in number, and one-third in value of real property directly benefited thereby, of the owners of such real property. 5th, That instead of being a petition of two-thirds in number, and one-half in value, of owners, it purports to be a petition of owners and occupiers, some of the latter not being owners, and many of the owners not being occupiers. 6th, That the by-law was passed without any previous notice having been, according to the by-law No. 292 of Corporation, left at the place of abode of the applicant, and other parties intended to be assessed for the contemplated improvements.

The by-law was produced. It was passed on the 8th August, 1859, and entitled "To provide for the construction of a stone side-walk on Yonge-street, and to levy a rate to defray the cost thereof." It recited a petition of certain persons and firms for the purpose, and that it had been ascertained as determined that the property comprised within certain fixed limits would be immediately benefited by the construction of the stone side-walk, and that the petitioners are two-thirds in number and one-half in value of the owners of real property to be directly benefitted, and that the value of the whole of the real property ratable under the by-law is $520.182; that the cost will be $6925.50, and amount required to be raised annually by separate rates to pay debt and interest is $761.80½. It further recites the rate to be imposed per lineal foot frontage on the real property directly benefited, and enacts—1. That the side-walk be constructed. 2. Imposes the special rate. 3. Authorizes raising the money by loan on debentures. 4. Directs that the debentures be made payable on the 1st of January, 1880, and the interest thereon half-yearly on the 1st of January and 1st of July. 5. Regulates the debentures as to place of payment, and directs expenditure of money raised, in constructing the side-walk. 6. Has no bearing on the points raised. 7. Ditto ditto. 8. That the by-law shall come into operation on the day it bears date.

Affidavits in support of the application were filed—1st, Of the relator, sworn 21st May, 1861, stating that to the best of his knowledge, recollection and belief, no notice was left at his place of abode or elsewhere for him, of the assessment made or proposed to be made by the by-law No. 292, or the amount thereof, or that such by-law would be passed; that he is one of the parties assessed under the by-law: that he was not aware of the by-law until some time after it was passed, and first became aware of the particulars of it, and of the proceedings on which it was based, when called on to pay taxes for last year (1860), which was the first year in which an assessment was made under the by-law; and that this was, to the best of his recollection, in February last, 1861; that he consulted counsel, and was advised it was illegal, but as it was too late to move against it last Hilary term, he was advised, in order to avoid a distress, to pay under protest, and to apply in the following term to quash the by-law; that he accordingly did pay under protest, and with the avowed intention of moving to quash the by-law.

Another affidavit of the relator stated, that the total number of assessed owners of real estate affected by the by-law were, as he believes, as ascertained by the city clerk, twenty-three; that to the petition on which the by-law is passed, there were subjoined the names of sixteen persons, setting them out; that out of the sixteen, eight persons were owners of real property affected; that the Bank of British North America and the Bank of Montreal were also owners, but neither their corporate name nor seal were set and subscribed to the petition, but their respective cashiers or managers signed in their own names; that the other six persons did not own the real property they occupied, which was affected by the by-law.

Another affidavit showed that by a by-law of the city, No. 12, passed on the 30th May, 1859, it is provided that the clerk should cause a notice to be left at the place of abode of each of the parties to be assessed; that such assessment had been made, and the amount thereof, and that a by-law in accordance therewith would be passed by the Council, unless appealed from, as provided by act of Parliament; that to the best of the deponent's recollection, no such notice was left at his residence or place of abode, or elsewhere, for him, though he was an occupant of property affected by the by-law, and was assessed thereunder.

Copies of two by-laws were also put in, providing for the assessment of property benefited by the local improvement, by which all petitions for such improvements, when received by the Council and referred to the city Board of Works, are to be examined by the clerk of the Council, who is to "examine and finally determine" whether such petitions are signed by

two-thirds in number, and one-half in value of the owners of the real property to be directly benefited thereby; and such petitions, when found to comply with the provisions of the statute 22 Vic. cap. 40, 1859, he shall among other things endorse thereon his certificate of the correctness thereof, and of the value of the whole of the real property ratable under the by-law. The city engineer is to make a report, showing what real property will be immediately benefited by the proposed improvements, and the proportions determined by him, in which the assessment to defray the cost is to be made on the various portions of the real estate so benefited, and the clerk is to cause a notice to be left at the place of abode of each of the parties to be assessed for such improvement, that the assessment has been made, and the amount thereof, and that a by-law in accordance therewith will be passed by the Council unless appealed from as provided by law.

Among the regulations of the city Board of Works is one that they will only recommend the construction of new works by special assessment, when the petitioners represent two-thirds in number of the proprietors in fee, and one-half of the assessed value of the property.

By the clerk's certificate, attached to the petition for this improvement, it is stated that the total number of persons assessed for property to be directly benefited by this improvement was twenty-three; that sixteen names were signed to the petition; that the total value of the assessed property was $520,182; that the amount represented by the signers of the petition was $413,496, leaving unrepresented $106,686. The petition began thus: "The petition of the undersigned, being owners and occupants of property," &c. All these words were printed except "and occupants," which were interlined in writing.

In Trinity term, *J. H. Cameron, Q.C.*, showed cause. He contended the relator could not go behind the petition and by-law; that the day of the passing of the by-law was a sufficient naming of a day for the by-law to take effect. He showed by affidavits that the debentures were in fact made payable within twenty years, and gave up the 4th section of the by-law moved against, which might be quashed, though the residue stood. He insisted that the relator was only an occupant (a counterpart of the lease to him being by consent put in), and that his lease only subjected him to pay rent and taxes in terms which do not apply to a special rate and if so, as the relator showed no other interest, he was not a a person authorized to move against the by-law.

Harrison admitted that if the last objection was sustainable, the case was out of court.

Cameron filed affidavits: 1. From the Chamberlain of the city, stating that all debentures issued by the city were drawn up under his direction, and that all those issued under the by-law in question were made payable within twenty years from the date thereof, being dated on the 16th August, 1859, and made payable on the 1st July, 1879. 2. From the assistant clerk of the Council, proving a copy produced of so much of the assessment roll of 1859 as refers to the stone side-walk in question, as that roll was finally passed by the court of revision for the year; that the roll is the only maans whereby the officers of the Corporation can make the necessary computation as to the number of owners of real property to be benefited by any improvement petitioned for, and the value of such real property. That according to the roll, the petition in question was signed by more than two-thirds in number and one-half in value of real property directly benefitted thereby, of the owners of such real property; that he made the calculation, and believes the same to be correct, and made the necessary certificate, which was signed by the clerk of the Council; that on the 2nd August, 1859, he filled up and addressed to each of the persons named in the seventh column of the assessment roll, under the head "owners and address," a notice of the application for the improvement, and the intention to pass the necessary by-law for that purpose (annexing a copy), and gave such notices to the messenger of the Corporation to be forwarded to such parties. In this roll the relator's name is entered in the first column as occupant, and in the seventh column, J. L. Robinson as owner, and the name of Mr. R. Gilmor, who made an affidavit in support of this application, appears in the first column. "Gilmour & Alfred Coulson," as occupants, and John Crawford in the 7th column, as owner. 3. Roddy, the messenger, made affidavit that all notices given to him by the assistant clerk to be forwarded, were either delivered by him to such persons personally, or left at their places of abode, or put in the post office, and he believes the notices referred to in the foregoing affidavits of the assistant clerk, were placed in the post-office in Toronto, on the day they were delivered to him.

The lease put in was from James Lukin Robinson to George Michie and Thomas Kay, dated 24th April, 1857, made in pursuance of the act to facilitate the leasing of lands and tenements.

Habendum for five years, with a covenant by the lessees among other things to pay rent "and to pay taxes."

DRAPER, C. J.—I am of opinion their is no weight in the objection as to the effect of the covenant to pay taxes. The statute in giving the enlarged sense of the limited expression extends it to all taxes, rates, duties, and assessments whatsoever, whether municipal, parliamentary, or otherwise, charged or to be charged upon the demised premises, or upon the lessor on account thereof. We must therefore treat the relator as a person having an interest in the by-law.

As to the first objection, I have felt a good deal of doubt whether the legislature did not intend that in the body of every by-law shall be stated a day upon which it is to take effect. The date on which the by-law is passed does not necessarily form a part thereof, though it may be the practice for some officer of the corporation to mark the day of its passing thereupon. And I think the legislature meant that it should not be necessary to refer to any thing extrinsic to the by-law for the purpose of learning when it would or had come into operation. The purchaser of a debenture, for instance, would require to see that it and the by-law under which it was issued were legal, and might on that account require to see when the by-law took effect. The third objection is answered by the affidavits in reply, the debentures are made payable within twenty years from the day the by-law was passed, on which day it took effect.

I think the fourth objection that the petition on which the by-law is based, was not signed by three-fourths in number and one-half in value of the owners of the real property to be benefited, cannot be entertained by us. The Municipal Institutions Act, section 300 expressly provides that the number of the owners and the value of the real property is to be ascertained and "finally determined" in the manner and by the means provided by by-law. There is a by-law for that purpose, under which the clerk of the city council has acted. It is not objected that he acted corruptly and fraudulently, and though, as I gather from the unanswered statements in the relator's affidavits, the city clerk has fallen into error, an error easily accounted for, as his conclusions were drawn from the assessment roll only, yet I think we cannot on that account annul the whole proceeding.

The 191 section of the act plainly contemplates that this objection should be heard and disposed of by the Council of the city before the by-law is passed.

I am not to be understood as determining that he should have confined his enquiry to the assessment roll, when he was required to ascertain and finally determine the matter of number and value, but I think that having acted as we must assume, *bona fide*, the legislature intended his determination to be final, as the foundation for the by-law authorising the improvement and imposing the special rate. The fifth objection involves the same consideration.

The sixth objection is sustained in fact as I understand the statements. But the provision requiring notice of the intention to pass the by-law to be given or sent to parties affected by it, is not statutory, nor is the validity of the by-law made dependent on provisions contained only in by-laws. And although the relator states in his affidavit that he had no notice of the by-law "until some time after it was passed," and that he first became aware of the particulars of it, and of the proceedings on which it was based in February last, yet it is difficult to suppose that he was not aware long before that date, that the stone sidewalk was being laid down, or that the work was of that character which was usually paid for by special local rate. This was enough to put any one on enquiry. Then he seems from his own expression to have become aware of the by-law some time before he became aware of its precise contents, but the knowledge of the first was

notice of the second, and he might then have learned everything necessary to support a much earlier application to quash the by-law.

There remains only the second objection, which is pointed at the fourth section of the by-law, and this section has been abandoned on the argument as illegal. To this extent therefore the by-law must be quashed, and the question is whether the residue can be supported without it. I do not perceive that the statute makes it indispensable that the by-law should name the day on which either the debentures or the interest thereupon should become payable. The third section of the by-law distinctly authorises the raising the money by loan on debentures. It appears that the debentures themselves were issued in conformity to the statute, not in compliance with this illegal provision in the by-law. The other portions of the by-law are independent of the fourth section. And it would have been, as I think, a legal and effectual by-law if this fourth clause had not been introduced. We may, I think, lop off this rotten limb, and leave the tree to which it was attached in full vitality. It is unnecessary to its existence, and to its bearing the fruit it was intended to produce. To drop metaphor, it appears to me the defect is confined to the fourth section, and does not vitiate the rest; the fourth section must be quashed.

Upon the whole, though leaning in favor of the first objection which strikes at the whole by-law, yet when I consider the mischief or serious inconvenience which probably would result from quashing the by-law at this late period, I think we ought, as a matter of discretion, if we possess such discretion, rather to discharge than to make absolute this rule. It is true, a distinction has been well taken between objections extrinsic to the by-law, and such as appear on the face of it, as to the duty of the court on applications to quash; and this objection is not extrinsic, but the Consol. Stat. U. C., ch. 2, sec. 18, subs. 2, enables us to treat the word *may* "as permissive," not mandatory, and the 195 section of the municipal institution act says the court *may* quash a by-law in whole or in part for illegality. Treating the expression as conferring an authority, with a discretion to abstain from its exercise, I think this a fitting occasion to exercise that discretion.

I think, therefore, the rule should be made absolute to quash the fourth section of the by-law, and should be discharged as to the residue, without costs on either side.

Per cur.—Rule discharged.

Snarr v. Baldwin et al.

Lease—Covenant for quiet enjoyment—Breach of, under superior authority not existing at execution of lease—How far lessor liable.

By letters patent, bearing date in the year 1840, certain lands situate on the water's edge in the city of Toronto, were granted to one "A.;" the patent containing a condition for the erection of an esplanada according to a certain plan, within three years from the date thereof.

A., by indenture, demised the said lands to plaintiff, with full covenants against all the world.

In 1853, the stat. 16 Vic. cap 219, enacted, that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it, and impose a special rate to defray the expense thereof; and by stat. 20 Vic. cap. 80, further powers were granted to the corporation with respect to the erection of the esplanade, among others to enter upon the water-lots, &c.

Under the above mentioned statutes the corporation, by their agents, entered upon the premises in question, and by filling up the space between the water's edge and the esplanade prevented the working of the plaintiff's mill, which was the damage complained of in this suit. *Held*, that the act of the corporation being done under superior authority (the legislature) although the statute did not exist at the time of the execution of the lease, yet as the breach of covenant did not arise from the neglect, fraud, or procurement of the lessor, but from the nonfulfilment by the lessee of his own covenants, the defendants were entitled to succeed.

The declaration set out a lease of certain premises in the city of Toronto, being a water-lot, made by one Margaret Phœbe Baldwin to one John Mulholland. The plaintiff shewed the term (of 42 years from 1st November, 1844) to be vested in himself by assignments, and stated that all the estate and interests of the lessor became legally vested in the Hon. Robert Baldwin, that he died, and that the defendants are his executors, and set out a covenant in the lease for quiet enjoyment by the lessee, his executors and assigns, without the lawful let, suit, hindrance, denial, ouster, eviction, ejection or interruption of the lessor, her heirs or assigns, or any other person or persons whomsoever, having or lawfully claiming any estate, right, title, interest or demand of, in, or to the demised premises, by or through her or them, or by or through her or their acts, measures, consents, default, neglect, or procurement, or by, from or through any other person or persons whomsoever. Breach, that after plaintiff became assignee of the term, and possessed of the premises, and while the reversion was vested in Robert Baldwin, and in his lifetime, and during the term, the corporation of the city of Toronto had the lawful right and title (not derived under Mulholland, &c) to enter and to grant to others the right of entry upon the demised premises, and to retain possession and to disturb plaintiff in the enjoyment thereof; and afterwards and while plaintiff was possessed, the Grand Trunk Railway Company, and other persons, having lawful right from and under the corporation of the city of Toronto, (not derived under Mulholland, &c.) and having full, just and perfect right to enter into the possession of the demised premises, by and with the consent and approbation of Robert Baldwin, in his life time, did enter and did rightfully put out the plaintiff from possession, and disturb and interrupt him in the enjoyment of the demised premises, and being in such possession the Grand Trunk Railway Company and other persons claiming title, and acting under the city corporation, and with the consent of the said Robert Baldwin, did fill up with earth the water-lot from the water's edge southwards to the northern limit of an esplanade, of 100 feet wide, built along the bay at the southern limit of the water-lot, and thereby, &c., stating the injury inflicted upon the plaintiff, and the damage.

Demurrer.—1. Because it is not shewn that the corporation of the city of Toronto claimed the alleged right, through Margaret Phœbe Baldwin, her heirs or assigns, or by her or their acts, consent, &c. 2. That it is not shewn that such alleged right accrued before the making of the covenant. 3. That it is not shewn by what right the corporation, or the railway, or the other persons claiming under the corporation, entered.

Pleas — 1. That the entry, eviction, &c., in the breaches charged, were not occasioned by reason of any matter or thing contained in the covenant. 3. That Mulholland, in the said indenture of lease, covenanted, that he, his executors, administrators or assigns, should within the time, and in the manner appointed by provincial, municipal or other competent authority, at their own cost, erect, build, &c., all such buildings, matters or things on the demised premises, or in the immediate neighbourhood thereof, according to the provisions contained in certain letters patent from the crown, dated 21st February, 1840, granting, amongst other things, certain lands adjoining to the demised premises, to the city of Toronto, upon certain trusts, were or might be necessary to be erected on behalf of the said Margaret Phœbe Baldwin, her heirs or assigns, as proprietors of the demised premises, so as to entitle her or them to a conveyance of the said adjoining lands from the corporation of Toronto, according to the provisions of the letters patent. That by the letters patent, and by force of the statute 16 Vic. cap. 219, it became necessary, on behalf of the said Robert Baldwin, as proprietor of the demised premises, and in respect of the same, to entitle him to a conveyance of the adjoining pieces of land, as in the covenant mentioned, to build in front of and upon the demised premises, an esplanade, within twelve months from the 1st of January, 1853, and plaintiff did not build the same at any time, wherefore, and by authority of the said statute, and also by authority of the statute 20 Vic. cap. 80, the corporation of Toronto and the Grand Trunk Railway Company, and the said other persons for the purposes in the said acts authorized, entered upon the premises, and did the several acts in the said breach charged.

2nd Replication to 3rd plea, that, according to the provisions of the said letters patent, it was not necessary in order to entitle the said Margaret Phœbe Baldwin, or the said Robert Baldwin, as her assignee and proprietor of the demised premises, to erect, build, &c., any buildings, works, matters or things, either on the demised premises or in the immediate neighborhood thereof, but that by the letters patent the said adjoining lands, with other lands, were granted to the corporation of Toronto, in trust, to convey the same to the owners of the demised premises, subject to a charge thereon binding the lands; that the proprietors of the

demised premises and adjoining lands would build the esplanade across the lands referred to in the third plea; that according to the letters patent, the building the esplanade was not a condition precedent to the conveyance by the corporation of the adjoining lands, but it was the duty of the corporation at once to convey the same without any erections, &c., being first made.

3rd Replication to 3rd plea, that according to the provisions of the said letters patent, and of the stat. 16 Vic. cap. 219, it became necessary on behalf of the said Robert Baldwin, as assignee of the said Margaret Phœbe Baldwin, as proprietor of the demised premises, and in respect of the same, so as to entitle him to a conveyance of the adjoining piece of land, that an esplanade of only 100 feet in width should be built in front of and across a small portion of the south end of the demised premises, and across land covered with water to the south thereof, and that no other erection, &c., was necessary according to the conditions of the said letters patent; that the building the esplanade according to the letters patent would not and did not disturb, &c., plaintiff in the quiet possession of that portion of the demised premises in the declaration specified, and that it was not necessary in the construction of such esplanade to do the several acts in the breach charged, but that the breaches of covenant complained of were on account of the rightful disturbance, against plaintiff's consent, by the Grand Trunk Railway Company and others, lawfully claiming and having title by and under the corporation of Toronto, of the plaintiff's quiet enjoyment of that portion of the demised premises extending from the northern side of the esplanade up to the water's edge, and not including the esplanade, and were other and different breaches and wrongs than those justified in the third plea.

Demurrer to first plea, because it neither denies, nor confesses and avoids the specific breaches charged. That the declaration does not allege that the breaches were occasioned by any thing in the covenant of Margaret Phœbe Baldwin, but that they were in contravention of that covenant. That the plea admits the facts stated in the breach, and only traverses the legal effect of them, and that the facts admitted were matters and things contrary to the covenant of Margaret Phœbe Baldwin.

Demurrer to the third plea.—Plea no answer, for the breach complained of is not the construction of the esplanade, but the entry by the Grand Trunk Railway Company and others, having lawful title under the corporation of Toronto (not derived under Mulholland, &c.,) upon the demised premises, and filling up a part other than that covered by the esplanade, with earth, and disturbing plaintiff in the enjoyment thereof; that it is not shewn that in the construction of the esplanade it was necessary to do the acts complained of, and it appears that the esplanade was erected before the disturbance complained of in the declaration; that the covenant declared on, and the covenant of Mulholland, pleaded, are independent covenants; that the justification attempted to be set up does not apply or refer to the breaches alleged.

Rejoinder.—Demurrer to 2nd replication to third plea, because it does not answer the plea; because the plea justifies not only under the covenant, but also under the statutes, in the plea mentioned.

Demurrer to 3rd replication to 3rd plea, that the replication only answers so much of the 3rd plea as justifies under the covenant of the lessee, and the stat. 16 Vic., but leaves unanswered the justification under the stat. 20 Vic., that the replication admits the justification as to that part of the premises included in the esplanade, to which part only the replication applies.

Joinder in demurrer.

Harrison for plaintiff.—The covenant is in the most general terms against the acts of every person lawfully claiming any right or interest in the premises.

It is unnecessary that the right of the corporation of Toronto to enter should be shewn, (*Foster* v. *Pierson* 4 T. R. 617, *Hodgson* v. *E. I. Company*, 8 T. R. 278); nor need it be shewn that such right existed when the lessor entered into the covenant. (*Buckley* v. *Williams*, 3 Jur. 325; *Skinner* v. *Kilbys*, 1 Show. 70; *Wotton* v. *Hele*, 2 Saund. 181, note 10; *Jordan* v. *Twells*, Cases Temp. Hardw. 172; *Brooks* v. *Humphreys*, 5 Bing. N. C. 55.) The declaration shows that the Grand Trunk Railway, and other persons, entered by authority of the corporation of Toronto, and their title is sufficiently shewn.

The first plea contains no answer to the declaration; it only alleges that the eviction, &c., were not occasioned or suffered by reason of any thing in the covenant of Margaret Phœbe Baldwin contained. Granted that it it so, yet the covenant which is for quiet enjoyment, against the acts of all persons, is broken by what is charged, and so the plea is no answer.

As to the 3rd plea, in *Lyman* v. *Snarr*, 9 U.C.C.P. 104, the court held that this plaintiff, who was lessee of Lyman, was bound to pay rent according to his covenant, although he pleaded that the city of Toronto had, under the 20 Vic. cap. 8, filled up the water lot leased with earth. (*Shaw* v. *Stenton*, 2 H. & N. 858; *Fischell* v. *Scott*, 15 C. B. 69.) See *Hale* v. *Rawson*, 4 C. B. N.S. 85; *Schilizzi* v. *Derry*, 4 E. & B. 873, which shew only that when a man engages to do a particular act, unless prevented by specified exceptions, the temporary existence of the prevention does not discharge him from his engagement. Then the power to build the esplanade does not include the filling in the rest of the land; and the two statutes, or the later one, 20 Vic. cap. 80, sec. 5, makes the filling in a charge on the lands, not on the occupants.

A. Wilson, Q.C., contra, contended that as the plaintiff, in the third replication to the third plea, restricted his claim to the filling up the lot between the northern boundary and the esplanade, such restriction was in effect a discontinuance. He argued that it was not enough to aver that the corporation of the city had lawful title, not derived from the plaintiff, *i. e.*, a lawful title shewn to have been created before the lease to the plaintiff; but it is not averred the title was derived from defendant. (2 Saund 180, n. 10.)

Plaintiff, as assignee of Mulholland, was bound to erect the esplanade within a year after the passing of 16 Vic. Owing to his not fulfilling this covenant, in the lease of which he was assignee, the provisions of 20 Vic. became applicable, and afford a justification to the corporation to do or authorize to be done the acts complained of. The plaintiff asserts that certain things were not necessary under the letters patent, but how can the court judge of them when they are not set out? The first plea, perhaps, cannot be entertained, but the third is good. The principal point is, whether under a general covenant for quiet enjoyment like the present, there being nothing in existence then inconsistent with the conveyance to the covenantee, a matter subsequently originating, which causes disturbance to plaintiff, gives him a right of action against the covenantor. (*Reid* v. *Hoskins*, 4 E. & B. 979; *Melville* v. *DeWolf*, 4 E. & B. 844; Rawle on Covts. 187, 188; *Dudley* v. *Folliott*, 3 T. R. 584.)

C. Patterson on the same side.

DRAPER, C. J.—The principal question is, whether the third plea answers the breach of covenant charged in the declaration. Considering the two statutes relied upon by that plea, and so much of the letters patent as the plea and those statutes set forth, it appears to me the corporation of Toronto had lawful right to enter on the demised premises, and to authorize others to enter and do the acts charged as constituting the breach of covenant, and the plaintiff himself asserts, and the defendants do not deny, that such lawful right existed. The right to enter and make the esplanade, and the right to enter upon and fill up the water-lot, rest upon distinct grounds, the one precedes, the other is created after the execution of the lease set forth in the declaration, and the alleged breach of covenant is declared in the replication to the third plea, to consist in the exercise of this later right.

And it could not well be otherwise when we observe that according to the letters patent as set out in the preamble to the 16 Vic. cap. 219, the erection of the esplanade in front of the water-lot, would entitle the owner thereof to a conveyance of an extension of the water-lot, as described in a map annexed to the letters patent, and also to a conveyance of other land specified. Margaret Phœbe Baldwin, as such owner, leased to Mulholland under whom the plaintiff derives his title, and Mulholland covenanted to build the esplanade; but according to the letters patent the esplanade should have been erected within three years from February, 1840. But no esplanade was even begun in 1853, when the statute 16 Vic. enacted, that unless the owners or lessees of the different water-lots should, within twelve months, erect that portion of the espla-

made fronting upon or crossing their respective premises, the corporation of Toronto should do it, and that corporation was empowered to impose a special rate to defray the expense of such erection by that body.

In 1857, the act 20 Vic. cap. 80, was passed, which recites that under the former act the corporation of Toronto had contracted with the Grand Trunk Railway Company to build an esplanade in front of the city, and that it had become necessary *to grant further and other powers* to the corporation to enable them to complete the esplanade according to the contract, and certain other work connected therewith; and in addition to authorizing the construction of the esplanade, and the entry upon all lands and water-lots and the crossing all wharves, docks, piers and premises lying within the limits of the esplanade, this act further empowered the corporation to contract for filling the whole space between the northern limit of the esplanade and the shore of the bay of Toronto, and for that purpose to enter into and upon all water-lots, &c. The expense of filling up, &c., was to be repaid to the corporation by the owners or other persons having estates in the land on which the grading, levelling and filling in shall be done.

The alleged breach of covenant, therefore, appears to consist in this—that the legislature, after the lease to Mulholland, who had not erected the esplanade in front of the demised premises according to his covenant, conferred powers on the corporation of Toronto to interfere with the private rights both of lessor and lessee, and their respective assignees; that the corporation exercised this right, and thereby disturbed the plaintiff in the quiet enjoyment of the water-lot. That the act of the corporation was lawful, being done under an *authority* paramount to the lessor, though exercised after the making the lease; and that this is analogous to an entry by *title* paramount, and therefore the defendants as executors of Robert Baldwin, in whose lifetime and possession of the reversion these acts were done, are liable to the plaintiff.

The declaration expressly negatives that the corporation of Toronto derived their title by, through or under the lessee or any subsequent assignee, and is not, therefore, open to the objection that it was matter of doubt whether the corporation did not derive their title in that manner. (See *Noble* v. *King*, 1 H. Bl. 35; *Brookes* v. *Humphreys*, 5 Bing. N. C. 57.) But the plea discloses what the title of the corporation was—shews that it is derived from the exercise of a superior authority, not from a prior or paramount title, and that it accrued after the lease to Mulholland was executed. It asserts in fact that the disturbance of plaintiff's possession was under the authority of the two statutes, and especially of the latter, and thus confesses the disturbance, but seeks to avoid the breach of covenant charged. And if the law be, as I understand it, from the case of *Wotton* v. *Hele*, 2 Wm. Saund. 177, and the authorities referred to in note 10 to that case, that in order to constitute a breach of this covenant the lawful title under which the act complained of was done must have existed before or at the time of the lease, the plea is a good answer, admitting that the declaration is sufficient.

Looking at all these pleadings, it appears clearly to me that the lawful right exercised by the corporation of Toronto, and those who acted under them, did not exist when the covenant declared upon was entered into; and so far as the statute 16 Vic. is concerned, the exercise of the powers granted to the corporation was contingent on the fulfilment or non-fulfilment by Mulholland of his own covenant set out in the third plea. Both statutes proceed from the supreme authority, the legislature; and I do not see how it can be said from anything that appears on the pleadings, that the exercise of that authority was brought about by or through the acts, measures, consent, default, neglect or procurement of the lessor or of Robert Baldwin. If what the plaintiff contends for be correct, then it would appear to follow that wherever the legislature have granted a charter to a railway company, with the usual powers to enter and take lands, the exercise of these powers will cause a breach of covenant on the part of lessors or former owners of such lands, who, prior to the granting of the charter, have leased or conveyed with a general covenant for quiet enjoyment. Such a covenant, however, is intended as an indemnity against the acts of particular persons: that is, of those having lawful title before the covenant was entered into. It is not a covenant to do some specific act or acts. And if it be conceded, as the language used by Sir N. Tindal, in *Evans* v. *Hutton*, 4 M. & Gr. 968, tends strongly to shew that a contract may be dissolved by superior authority, so that the contractor is relieved from performance, I do not see why the act of the Legislature in this case may not equally relieve the covenantor from indemnifying his lessee. If after the letters patent and the lease to the plaintiff an act had been passed prohibiting the erection of the esplanade, there is, I apprehend, no doubt that the plaintiff would have been relieved from his covenant to erect it; and it appears to me the defendants should be equally relieved from indemnifying against acts lawful, because done under powers given by the legislature, and which acts, if not so legalized, would not have constituted a breach of the lessor's covenant for quiet enjoyment.

I think the defendants are entitled to judgment on this record.

Per cur.—Judgment for defendants.

The Bishop of Toronto v. Cantwell.

Ejectment—Notice of intention to proceed—Necessary when four terms have passed without any steps having been taken.

Held, that one month's notice of intention to proceed is necessary in ejectment as in other actions, when four terms have passed without any proceedings having been taken.

M. C. Cameron, in Easter term, obtained a rule *nisi* to set aside the notice or trial, trial and verdict in this cause for irregularity, with costs, issue having been joined more than four terms, and no term's notice of intention to proceed having been given, or for a new trial on the merits.

The affidavits stated that the writ in this ejectment suit was served on the defendant in the latter end of February or beginning of March, 1859, and an appearance was entered on the 14th of March, 1859; that no notice or proceeding of any kind was served or taken in the cause from the last date until the 9th March, 1861, when notice of trial was served for the then next ensuing assizes at Guelph. That on the 25th of March, 1861, notice was served on the agent of the plaintiff's attorney, that if the trial was proceeded with, application would be made to set aside the proceedings for want of a term's notice, and that no such notice had been given; that the plaintiff proceeded to trial and obtained a verdict; that the defendant's attorney caused the defendant to be written to, informing him of the service of notice of trial, directly after such notice was served. The defendant swore he never received this letter; that he only became aware the cause was entered for trial by being casually in Guelph on the first day of the assize: that he was not prepared to defend, and that no defence was offered, and that he had a good defence on the merits as he verily believed, stating that he and his father, under whom he claimed, had been about 27 years in possession, occupying, clearing and improving.

In Trinity Term, *N. Kingsmill* shewed cause on affidavits, that the notice not to proceed was not served until after the opening of the assizes at Guelph; that the verdict would have been taken on the first day if the defendant had not expressed a desire to have it put off till the arrival of his counsel; and on the following day the verdict was taken, the defendant's counsel being in court, but not appearing. On the question of merits an affidavit was filed setting out a letter dated in 1846, from defendant, according to which he desired to purchase the land from the Church Society of the Diocese of Toronto, for whom the plaintiff holds this land as trustee. (*Hagarty*, J., referred to *Scrope* v. *Paddison*, 4 L. T. N. S. 254.) 4th May 1861.

M. C. Cameron contended that *Scrope* v. *Paddison* did not apply. The objection here is, that a term's notice has not been given. The English rule No. 176 of Hilary Term, 1853, has not been adopted by our courts, and consequently the old practice remains. He referred to *Tyre* v. *Wilkes*, U. C. 2 Prac. Rep. 325.

Draper, C. J.—The case of Doe on the demise of *Vernon* v. *Roe*, 7 A. & E. 14, establishes that the practice of requiring a term's notice of intention to proceed, when there had been no proceeding for a year, applies to ejectment as well as to any other kind of action, and the case is the more remarkable since the tenant had not even appeared, and the parties to the record as it stood were fictitious. The plaintiff John Doe being one and the defendant Richard Roe, the other. Still on the tenants application a judg-

ment against the casual ejector was set aside for want of a term's notice. I confess I have not been able to understand why the rule should not apply to actions of ejectment as well as to any other actions. The reason of the rule requiring a term's notice, viz., to prevent any surprise on the defendant after the plaintiff has laid by four terms or a year without proceeding, is as applicable to ejectments as to other cases.

I do not understand the statement of counsel in *Scrope* v. *Paddison*, that in ejectments under the old practice, the plaintiff was out of court if there was no step taken for two years. I do not find the practice so laid down in any authority or book of practice that I have been able to consult, and I have never met with any instance of such a practice obtaining. With regard to the difference in the proceeding since the Common Law Procedure Act, it is true there is now no declaration, nor yet any plea, but after appearance the writ and appearance are in effect substituted for declaration and plea, an issue is made up upon the writ and appearance, and the statute defines what question the jury is to try. A special verdict may be given, a bill of exceptions tendered, and judgment may be entered on the verdict, and costs taxed for or against either party. In that case *Pollock*, C. B., merely decided that a commission to examine witnesses might go, although a month's notice of intention to proceed had not been given, and this may have been on the ground that the granting a commission is not a step in the cause towards the attaining judgment, it is a collateral proceeding like issuing a subpœna; or, which I incline to view as the best reason for the decision, that the objection of the defendant's counsel was that the plaintiff had not declared within a year after the service of the summons, and therefore he was out of court, which objection might be conclusively answered by remarking that the rule could not apply to ejectments since the Common Law Procedure Act, because the writ itself was substituted for a declaration as soon as the defendant put in an appearance, which that statute makes equivalent to a plea. In these suggestions, however, I am speaking for myself only.

I confess I see no reason why the case of *Doe Vernon* v. *Roe* should not still govern us, and as nothing is specifically settled upon this point either by statute or other rules of court, we think we should adhere to the old practice, which has been heretofore in accordance with that case.

We decide, therefore, this rule should be made absolute, costs of the application to be costs in this cause.

Per Cur—Rule absolute.

McMASTER v. THE CORPORATION OF NEWMARKET.

By-law, quashing of—Corporation, ordinary expenditure of—Power to dispose of funds.

Motion to quash by-laws 68 and 69, passed by the Corporation of the village of Newmarket, on the 5th August, 1861. The first, after reciting that it is necessary that the Corporation should purchase a site for a town hall, enacts that they purchase a certain parcel of land for the sum of $250; secondly, that the Reeve shall issue his draft for the said sum payable the 1st November, 1861. The second (No. 69), after reciting that the inhabitants of the village are desirous of erecting a town hall, and that there will be a large surplus in the hands of the Corporation after paying for the site, and paying the ordinary expenses of the village for the year, enacts that $750 be appropriated for the erection, and that the Reeve should issue his drafts, payable the 1st November, 1861.

At the time of passing these by-laws, there had been no by-law passed to provide for the ordinary expenditure of the year.

On motion to quash, *held*, that the Corporation has no power, without the consent of the electors, to authorize the expenditure of money for purposes not falling under the head of ordinary expenditure, without having the money in hand to meet the demand, and without making provision, by rate or otherwise, to raise the required amount to meet the demands when they become due.

S. M. Jarvis obtained a rule *nisi* to quash by-laws Nos. 68 & 69, of the Corporation of Newmarket, on the following grounds: 1st. That they are by-laws for raising money upon the credit of the municipality, and for contracting debts not payable within the present municipal year, not required for its ordinary expenditure, and have not received the assent of the electors of the municipality. 2nd. They do not name a day in the financial year, when the same shall take effect. 3rd. They do not name a day when the debts thereby created shall become payable. 4th. No special rate is settled, to be levied for paying the debts to be created, nor the amount to be levied annually. 5th. The amount of the ratable property in the Corporation for the year 1861 is not ascertained. 6th. The by-laws do not show the amount of the rate in the dollar to be levied by the Corporation for the year 1861, nor that such rate will not exceed the rate of five hundredths in the dollar. 7th. They do not contain the recitals required by the Municipal Corporations Act, Con. Stat. U. C. cap. 54, sec. 222. 8th. A by-law for a similar purpose was rejected by the rate-payers of the village.

By-law No. 68 was passed on the 5th August, 1861, and is entitled "A by-law for purchasing a site for a town hall." It recites that it is necessary the Corporation should purchase a piece of land, whereon to erect a town hall, and that a certain piece can be bought from Moses W. Bogart for $250; and enacts that the Corporation do purchase the said parcel of land for $250, to be used as a site for a town hall. 2nd. That the Reeve shall issue his draft to the said Moses W. Bogart for $250, so soon as he shall have properly conveyed and assured the said parcel of land to the Corporation, payable the 1st day of November, 1861.

By-law No. 69 was passed on the same day, and is entitled "A by-law for erecting a town hall." It recites that the inhabitants of Newmarket are desirous of erecting a town hall; that the Corporation are about purchasing a site for such hall; and that it appears there will be a large surplus in the hands of the Corporation after paying for the site and paying the ordinary expenses of the village for the year; and enacts, 1st, That the committee appointed to obtain a site for a town hall, and to make the necessary arrangements for the building of the same, do at once proceed to erect a hall on the land to be purchased as a site therefor. 2nd. That the sum of $750 be appropriated, to be expended by the committee on the erection of the hall. 3rd. That the Reeve do issue his draft for such sums as may be required by the committee as the work on the hall progresses, so that the amount for which said drafts are issued shall not in the aggregate exceed $750, not payable before the 1st November, 1861. 4th, This by-law not to take effect unless the by-law for the purchase of a site passes.

An affidavit of a resident and rate-payer of the village of Newmarket was filed, stating that a by-law was prepared by the Council of the Corporation of that village in June, 1861, for raising by loan $4,600, upon interest, payable within fourteen years, to be applied in the purchase of a site and the erection of a town hall and market in the said village, a copy of which was annexed to the affidavit; which by-law, on the 9th June, 1861, was put to the vote of the electors, and was rejected by a majority of 85 out of 109 voters, only 12 voting for it. That three of the Council, being a majority, passed by-laws Nos. 68 & 69, the other members opposing them. That neither of these by-laws was submitted to the electors, and they were passed in defiance of a petition signed by a very large majority of the electors. That at the time the affidavit was sworn—the 29th August, 1861—the assessment roll had never finally been revised, nor had any estimates of the ordinary expenditure of the Corporation for the current year been prepared or submitted to the Council, and no rate had been settled for the payment of the ordinary expenditure, nor had any special or other rate been imposed for discharging the debts to be created by the purchase of the site and the erection of the town hall. That for 1860, the whole ratable property of the village was $14,800 or thereabouts, and the rate levied for that year was 5c. in the dollar, leaving a surplus of about $19. That the ratable property of the present year, as appears by the assessment roll, as it then stood, was $17,017 27c. A rate of 5c. in the dollar would produce the sum of $850 or thereabouts, and the income of the said Corporation from all other sources will not exceed $700 or thereabouts, and the ordinary expenditure will amount to about $1,000, as the deponent believes. That the architect had shown him the plans and specifications for the town hall, and had told him (deponent) that the building could not be completed for less than $1,400, and that it was only intended to complete the external portion of the work this year.

Harrison, R. A., showed cause. He filed an affidavit of one of the Municipal Council, attacking the motives of the person whose affidavit is above set forth, and stating that the place selected by by-law No. 68, is approved by a majority of the rate-payers, who have signed a certificate to that effect. That neither of the by-laws Nos. 68 & 69 was submitted to the rate-payers, because it was neither necessary nor proper, as the money to be expended was intended to be raised and expended within the present year, and the members of the Council who passed the by-laws were

aware that a large majority of the rate-payeas were in favor of the proceedings of the Council as regarded those by-laws. That the revenues of the year will be sufficient for this purpose, after providing for all other expenses made or contemplated. That the rate usually levied is 5c. in the dollar, which the deponent believed had been levied every year since the village has been incorporated. That the other resources of revenue will produce $1,250 and upwards. That estimates of revenue and expenditure for the current year have been repeatedly made by committees (not shown what they are). That the site of the hall cost $250, and has been conveyed to the Corporation. That the estimate of the architect for the hall was $750 to $800. That this expenditure will complete the hall, so that the same will answer all the purposes of a town hall. That certain additions will probably be made at a future day, such as a gallery and partitioning off two ante-rooms, but they are not included in the work the Council contemplates doing, though if added the architect estimates the whole expense at $1400. That the Council has contracted for the lumber and timber, and accepted tenders for the erection. That there will be a pecuniary advantage (explained how) result to the Corporation, if the hall is up and closed this autumn. That the drafts are not made payable until the 1st December, and that the rates are not usually collected until October and November. That the principal part of the lumber and timber has been delivered, and the carpenters' work is in a forward state. Attacks the petition stated in the other affidavit to have been signed by a majority, because signatures, as the deponent believes, were obtained by misrepresentation and fraud, and many of the signers have since signed a certificate approving what the Council have done.

J. H. Cameron, Q. C., supported the rule, citing *Harrison's Municipal Manual*, p. 108, note *u*.

Draper, C. J.—It would be better if the affidavits were confined to the statement of such matters of fact as have a bearing upon the questions which the court are called upon to decide. A good deal of what is above stated, and much more which is not stated, might have been omitted without injury to the real merits, viewing the nature of the application, and the duty of the court in respect to it.

We are of opinion that the rule must be made absolute to quash both by-laws. Each of them authorizes the expenditure of a considerable sum, for a purpose clearly not falling under the head of ordinary expenditure, without having money in hand to meet the demand, when, according to the by-laws, it will be due and ought to be paid.

It appears that the subject matter of each of these by-laws had been already discussed, and to effect the desired object it had been thought advisable to authorize the creation of a debt not to fall due within the financial year. This rendered an appeal to the electors necessary, and they decided by a large majority against the proposal. The present by-laws are intended to attain the same object by a different mode, and to avoid the necessity of a reference to the electors by making the debt payable within the financial year. It is urged on behalf of the municipality that they have hitherto been in the habit of imposing a rate of 5c. in the dollar (the highest rate they have power to impose) for their ordinary expenditure, and that the produce of that rate, if again imposed for 1861, added to some other revenues, will leave a sufficient surplus to meet these new debts when they become payable.

This, however, seems open to very serious objection. There is no existing surplus shown. If there were, and this expenditure was directed by these by-laws to be made out of it, there would be no difficulty, for the objects are within the authority of the Corporation; but for all we see, there has been no by-law passed for the ordinary expenditure, and I do not see what right the Corporation have to create a surplus to be at their disposal, by raising, under the declared purpose of providing for ordinary expenditure, more than is obviously or probably necessary for it. It is true that the Corporation might even yet pass a by-law authorizing a special rate to supply funds for the purposes of these two by-laws; but in the meantime the whole debt may be incurred, for the operation of these by-laws is not made contingent on the imposing a sufficient rate to raise the money, or upon the money being raised by other means. Money or no money, the expenditure is directed, and thus, unless a rate be specially imposed, or under the name of ordinary expenditure a much larger sum than is necessary is raised (if that can legally be done), when the 1st November arrives there will be no funds to meet the Reeve's drafts for $1000, and a debt will exist which must be paid by funds to be raised during the ensuing year, though in terms made payable in the present year.

Considering the whole scope and apparent intention of the statute with regard to the incurring debts by municipalities, we think that no expenditure for extraordinary purposes should be authorized by by-law, unless it be out of unappropriated money in hand, or unless the by-law provides expressly for raising the necessary money, or is not to come into effect and be acted upon until some other by-law is passed making the necessary provision.

We think, therefore, this rule should be made absolute, with costs.

Per cur.—Rule absolute.

Devlin v. Bayne.

Con. Stat. U. C. cap. 56, secs. 2 & 3—Injury to plaintiff on a highway—Questions to be submitted to jury.

It is by sec. 2, Con. Stat. U.C cap. 56, provided that "in case any person travelling upon any highway, in charge of a vehicle or on horseback, be overtaken by any vehicle or horseman travelling at greater speed, the person so overtaken shall quietly turn out to the right, and allow the said vehicle or horseman to pass."

It is by sec. 3 of the same statute provided that "in case of one vehicle being met or overtaken by another, if by reason of the extreme weight of the load on either of the vehicles so meeting, or on the vehicle so overtaken, the driver finds it impracticable to turn out as aforesaid, he shall immediately stop," &c.

Plaintiff was driving a sleigh and horses, and, at a point where it was impracticable to turn out, was overtaken by defendant's sleigh and horses; and defendant, in attempting to pass plaintiff, drove him into a ditch, whereby his leg was broken. Plaintiff did not stop when overtaken by defendant.

The jury found a verdict for plaintiff. for £60.

Held, that the opinion of the jury should have been taken as to whether the injury to plaintiff was caused by the improper conduct of defendant, or was contributed to by the act of the plaintiff in not turning out or stopping his horses; and it not appearing from the notes of the judge who tried the cause, that any such question was submitted, a new trial was granted—costs to abide the event.

(M. T., 1861.)

The declaration contained two counts. First, That plaintiff and defendant were each driving their horses and sleighs along the same highway, the defendant driving behind plaintiff at a part of the highway where it was impossible for one sleigh safely or without a collision to pass the other, or to turn out of the road to allow the other to pass, as plaintiff well knew; yet defendant, intending to hurt plaintiff, violently and unlawfully, and without notifying his intention to plaintiff, who was carefully driving his sleigh in front of defendant, endeavored to pass the sleigh and horses of the plaintiff at the said point of the highway, and there so violently, unskilfully and improperly conducted himself that in so driving past the plaintiff the sleigh and horses of defendant were driven with great violence against the plaintiff and his sleigh and horses; and plaintiff, having no notice of defendant's intention so to do, and being unable to avoid the said collision, was thereby thrown and bruised, and one of his legs broken.

Second, That the defendant so violently, negligently and unskilfully drove and managed a sleigh and horses on a public highway, that the same were forced and driven with great violence against the plaintiff, and against his sleigh and horses, which he was then driving on the highway, whereby the sleigh and horses of the plaintiff were much broken and damaged; and thereby the plaintiff, who was driving his said sleigh and horses along the said highway, and unable to avoid the said collision so caused by the negligent and improper conduct of defendant, was then thrown down and bruised and crushed between the said two sleighs, and one of plaintiff's legs was thereby broken.

The plea was Not guilty.

The cause was taken down to trial at the last fall assizes for the United Counties of York and Peel for 1861, before the Chief Justice of this Court.

It appeared that plaintiff and defendant, in February last, were both coming along the plank road of the third concession of the township of York. The defendant was driving a load of hay, and plaintiff a load of stone. Both were proceeding in the same direction. Plaintiff's team was so close to the side of the road that he could not turn out. Defendant, on turning out to pass plaintiff's sleigh and horses, shoved them off into the ditch, and plaintiff's leg was broken.

For the defendant it was contended that, under cap. 46, sec. 3, of Con. Stat. of Upper Canada, plaintiff should be non-suited; that

it was his duty to stop when he found defendant was desirous of passing him.

The learned Chief Justice refused to non-suit.

The defendant called witnesses, and they gave evidence that when the defendant was about to pass the plaintiff's team, they increased their speed, and if plaintiff had stopped his team or turned out the accident might have been avoided.

The jury were told that there seemed no doubt that defendant was travelling at a greater speed than plaintiff, but were asked to say whether the plaintiff, by reason of the extreme weight of his load, found it impracticable to turn out, or whether his not turning out arose from the ditch being so near that he could not turn out; further, that under the statute it was the duty of the plaintiff to stop when defendant was coming up at the greater speed. They were further told that if the extreme weight of the load on plaintiff's vehicle made it impracticable for him to turn out, they were so to find; and if they found for plaintiff on the other points, defendant had leave to move to enter a verdict for him. They were further asked if defendant drove his horses so as to run against plaintiff's horses or himself, so as to do him an injury, and the amount of the damages.

The jury found for the plaintiff, with £60 damages, and said that plaintiff could not turn out, by reason of the depth of the snow on the track, and from the weight of his load.

In Michaelmas term last, *James Boulton* moved in pursuance of the leave to enter a verdict for defendant, or for a new trial, the verdict being contrary to law, evidence, and the judge's charge.

During the same term, *R. A. Harrison* showed cause, and contended that under the facts proven, the case was not brought within the provisions of Con. Stat. U. C. secs. 2 & 3; and if it was, plaintiff, by non-compliance with the statute, only forfeited the penalty imposed under sec. 11; and the statute did not interfere with his right to recover in this action. He further contended, under the evidence, that plaintiff ought to recover, as his alleged negligence in disobeying the statute did not in any way contribute to the accident.

RICHARDS, J.—Secs. 2 & 3 of Con. Stat. U. C. cap. 56, provide that "in case of any person travelling on any highway, in charge of any vehicle, be overtaken by any vehicle travelling at greater speed, the person so overtaken shall quietly turn out to the right, and allow the said vehicle to pass;" and sec. 3, that "in case of one vehicle being overtaken by another, if by reason of the extreme weight of the load on the vehicle so overtaken, the driver finds it impracticable to turn out as aforesaid, he shall immediately stop, and, if necessary for the safety of the other vehicle, and if required so to do, he shall assist the person in charge thereof to pass without damage."

Now the jury have found for the plaintiff, but at the same time have also found that he did not turn out, as required by the statute, because of the depth of the snow and the weight of his load. Then, according to the statute, he ought to have stopped.

It does not appear, from his lordship's notes, that he left it to the jury to say whether the plaintiff, by his negligence, contributed to the accident, or whether it was caused by the improper conduct of the defendant

Under all the circumstances of the case, we think there ought to be a new trial.

The finding of the jury seems inconsistent and unsatisfactory on the points submitted.

We think the opinion of the jury, on a new trial, in addition to the questions submitted on the former trial, should be taken, whether the injury to plaintiff was caused by the improper conduct of the defendant, or was contributed to by the act of the plaintiff in not turning out or stopping his horses.

Neither party seems to have called the attention of the presiding judge to this point, and it is probable the new trial is rendered necessary in consequence. The rule for a new trial will be made absolute; costs to abide the event.

Rule absolute; costs to abide the event. *

* On the second trial of the late York and Peel Assizes a verdict was again rendered for Plaintiff for £60 damages.

CHAMBERS.

(*Reported by* ROBT. A. HARRISON, Esq., *Barrister-at-Law.*)

ANDERTON V. JOHNSTON.

Specially endorsed writ—Declaration—Judgment—Setting aside.

Where plaintiff specially endorsed his writ for $266.62½, and afterwards declared on the common counts claiming £100 at the end of the declaration, and then signed judgment for £100, the judgment was held to be irregular and set aside.

Under the particular circumstances of this case, leave to amend the judgment was refused.

An affidavit disclosing a set off merely, is not an affidavit of merits.

In order to set aside a judgment entered on a specially endorsed writ, an ordinary affidavit of merits is not sufficient.

(Nov. 8, 1861.)

A writ specially endorsed for $266.62½ was issued on 9th October, 1861, and served on same day. The defendant appeared in proper time, by his attorney.

The declaration was on the common counts for work, goods, and money, and was served on the 23rd of October, 1861, on the defendant's attorney in Toronto. It was accidentally mislaid in his office and not found until the 31st of October, the day after the time for pleading expired.

Judgment for want of a plea was signed on the 31st of October, for £100 damages laid in the declaration, and £5 16s. 11d. costs.

The defendant was sent to immediately for an affidavit of merits, which was sworn to on the 1st of November, in which he stated that the plaintiff had agreed to teach him to make patent and enamelled leather, &c., which engagement the plaintiff had entirely broken; that the defendant in consideration of such agreement, gave him promissory notes for £50, which plaintiff discounted, and which are outstanding and unpaid, and that defendant had a just account against plaintiff, which, with the £50 would exceed plaintiff's claim.

It was objected the affidavit shewed only a set off, and that as an affidavit of merits it should have explained what the account was. *Warrington* v. *Leake*, 11 Exch. 804, *Wiley* v. *Wiley*, 6 W. R. 649.

DRAPER, C. J.—It must rest, I think, on the regularity of the judgment, whether the plaintiff could sign judgment for £100. Sec. 147 of our C. L. P. enacts, that where the plaintiff seeks to recover a debt or liquidated, demand in money, the true cause and amount of which is stated in the special endorsement on the writ of summons, or in declaration, judgment by default shall be final.

Final judgment has been signed in this cause for £100 damages and costs; the declaration is on the common counts, only claiming that sum at the end.

I do not think this can be treated as the true amount, though among the common counts the true cause is no doubt to be found.

In my opinion the judgment is irregular, and must be set aside. It might have been signed for $266.62½.

The plaintiff now asks to amend it, reducing it to that sum, but I think the defendant's affidavit discloses enough to meet the application, though not sufficient as an affidavit of merits to set aside the interlocutory judgment.

JOHNSTONE V. JOHNSTONE.

Pleading—Judgment for want of a plea—Form thereof.

Where the first count of the declaration was on an award, and the second on the common counts, and defendant demurred to the first count of the declaration, and as to the residue pleaded "that he never was indebted as alleged," and "that the plaintiff at the commencement of this suit, &c.," (pleading a set off,) "which amount the defendant is willing to set-off against the plaintiff's claim," the plea of set-off was held to apply to the second count only; and the demurrer to the first count having been set aside as frivolous, plaintiff was held entitled to sign interlocutory judgment for want of a plea.

Form of interlocutory judgment in such a case given.

(November 8th, 1861.)

This was a summons to set aside interlocutory judgment to first count of declaration, for irregularity in this, that it was not signed in the manner and form required by the practice, and was signed while a plea was on the files to the first count.

The action was commenced by writ of summons specially endorsed with a claim for the amount of an award and costs. An appearance was entered on 18th September, 1861: declaration

filed 20th September. The first count was on an award, and the common counts were added. The defendant demurred to the first count; and "the defendant to the residue of the declaration pleaded that he never was indebted as alleged, and that the plaintiff at the commencement of this suit," &c., (pleading a set-off,) "which amount the defendant is willing to set-off against the plaintiff's claim."

On the 21st October the demurrer was set aside as frivolous. On the same day the plaintiff's attorney signed judgment for want of a plea in the following form:—

"*In the Court of Common Pleas.*

"WILLIAM JOHNSTONE, Plaintiff,
"vs.
"FRANCIS JOHNSTONE, Defendant.

"The 20th day of September, in the year, &c., 1861, William Johnstone, by George Robinson Vannorman, his attorney, sues Francis Johnstone, who has been summoned by virtue of a writ issued on the 9th day of September, in the year of our Lord one thousand eight hundred and sixty one. For that, &c.

"Interlocutory judgment signed this twenty-second day of October, in the year of our Lord 1861, as to the first count of the declaration for want of a plea to the first count."

Notice of trial and assessment of damages was given for the then following Guelph assizes. The plaintiff swore that the defendant had not pleaded to the first count.

For the defendant it was insisted that the plea of set-off stands to the first count.

The managing clerk to the defendant's attorney swore that the judgment was informal, and not signed according to the practice of the court, which was the very point in dispute.

On the 4th October the plaintiff filed a joinder in demurrer, and took issue on the plea of the defendant to the second count in the declaration.

DRAPER, C. J.—The judgment seems to me well signed according to the directions given in Chitty Archb. Prac. 921 (9th Edn.). The papers filed may be treated as the *incipitu* of the declaration, or of the roll containing an *incipitu* of the declaration.

Therefore the only objection of form to the judgment fails, and the question which remains is, whether the plea of set-off extends to the first count; as to which I think it is properly to be treated as pleaded to the second count only.

It does not appear that there was leave to plead and demur to the first count, and I conclude that there was no such leave, for filing a frivolous demurrer would not have been advisedly permitted.

Summons discharged.

WARNOCK V. POTTER.

Order—Surprise—Rescinding same.

Where the true state of facts was not laid before the judge who made an order for leave to amend pleadings, and he acted on an affidavit not conveying the right impression of the actual proceedings, he, on subsequent application to him on behalf of the party affected by the amendment, rescinded his order to amend.

(9th November, 1861.)

On the 30th October last Draper, C. J., made an order in this cause that the plaintiff might amend his replication served by making it correspond with the replication filed, and that the issue book might be amended by making it correspond with the replication; and that the notice of trial and all other notices should stand, and be deemed good and effectively served.

This order was made upon affidavits stating that the replication served was "by mistake" not a copy of the one filed; and that the issue book was made out incorrectly, omitting a plea of set-off.

On the 2nd November the defendant obtained a summons to rescind the foregoing order, or vary it in part so far as relates to the notice of trial and other notices served.

In support of this application defendant filed several affidavits from which and from others filed by the plaintiff the facts appeared to be that the declaration was served on the 19th October; that the time for pleading expired on the 26th October, that the defendant's attorney, with the apparent view of preventing the plaintiff from getting to trial at the Berlin assizes on the 4th November sent a clerk to the Deputy Clerk of the Crown's office, at Berlin, on the last day of pleading, with instructions not to file the pleas (never indebted, payment and set-off) "till after the hour of three of the clock in the afternoon; that he had sent copies of his pleas to his agents in Toronto to be served by them on the agents of the plaintiff's attorney there, but not to serve them until after three o'clock in the afternoon—the 26th October being on a Saturday; that the plaintiff's attorney was waiting in the Deputy Clerk of the Crown's Office, and as soon as the pleas were filed he filed a replication, and according to the clock in the Office of the Deputy Clerk of the Crown, both were filed before the hour of three in the afternoon; that the defendant's attorney lived at Elora; that the plaintiff's attorney had prepared an issue book, containing, as defendant's pleas, never indebted and payment, on which plaintiff took issue; that plaintiff served that issue book, with notice of trial, and notice for the defendant to appear at the trial before three o'clock on Saturday the 26th October; that the issue book served consequently did not correspond with the pleas filed, the plea of set-off being omitted, nor with the replication filed, as there was no issue on the plea of set-off.

This was stated in the affidavit on which was made the order of the 30th October, in the following words, "that the replication served on the 26th October was not a copy of the one filed."

In fact it appeared probable, as represented in the affidavit of the defendant's attorney, sworn on the 31st October, that the plaintiff's attorney took the step in this cause of serving the notice of trial, notice of examination of defendant, issue, and issue book before the defendant's pleas were filed or served; but it was certain that he made up the issue book, and served it and the notice of trial and other papers speculating on the chance that the defendant would plead the pleas which he (the plaintiff) set out in the issue book.

The reason for this course appeared to be that he had let a day slip by in declaring, and thus incurred the almost certain risk of being thrown over the assizes; and the defendant having pleaded differently from what he anticipated, he applied to amend his issue book, as if it was a mere clerical error in copying.

DRAPER, C. J.—According to the copy of the order of the 30th October, now before me, as well as according to the original summons of the 29th October, on which the order was made, the plaintiff did not ask to amend the issue book by inserting the plea of set-off, though in the affidavit of the plaintiff's attorney, sworn 28th October, he refers—not very distinctly—to the variance between the pleas filed and those set out in the issue book. I am not certain that the plea of payment is not omitted as well as that of set-off. The latter I have no doubt is.

Considering that the true state of facts was not before me when I made the order of 30th October, and that I was acting on an affidavit not conveying the right impression of the actual proceedings; and observing, moreover, that the leave to amend the issue book does not apparently extend to the pleas, but is confined to the replication, I think that order should be rescinded so far as respects the service of the notice of trial, and shall order accordingly. The defendant will then be obliged to move the court above to set aside the verdict, and the whole matter will be reviewed. In order to accomplish this I shall also order that further proceedings be stayed until the fifth day of next term.

Order accordingly.

RUTTAN, ONE, &C., V. AUSTIN.

Bills of Costs—Lapse of time in applying to have same referred—Refusal of Order.

Where several bills of costs were delivered by plaintiff to defendant, the first in January, 1854, and the last in January, 1859, where there were several applications for payment, and a payment made in January, 1860, where an action was commenced in respect of the bills, in August, 1861, and no application made to refer the bills, or any of them till 4th November, 1861, a summons then obtained to refer them to the Master was discharged.

Reed et al. v. *Cotton*, 6 U. C. L. J., 114 upheld.

(November 15, 1861.)

A summons was obtained on 4th November, 1861, to refer plaintiff's bill of cost to the Master of Queen's Bench for taxation, plaintiff to give credit for all payments, &c., master to certify what shall be found due on the bill, &c., and the costs of the reference; plaintiff to be restrained from prosecuting his action

during the reference, and on payment of what might appear due, and costs, further proceedings to be stayed, defendant to have leave to dispute any retainer charged in the bills.

There were eight bills—No. 8 was delivered in January, 1854, when defendant paid £100, leaving a balance of £35 1s. 4d. The other bills were delivered in January, 1859. No objection was made to the bills till January, 1860, when defendant paid £25, saying that was enough. Defendant swore then that plaintiff claimed only £5 additional; this plaintiff however denied, but admitted the receipt of £25. Plaintiff asserted that as to the balance defendant promised to make all right.

Plaintiff had written on 4th August, 1859, requesting a settlement. To this letter there was no answer. He wrote on 9th July, 1861, demanding payment or threatening suit. The suit was brought in August, 1861.

The pleas were,—never indebted—payment—and set off.

The following cases were referred to during the argument:—*Cook* v. *Gillard*, 1 E. & B., 26; *The Queen* v *Eastwood*, 6 Ib., 285; *Read et al.* v. *Cotton*, 6 U. C. J. L., 114; *Robinson* v. *Powell*, 5 M. & W., 479.

DRAPER, C. J.—Considering the lapse of time that the last bills were delivered in January, 1859, that there were several applications to pay; that a payment was made in January, 1860; that an action was commenced in August, 1861, and no application to refer made until this month, I think in accordance with the decision of Hagarty J., in *Read et al.* v. *Cotton*, 6 U. C. L. J., 114, this summons must be discharged.

Summons discharged.

WORTHINGTON v. THOMAS PEDEN AND JOHN PEDEN.

Attachment of debts—Money accruing due on Mortgage—Assignment of Mortgage between order to attach and order to pay—Effect thereof.

On 30th July, 1859, garnishee executed a mortgage to secure the payment of £200 to the judgment debtor, by six equal annual instalments of £33 6s. 8d. each. About a month after the date of the mortgage, garnishee paid to the judment debtor £50 on account of the mortgage. An order was obtained at the instance of plaintiff, before the first instalment fell due, attaching all debts due or accruing due from the garnishee to the judgment debtor, and this on 29th June, 1860, was followed by an order that the garnishee should pay to plaintiff £34 11s. 8d. in the following manner:—£16 13s. 4d. on 30th July, 1861, and £17 18s. 4d. on 30th July, 1862. An application was afterwards made to set aside these orders upon a suggestion that the mortgage had been assigned; but it appearing that the assignment, if any, was made after the attaching order had been served, the application failed.

(Nov. 16, 1861.)

On 29th June, 1860, Logie, County Court Judge, made an order, founded upon an order of McLean, J., made in this cause, that the garnishee should pay to plaintiff £34 11s. 8d., in the following manner:—£16 13s. 4d. on the 30th July, 1861, and £17 18s. 4d. on 30th July, 1862, and in default of payment execution was to issue against garnishee.

The only affidavit referred to in this order was one made by garnishee, who swore that on 30th July, 1859, he executed a mortgage to secure the payment of £200 to the defendant, by six equal annual instalments. That about a month after the date of the mortgage he paid him £50 on account. That the balance remained unpaid, which, as it fell due he was willing to pay to the person lawfully entitled. If £50 were paid nothing would be due until 30th July, 1861, and then only £16 13s. 4d., which was precisely what the judge ordered.

On the 29th October, 1861, Draper, C. J., granted a summons to shew cause why the attaching order, of McLean, J., and the order of the County Court Judge should not be rescinded and the writ of execution against the garnishee's goods set aside, on the ground that the debt had been assigned before the same became due from the garnishee to the defendant on the mortgage, or to the plaintiff by the order, and because the defendant was not served with a copy of the attaching order and summons to appear before the County Court Judge, and because the order was not served on the garnishee until the 12th October, 1861, and therefore must be treated as abandoned or void, not having been drawn up or served within proper time, according the practice, or why the order should not be varied under the circumstances appearing.

Two affidavits were filed, on which this summons was granted; they shewed that the garnishee appeared before the County Court Judge, filing the affidavit already stated. That neither the garnishee nor his attorney then knew, as they have since learned, that the defendant had not been served with the attaching order and summons, and that no person appeared before the County Court Judge on behalf of the defendant.

The garnishee further swore that he had since been notified, (not stating when), and led to believe that the defendant duly assigned the mortgage to one Edward Carter, before the second instalment became due, and that Carter had not any notice of the garnishee summons or order that part of the second instalment was due at the time he made his affidavit, and he apprehended the assignee would take proceedings against him for it; that the plaintiff had issued a writ of execution against his goods, and the sheriff had seized them.

In reply, affidavits were filed suggesting that the assignment was fraudulent, and that the judgment debtor had the control of the mortgage, and that the assignment had never been registered.

DRAPER, C. J.—The debt was properly attached, for all that appears, inasmuch as the attaching order was taken out and served before the first instalment became due.

The garnishee had no ground for disputing it, beyond the payment of the £50 which as was conceded to him, satisfied the first instalment and part of the second.

If the debt was properly attached it was bound in the garnishee's hands, though he was not bound to pay it over to the judgment creditor until served with the order to pay, but he could not pay it to any one else, neither to the defendant, the original mortgagee, nor to any assignee, after the attaching order.

The judgment debtor, the defendant, is, according to the garnishee's last affidavit, residing in Hamilton. If he never was served with the attaching order his affidavit of that fact might have been procured. In the absence of proof to the contrary, I think the presumption is, that as he or his attorney was served. No such objection was raised against the order to pay over.

Then there is no direct proof that the mortgage has been in fact assigned, though if assigned after the attaching order was made and served on the garnishee, the assignment would not avail.

I see no ground to interfere with either the attaching order or the order to pay, least of all with the former, which, according to *Kersch* v. *Coates*, 18 C. B. 757, must be sustained.

Summons discharged with costs.

CHANCERY.

(*Reported by* ALEXANDER GRANT, ESQ., *Barrister-at-Law*)

ATTORNEY-GENERAL v. HILL.

Crown patent—Mistake

Where the provincial government had appropriated and patented as a glebe, a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier, and not returned by the government, the patent was set aside as having issued in error and mistake, but under the circumstances, without costs.

The facts are set forth in the judgment.

Mr. Mowatt, Q. C. and *Mr. Blake*, for relator.

Mr. G. D. Boulton, for defendant.

ESTEN, V. C.—This is an information by the Attorney-General, at the relation of Mr. McKellar, for the purpose of annulling a patent, as issued in error and mistake, by which lot No. 19, in the 9th concession of Vaughan, was appropriated as a glebe, parcel of the rectory, of which the defendant Hill is the incumbent. The other defendants are the Lord Bishop of Toronto as the ordinary, and the Church Diocesan Society as the patrons of the living. The error and mistake under which it is alleged that this patent issued, was, that the government at the time of issuing it, thought the lot in question was vacant, whereas it had been and was then occupied and improved. The report of the case of *Martin* v. *Kennedy*, decided in this court, was agreed to be admitted in evidence of the points there "decided, ruled and set out," and certain evidence taken before a committee of the House of Assembly, on the petition of Martin McKinnon, the occupant of the lot, was also agreed to be received; to which were added some affidavits, filed in support of the present motion, and the answer of the defendants, which, this being a motion for a decree, is of course to be treated as an affidavit. From these data it is abun-

dantly clear that the government never would, without some extraordinary reason, have appropriated as a glebe a lot which had been occupied and improved, much less where the patent fee had been paid upon it, and not been returned. If such then be the facts here, a strong presumption of mistake arises on the part of the government in issuing this patent. Some facts are clearly established by the evidence, namely, that one French, in 1829, applied to purchase lots 17, 18 & 19; also, as I think, that he paid the patent fees on them; that the patent fee for lot 19 was never returned to him: that he transferred his interest in this lot to Martin McKinnon for valuable consideration; and that McKinnon in 1835 had built a house, and cleared and brought under cultivation sixteen acres, and was then in occupation of the lot. That the government should have granted a lot, so circumstanced as a glebe, was totally contrary to their ordinary practice, and the question is, whether it was not done in error and mistake. If the books were consulted, they shewed that French in 1829 applied to purchase lots 17, 18 & 19; that upon the entry of this application was endorsed a memorandum in pencil, to the effect that it had been cancelled, as it appeared that French had applied only to obtain money for his interest as first applicant; that opposite lots 17 and 18 was an entry that "the certificates of payment of patent fees had issued;" and opposite lot 19 an entry in these words: "Application made to purchase by John French." In 1835 an inspection and return was made of this lot. The return was dated 9th April, 1835, and was in these words: "Martin McKinnon, 19, 9th concession Vaughan, has been 14 years in the country—owned land in Caledon—is now cutting staves—purchased from John French—returned as a glebe. James McLean states that he and J. French applied together, 16th April, 1835"

This return of course negatives the idea of McKinnon being in occupation of the lot. The officer never would have stated concerning the occupant of the lot, merely that he was cutting staves on it. There was enough, I think, in these entries to invite enquiry. The memorandum of French's application to purchase was left standing against lot 19, and the inspecting officer had thought it right to mention McKinnon in connexion with this lot, as he had purchased it from French, and he so stated.

The government, however, appear to have considered that as French's application to purchase had been, as appeared from the pencil memorandum, cancelled, and attaching no importance, under these circumstances to the memorandum opposite lot 19, or to McKinnon's purchase from French, and supposing from the return of the inspecting officer that McKinnon was not in the occupation of lot 19, but was merely cutting staves on it, and was probably living in Caledon, concluded that the lot was vacant, and under this impression granted it as a glebe.

In short, the government had reason to think that French had applied to purchase, but that his application had been cancelled, although the memorandum of it still stood against the lot that he had sold to McKinnon, and that McKinnon was cutting staves; but they were ignorant of the fact that McKinnon had occupied and improved, and was then living on the lot.

It is to be observed that French states that he was deprived of 17 & 18, but not 19, and the evidence seems to countenance this, with the exception of the memorandum of cancellation, which appears to include the three lots; for the memorandum of the issue of the certificate of payment of patent fees (which means, I think, payment by others than French) is confined to 17 & 18, and the memorandum of application to purchase is confined to lot 19. I am strongly inclined to think that the Government, although considering French a speculator, left him in possession of lot 19; and that the patent fees of 17 & 18 were returned to him, but not of lot 19, at all events I am satisfied that French was persuaded of his title to lot 19, and *bona fide* transferred his interest in it to McKinnon, who occupied it and improved it, and in 1836, when this patent issued, had done a great deal to it, and was living on it, of which the government were ignorant, but if they had known it, would never have appropriated this lot as a glebe.

I think, therefore, that this patent was issued in error and mistake, and must be declared void, but I give no costs.

I may remark that in the case of *Martin* v. *Kennedy*, it was considered that if the patent fee had been paid and the lot occupied and improved, the government would not appropriate it as a glebe. Mr. Baines in his evidence in this case goes further, and says, that although the patent fee had not been paid, and although the lot had been returned as a glebe, yet, when it had been occupied and improved, it was not the practice to appropriate it for a glebe, but to respect the rights of the occupant, and I am satisfied that he is right. No man was more competent to give testimony. I think the lease taken by McKinnon from Mr. Mayerhoffer in 1841 would not have prejudiced his own claim under the circumstances: much less can it operate to the prejudice of the rights of the government.

Goodhue v. Widdifield.

Mortgage—Usury.

Quære, whether the amount of interest reserved by a mortgage may not be so great as to evidence such a case of oppression as would induce this court to refuse to interfere on behalf of the mortgagee, leaving him to his remedies at law, notwithstanding the repeal of the usury laws.

This was a bill of foreclosure, which had been taken *pro confesso* against the defendant, setting forth the execution of a mortgage by the defendant in favor of the plaintiff, for securing the payment of certain monies, with interest thereon, at the rate of 24 per cent. per annum; and on the cause coming on for hearing.

Mr. Fitzgerald for plaintiff, asked the usual reference to the master at London, to enquire as to incumbrances, and take accounts.

Spragge, V. C.—The question which suggests itself to my mind, has formed the subject of conversation amongst the members of the Court of appeal; the question being, whether a case so gross may not arise as to justify this court in refusing to lend its aid in carrying out the contract between the parties, on the grounds of undue influence and oppression. Before any decree is drawn up, I will take occasion to consult with by brother Esten.

On a subsequent day his honour stated that on consulting with Vice-Chancellor *Esten*, he found that in one case a decree was pronounced in favour of the mortgagee, where the rate of interest reserved was 30 per cent; under these circumstances he made the decree as asked, observing that it may be urged that the legislature intended when they abolished the usury laws, that all the remedies both at law and in equity should be open to the lender.

COUNTY COURT CASES.

In the County Court of the United Counties of Frontenac, Lennox & Addington before his Honour Judge Mackenzie.

McCarthy v. Shaw.

Collector of Taxes avowing for distress, in levying a municipal rate, must show on his avowry that a By-law was passed authorizing the levying and collecting of such rate, or the avowry will be bad.

(January Term, 1862.)

Replevin—for household furniture.

Avowry—That defendant had been duly appointed by the Council of the Corporation of the City of Kingston, to collect certain unpaid taxes, and that there had been delivered to him, (the defendant) the roll for the purpose of collecting such unpaid taxes, and he at the said time, when, &c., held the Collector's Roll for St. Lawrence Ward, of the said city, for the year of our Lord, 1854, duly made out by the clerk of the municipality of the said city, and containing the names of the parties assessed, and the assessed amount of the ratable, real and personal property of such assessed parties, for which might be assessed in the said municipality, as ascertained after the final reversion of the assessment for the said ward in 1854, containing the amounts for which each respective party is chargeable for the taxes or rates, ordered by the said Council to be levied in the said year, under, and in accordance with, the provisions of the assessment laws in force in Upper Canada in 1854, calculated and set down opposite the lot of land. The defendant averring that it was his duty to collect from the parties, by law liable to pay the same taxes appearing on the the said roll; and that on the said roll a certain lot of land and premises situate in the said ward, and now and at the said time when, &c., in the occupation of the plaintiff, was set down and

assessed to one John Johnson, as owner, (he being then the occupant of the same) as assessed at the annual value of £65, and the rate ordered to be levied by the said Council for the year 1854, in respect thereof, was three shillings in the pound, for all purposes or £9 15s. taxes for the said year 1854, payable in respect of the said lot of land, rated and assessed against the said John Johnson as aforesaid. The defendant averred further in his avowry that payment of the said sum of £9 15s. taxes was duly demanded as required by law, and that the same so being due and unpaid, and the plaintiff at the said time when &c., being the occupant of the said lot of land, and then having in his possession thereon the goods in the declaration mentioned, and 14 days having elapsed after payment was demanded, without the same having been paid, he, the defendant, in performance of his duty, justly took the goods in the declaration mentioned, the same being then in the possession of the plaintiff on the said premises, as he lawfully might, as for and in the name of a distress for the taxes aforesaid, so imposed and remaining due and unpaid.

The plaintiff demurred to the avowry.—and among other exceeptions taken to it, took the exception that the avowry does not show that a By-law was passed authorizing the levying and collecting of the rates and taxes mentioned in the avowry.

A. S. Kirpatrick for demurrer.

Agnew, Contra.

MACKENZIE, Co. J.,—The case of *Haacke* v. *Marr*, 8 U. C. C. P. 441; the 28 section of the Act, respecting the Municipal Institutions of Upper Canada, and the 12th section of the Consolidated Assessment Act of Upper Canada, show very pointedly that the avowry is bad for not showing that a By-law was passed by the council of the corporation of the city of Kingston, authorizing the levying and collecting the rate of three shillings in the pound upon the assessed value of property in the Municipality of the City of Kingston for the year 1854.

The Corporation of the City of Kingston could not set or fix a rate of three shillings in the pound on the assessed value of the property within the city, except under the authority of a By-law.

It is not pretended in the avowry that such a By-law was passed in 1854. Consequently the defendant has not shewn a legal cause or excuse for seizing the property of the plaintiff.

On looking at the case of *Haacke* v. *Marr*, and the sections of the Assessment and Municipal Acts to which I have already referred in connection with the 89th section of the Assessment Act, it will be seen that the Clerk of the Municipality cannot lawfully make out a Collector's Roll until the rate of so much in the pound, or in the dollar, shall be fixed and settled by a by-law duly passed in that behalf.

If a collector of taxes choose to proceed to collect taxes by distress and sale of goods, without knowing whether a by-law has been passed by the Council of the Municipality by which he is employed, settling a rate and authorizing his roll or not, he proceeds at his own peril.

If a by-law has been passed, all well—if it should turn out that no by-law had been passed, he, the Collector, would make himself liable as a trespasser, if he proceed to sell goods by distress for non-payment of taxes.

The Roll is the Collectors warrant. The by-law is the authority upon which the roll rests. The Collector should take good care that such authority exists before he makes a seizure under his collection roll.

The distinction taken in the case of *Haacke* v. *Marr*, between a justification to an action of trespass and an avowry in replevin, is as applicable to the present as it was to that case.

In trespass "it is sufficient for the defendant to allege in his plea, matter to excuse the trespass, but in replevin the avowant is in the nature of a plaintiff, for he is to have a return, and therefore the avowry, which is in the nature of a declaration, must show a good title, *in omnibus*, and contain sufficient matter to entitle him to a return."

In the present action of replevin, the defendant in his avowry, to make out a good title to a return of the goods, should show that he received a Collector's Roll from the Corporation of the city of Kingston, for the purpose of collecting the taxes under consideration, and that such a collection roll was made out and founded upon a by-law passed by the Council of the Corporation, authorising the levying and collecting of the rate in the avowry mentioned.

In the case of *Mace* v. *Ruttan*, decided in this court in last October Term, 7 U. C. L. J. 298; a plea of justification to an action of trespass against a Collector of taxes contained, properly, an averment that the Clerk of the Council of the Municipality of Loughborough made out a Collector's Roll under the authority of a by-law of the Council in that behalf passed.

The present avowry is clearly insufficient by reason of its not showing that such a by-law was passed by the Council of the Corporation of Kingston, in 1854.

As the judgment of the Court must be for the plaintiff on the demurrer to the avowry, it becomes unnecessary to examine the other points presented on the record.

Judgment for the plaintiff, on the demurrer to the avowry, with leave to defendant to amend in ten days.

In the County Court of the County of Wellington, before his Honor James MACDONALD.

KELLY V. GAFNEY.

Gambling debt—Division Court jurisdiction—Certificate for C. C. Costs.

Plaintiff sought to recover $60 deposited with defendant, as a stakeholder, to await the result of the running of plaintiff's horse against time. A verdict was rendered for the plaintiff, and his counsel moved for a certificate for C. C. costs, contending that the Division Court had no jurisdiction.

Held, that case was within the jurisdiction of the Division Court, and certificate refused.

The plaintiff brought an action in the County Court to recover $60 paid to defendant as a stakeholder, to abide the result at the running of plaintiff's horse against time. The bet was between plaintiff and one Morgan, $100 aside; $70 was put up by each, and a side bet with another person for $30.

The plaintiff recovered, having given defendant notice not to pay over to the other party, and having demanded his deposit before the time for the running of plaintiff's horse had elapsed.

The plaintiff's counsel moved for a certificate for County Court costs, on the ground that the Division Courts have no jurisdiction in such a case, it being contended that the plaintiff's claim is "a gambling debt," within the Division Court Act, which precludes gambling debts from being recovered in such courts.

MACDONALD, Co. J.—I am clearly of opinion, this is not a gambling debt.

There is nothing in the Division Court Act to shew what was thereby intended to be included by the term "gambling debt."

The term is used as if to express something known in legal phraseology. I cannot read the act as if the legislature had used the words in a more extended sense, than implied expressly by the words themselves. I cannot extend them to mean any claim connected with, or arising out of a gambling transaction. The words must be taken to apply to some particular kind of debt known at common law, or by the language of the statute as a gambling debt. To determine what is meant we should ask ourselves, what debts in connection with gambling transactions might be recovered in the Division Court, not recoverable in any court, but for the prohibition contained in the Division Court Act?

The statute of Anne, c. 14, sec. 1, enacts that notes, &c., or other securities for money, &c., won by gambling or playing at cards, &c., or other game, or for repaying money knowingly lent for such gambling, betting, &c., or lost at the time of such play, &c., shall be void. The second section declares that any person who shall loose at a sitting, the sum of £10, by playing, &c., may within three months recover the same by action; or any other person may sue and recover from the winner treble the value with costs.

Now, at common law gambling was lawful, although it was an indictable offence to keep a *common gambling house;* and since the statutes an action lies to recover a less sum than £10 fairly won at play—(*Bulling* v. *Frost*, 1 Esp. 235, and Chitty on contracts, p. 713).

I am of opinion that the legislature meant only to exclude from the Division Courts, the recovery of such debts connected with gambling, as would (if the amounts were beyond the limits fixed in the statute, as the least sum to be affected by them) not be

recoverable at all in any court, on account of the statutes affecting gambling debts.

I am further of opinion that the plaintiff's claim in this case cannot be called "a gambling debt," for the defendant is a mere stakeholder; and the plaintiff's right to the money claimed does not depend on the result of any race or game; the money in the defendant's hands was always the plaintiff's from the time of the deposit, and subject to the plaintiff's own orders, as proved by the result of the case in favor of the plaintiff, the law having determined, that notwithstanding the terms of the deposit, it required the plaintiff's own act only, by commencing the action before the money was paid over by the defendant, to enable the plaintiff to recover.

I think the jurisdiction of the Division Court is clear. I have never had any doubts about it, and have sustained suits in the Division Courts for just such claims, in one case where the dispute arose after the race was run, but before the money was paid over.

Under the circumstances I cannot grant a certificate for County Court costs.

I refer to *Warner* v. *Hickman*, 5 C. B., 271; *Moore* v. *Durden*, 2 Ex., 22; *Martin* v. *Hewson*, 10 Ex., 572.

Certificate refused.

UNITED STATES LAW REPORTS.

NEW YORK COMMON PLEAS.

HENRY RASQUIN v. THE KNICKERBOCKER STAGE COMPANY.

A settlement privately effected between the parties with the design of preventing the attorney in the cause from obtaining his costs, will not be recognised by the Court; but the Attorney, on application to the Court, will be allowed to go on and collect the costs in the action, that he may thereby secure himself.

(July, 1861.)

The opinion of the Court was delivered by

DALY, J.—This was a motion on the part of the defendant for an order discontinuing the suit on the ground that it had been settled between the plaintiff and the defendant. The action was brought by the plaintiff, to recover for the loss of service, and the expense he had been put to, in consequence of an injury sustained by his son, arising from the negligence of the defendants' servants, in which the plaintiff laid his damages at two thousand dollars. The cause had been at issue for eleven months, during which period it had been twice reached and was ready for trial on the part of the plaintiff, but was put off on the defendants' motion. A settlement was then effected between the President of the Stage Company and the plaintiff, without the knowledge of the plaintiff's attorney, by the defendants paying to the plaintiff three hundred and fifty dollars, and the plaintiff executing and delivering to the defendants, a written instrument, by which he discharged them from all claims growing out of the accident, declaring that it was the express understanding that they were not to pay any more costs and charges of any kind than were embraced in the above named sum. The next day after this settlement was effected, the plaintiff's attorney wrote to his client, informing him that the cause would be on the day calendar for trial, on the following Monday, and requesting him to call for subpœnas for his witnesses, to which the plaintiff answered by letter, that his means did not allow him to continue the suit, and directing his attorney to let it rest. Though the plaintiff's attorney did not notify the defendants that they had a claim for costs, and that they were not to settle or compromise with the plaintiff, Mr. Clegg, one of the attorneys, swears, that he was informed and believes that the defendants knew of the right of the attorney to the costs of the action, and that they combined with the plaintiff to defraud them out of their costs; that they knew that the plaintiff was totally irresponsible, and that they made the first overtures to him, and induced him to act without the knowledge of the attorney, and in fraud of their right; and as this is not denied on the part of the defendants, nor on the part of the president, by whom the settlement was made, it must be taken to be true.

Where a settlement is privately effected between the parties, with the design of preventing the attorney from obtaining his costs, the Court will, notwithstanding the settlement, allow the attorney to go on and collect the costs in the action, that he may thereby secure himself. *The People* v. *Hardenburgh*, 8 Johns., 259; *Pinder* v. *Morris*, 1 Car., 165. *Read* v. *Dupper*, 6 T. R., 361; *Chapman* v. *How.*, 1 Taunt., 341.

That there was such a combination in the case is, as I have said, not denied,; but the defendants insist that before verdict or judgment the attorney can have no lien, except upon money paid into Court; that there must be something to which his lien will attach, and that that does not exist until the liability of the defendant or of the plaintiff is ascertained by verdict or by the entry of judgment. They claim the rule to be that if, after verdict rendered or judgment entered, the parties settle in fraud of the attorney's lien, the Court will allow him to enforce the judgment to the extent of the costs included in it, and even then only where he has given notice to the defendant of his lien. The case of *Swain* v. *Senate*, 5 Bos. & Pul., 99, is expressly to the contrary. In that case there was a conclusive settlement before judgment, and the attorney had given no notice of his claim for costs; yet he was allowed to enter judgment, and issue a *scire facias* against the bail. The Court said that it was a fraudulent attempt to deprive the attorney of his costs, and that therefore the plaintiff's attorney ought to be at liberty to proceed for his costs, and to recover nominal damages.

We are referred to the case of *ex parte Harte*, 1 Barn. & Adolph. 462, to shew that where the action is for unliquidated damages, the parties may settle, even though the attorney has given notice to the defendant not to compromise or settle the suit without his consent, and in which the Court refused to aid the attorney. The Court did notice that feature as distinguishing it from the preceding cases, which were for the recovery of a liquidated amount, but they also put their decision upon the ground that there was no collusion in that case. Where there is collusion, it can make no difference whether the damages claimed are liquidated or not. The power of the Court is not limited to cases where the action is brought for a liquidated sum, but it interposes upon the general principle that it is equitable and right to protect the attorney against a dishonest combination between the parties to deprive him of the fruits of his labor and services. The plaintiff's attorney had a right to go on and enter up judgment for the costs, and the motion of the defendants for an order discontinuing the action was properly denied.

A. R. Lawrence, Jr., of counsel for appellant.

Clegg & Semler, for respondent.

SUPREME COURT OF PENNSYLVANIA.

MUNN & BARTON v. THE MAYOR, &c., OF PITTSBURG.

A city has a right to connect its sewers and drainage with any natural channel for the flow of water, without incurring a liability to keep that channel open to its mouth. Nor does it change the right or responsibility if the State or the lot owners have made an artificial and covered substitute for the natural channel.

The fact that the city has occasionally made repairs on the sewer substituted by other parties for the natural channel, is not evidence tending to shew that the city has adopted it as its own.

The city is not liable in such case for damage done to lot owners by the falling in of the sewer thus substituted for the natural channel, unless the damage has been caused by the negligence of the city's agents in connecting their own sewer with the former, or in keeping their own sewer in order.

Error to the District Court of Alleghany County.

The facts of the case appear sufficiently in the judgment of the Court.

Gilmore and *Marshall*, for plaintiff's in error.

Kuhn and *Slagle*, for defendant in error.

The opinion of the Court was delivered at Pittsburg, October 31st 1861.

STRONG, J.—In this case the District Court, on the trial, ordered a non-suit to be entered, being of opinion that the plaintiffs had given no such evidence as in law was sufficient to maintain the action. It was an action of trespass upon the case to recover damages alleged to have been sustained by the plaintiffs in consequence of the breaking and falling in of a sewer, by which their mill and manufactory had been thrown down. The fall of the sewer was averred to have been caused by the wrongful act of the defendants, or to have happened in consequence of their negligence. It alleged, and so the evidence submitted proved, that the

broken sewer was not in any highway, or on any land belonging to, or in possession of the defendants, but on a lot of the plaintiffs.

It was constructed thirty years ago by the Commonwealth of Pennsylvania to carry the water of a small creek called "Sukes Run," and to prevent its flowing into the State canal, which, in places occupied the bed of the stream. It was a substitute for the run, located near where the old run was, and, probably, at the place where it broke, in the old channel. Whether this was so or not is however immaterial. There was no contradiction in the evidence that it was a substitute for the run, and that the water of the run passed through it. In 1849 the defendants caused another sewer to be constructed along Pennsylvania avenue, in the city of Pittsburgh, to the old sewer constructed by the Commonwealth, formed a connection with it, and thus discharged the water of the avenue and other streets throught it into the Monongahely river. The junction of the two sewers is on the lots now owned by the plaintiffs, and they were covered with earth in places to the depth of fifteen feet. In 1838 the plaintiffs became the purchasers of the lot where the State sewer commenced, and through which it passed and erected their mill directly over it. In July, 1859, the old sewer broke under the mill, and as a consequence the mill itself was injured. Such are the prominent facts of the case as they appeared in evidence. Other facts which are considered of consequence by the plaintiff's in error, will be noticed hereafter. Now, it is clear that on such a state of facts the action could not not be sustained against the defendants unless they were guilty of such negligence, in not keeping the State sewer in repair, or unless the connection of their own Sewer with it was a wrongful act and the injury was caused by that connection. Whether they were guilty of such negligence, depends upon the question whether it was their duty to maintain the State sewer in a safe condition, for if it was not, their omission to do it was no wrong to the plaintiffs. It is not easy to see, however, how it can be maintained that such was their duty. The sewer was not built by them, and it was not upon any lands of which they had the control. It was the property of the Commonwealth, or of the Pennsylvania Railroad Company, to whom the Commonwealth sold, and it was upon ground belonging to private owners, the plaintiffs and others, ground upon which the defendants had no right to enter. It is argued that by connecting their own sewer with it, the defendants adopted it as their own, and again that inasmuch as it was shown that on several occasions they had made some slight repairs to it, they may be considered as having assumed the obligation to maintain it. The argument loses sight of the fact that the sewer is the substitute of "Sukes run," is in fact "Sukes run" itself. Into that run the city had a right to pour its sewers and drains, without being under any obligation to keep it clear to its mouth, on the private property of all the lot holders through which it flowed. This right it could not loose by the fact that the lot owners, or some one else had conducted the run through a covered passage way. Conveying the water of their own sewer into the old State sewer was, therefore, but the exercise of a right burdened with no obligation. It no more imposed upon them the duty to maintain the old sewer than their conducting the water into the run, before the Commonwealth interfered with it, would have compelled them ever after to keep the run clear to its mouth.

Nor can the repairs of the old sewer, occasionally made by the defendants, be regarded as any evidence of their voluntary assumption of the duty of maintaining it. It is conceded that when there has been a dedication of a highway to public use, a municipal corporation may become bound to repair by adopting it, and that making repairs is evidence of adoption. The cases cited by the plaintiffs in error prove this, but they prove no more. In such cases there is not only a right to make the repairs, but they can only be accounted for on the supposition that there exists a liability to make them, and they work an estoppel in pais against the owner of the land. They are cases of dedication. But when the repairs made have been rendered necessary to the enjoyment of a right without any obligation to make them; when a channel which the corporation may use, without any duty to maintain it, has been appropriated and exposed to obstructions, and has thereby become dangerous to the sewerage which the corporation has constructed, it would be going very far to hold that work done to guard against the danger was evidence of obligation to do it. The present is not a case of dedication. The defendants have no right of entry on the private property of the lot holders, for the purpose of repairs, and probably the plaintiffs, themselves, would stoutly deny their right, if it became necessary to take down the mill in order to keep up the sewer. Under the circumstances of this case the repairs made were no evidence of a duty of the city to maintain the sewer built by the Commonwealth.

Then was there evidence that the old sewer was broken in conseqence of a wrongful connection of the new sewer with it? That the defendants had a right to make a connection, and conduct the water from their sewer into it we have already said, and we discover no evidence that the mode of connection was negligent or unskilful. It is urged that the diameter of the city sewer was three inches greater than the old; and that it brought into it an additional quantity of water. These facts it is contended tended to establish a liability of the defendants for damages resulting from the fall of the old sewer. It was proved, however, and there was no conflict of testimony, that the old sewer would vent more water than the city sewer could bring into it, in consequence of its greater inclination. Nor was there a spark of evidence that it broke in consequence of being gorged with water. The proof was the reverse. Nor was it proved that any injury was or could be sustained by it in consequence of the alleged fact that the city sewer increased the flow of water. This part of the case has not been relied on in the argument, and it could not be. There was no evidence to sustain it. The case has been rested upon the assumption that it was the duty of the defendants to maintain and keep safe the sewer built by the Commonwealth, a position which we have shown untenable.

The Court then was right in holding that there was no evidence sufficient in law to maintain the action, and in directing a nonsuit. The complaint that the constitutional right of trial by jury has been violated, is made without due consideration. The province of a jury has always been to determine facts. What is the law applicable to those facts has always been a question for the Court. In ordering the non-suit, the Court conceded all the facts which the jury could have found, and simply declared that under the law as applicable to them, there was no liability on the part of the defendants.

The judgment is affirmed.

LOVE & SON v. BROWN, BROTHERS & CO.

Time given to the endorser of a note, or a composition accepted from him by the holder, does not discharge the maker; yet to the extent to which the endorser pays the holder, the maker of accommodation paper is discharged.

Error to District Court of Philadelphia Co. Opinion by

WOODWARD, J.—The acceptor of a bill of exchange and the drawer of a negotiable note stand as principal debtors, and after endorsement, the endorsers stand as sureties. As between themselves, the payee may be, after negotiation of the paper, the principal debtor, and the maker the surety. This is always the case as between an accommodation drawer and his payee, but in the hands of a third party, the paper is, as to him, just that which it imports to be on the face of it. It follows, of course, that the time given to the endorser, or a composition accepted from him by the holder, does not discharge the drawer, since a principal debtor is not discharged by the indulgence shown to his surety. Yet to the extent to which the endorser pays to the holder, the drawer of accommodation paper is discharged, else part of the debt would be collected twice. These principles, sustained abundantly by the authorities cited in the argument, entitled the plaintiffs below to a judgment for the sums of the notes sued, less whatever they had received from Hillborn, the endorser. This is stated in the affidavit as twenty per cent., *or thereabouts*, which is too indefinite for a good affidavit of defence; but, as on the arguments before us, counsel consented to a credit of twenty per cent., we will affirm the judgment for the balance, directing the court below to ascertain the amount by deducting the twenty per cent., as of the date of the payment if readily ascertainable, and if not, then as the date of the judgment.

GENERAL CORRESPONDENCE.

Municipal law—Town—Mayor—Reeve.

To the Editors of the Law Journal.

Gentlemen,—A question has lately arisen in this town, the decision of which may be of practical benefit to the public, and I therefore venture to trouble you with it.

At the meeting for the organisation of the Town Council for this year, the Mayor of the town was elected Reeve. The question arises is the Mayor of a town eligible for the office of Reeve?

By replying to this query, you will oblige

Yours, &c., Lex.

St. Catharines, Jan. 21, 1862.

[In our opinion, the Mayor of a town not separated from the county in which situate, is not eligible to be elected Reeve thereof.

We ground this opinion upon a careful perusal of secs. 66 120, 135, 144 & 147 of the Municipal Act.

It is provided by sec. 66, subsec. 2, that "The Council of every town shall consist of the Mayor, who shall be the head thereof, *and of three Councillors* for every ward, &c.; one of the *Councillors* to be elected by the Council to be Reeve of the town."

It seems to us, under this clause, that the Mayor is not a Councillor within the meaning of it.

This opinion is strengthened by sec. 144 of the Act, which provides that "In case of the death or absence of the head of a Town Council (in other words, the Mayor), the *Reeve* shall preside,"—intending, as we think, that the Reeve and Mayor shall not be one and the same person.

Though the Mayor of a Town Council is for many purposes a member, it appears to us that he is not such a member as is intended by sec. 135, read in connexion with the other sections of the Act to which we have referred.

We know of no decision on the point.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

V. C. W. Gardner v. Stevens. *Dec.* 10.

Will—Construction—Absolute interest.

Leaseholds were bequeathed to executors in trust for A. & B. for their use and benefit until A. is 25 years old, and in case A. & B. should die before A. attains 25, then the leaseholds shall be equally divided between C. D. & E., A. attained 25.

Held, that A. & B. become absolutely entitled in moieties to the leaseholds.

S. C. Haswell v. Haswell. *Nov.* 22, 26.

Power of appointment—Extinguishment of—Power in gross.

Settlement of money upon trust to pay the income to a husband until his insolvency or death, then to wife for her life; and after the determination of these trusts, for the children as the survivor of them (husband and wife) should appoint; and in default of appointment after the several diseases of them, or the sooner determination of the interest limited to them, upon trust for the children and issue. The husband having become insolvent before the death of his wife.

Held, that although the power of appointment was given to the survivor, yet there being a clear indication that the power was to be exercised while the interest of the husband or wife continued, upon the death of the wife—the husband's interest having previously determined—the power was extinguished, and the fund became divisible.

V. C. S. *Re* Ryan's Settlement. *Dec.* 14.

Vesting order—Settled fund—Right to capital vested in husband.

A sum of £500 stood settled on the trusts of a marriage settlement. The trustees were dead, there were no children, the wife was fifty eight years old, and had assigned all her interest to her husband, who was one of the *cestui que trusts*. On the petition of husband and wife, the court ordered that the right to transfer might vest in the husband, and that he might transfer to himself.

V. C. S. Courtenay v. Wright. *Nov.* 6, *Dec.* 6.

Debtor and Creditor—Debtor's right to securities on payment—Grantor and Grantee of annuity.

Where the relation of debtor and creditor subsists (the debtor and creditor in this case being grantor and grantee of a life annuity) and the true construction of the instruments, and the evidence of the real nature of the transaction shews that a policy of assurance was effected by the creditor as an indemnity, if the debtor substantially bears the expense of that security, he is entitled on a principle of natural equity to have it delivered up to him when he pays the debt, which it was directly or indirectly effected to secure.

L. C. Maclachlan v. Tait. *Nov.* 23, 26.

Will—Construction—Vesting.

Devise to trustee for testator's wife for life, remainder for E. and S. for their lives, and, if either should die without issue, for the survivor for life; but if either should leave issue, then one moiety for the children of E., and one moiety for the children of S., and their respective heirs, executors, administrators, as tenants in common, "the said children to become beneficially interested on the death of their respective parents.

Held, that the period of vesting in the children was at the death of the testator, and not at the death of E. or S.

V. C. K. *In re* Wrangham's Trust. *Dec.* 14.

Will—Construction—Contingency—Order for maintenance.

A testator gave the dividends of certain specific stock to his daughter for her separate use, and after her decease the principal to her child or children equally on their attaining 21, with a gift of the dividends to the husband of his daughter, in case he survived her; but should she die without leaving any issue, then, after the decease of her husband, to the testator's son absolutely. The testator's daughter predeceased him, leaving one child, a daughter, who survived her and her father, and died under 21, an order having been made for a guardian and maintenance. On the question whether such child took a vested interest in the fund,

Held, that she did not, and on her death under 21, the fund went over to the testator's son.

L. C. Jenner v. Jenner.

Undue influence—Parent and child—Setting aside family settlement.

Bill by a tenant in tail against his father to set aside a re-settlement of the family estates, by which the estate tail had been converted into an estate for life—affirming the decision of Stuart, V. C., dismissed with costs.

The father having gained no pecuniary advantage by the re-settlement, which was in itself reasonable, it would not be set aside on the ground of parental influence, or because the son had not a separate solicitor.

L. C. BOELON v. DUNBAR. *Nov.* 8, 9.

Will—Construction—"Remainder of my money and effects"—Reversionary Interest—Costs.

An officer while returning to England, made his will, by which he gave two legacies of £10, and directed his portmanteau, &c., to be sent to his father, and then as follows:—"I beg that the remainder of my money and effects be expended in purchasing a suitable present for my godson," naming him. The testator was then, and at his death, entitled to reversionary interests in two considerable sums of stock.

Held, that the stock did not pass by this gift to the testator's godson.

The appellant having failed in his appeal ordered to pay costs.

M.R. NORMAN v. KYNASTON. *Nov.* 10, 12.

Will—Construction—Absolute Gift—Revocation.

A testatrix by her will desired that all her fortune should be divided between R. N. and A. K.

By a codicil, after stating that A. K. was dead, she expressed her desire that her fortune should be divided between R. N. and T. K., adding these words, "for the use of their children, and when they come of age to have settled upon them, share and share alike."

R. N. died after the testatrix, never having had any children.

Held, that the absolute gift of the moiety to him was not revoked; it was only limited to the extent that a beneficial interest was given to his children which afterwards failed.

V. C. S. BLAND v. MACCULLOUGH. *Nov.* 8.

Gift—Inter vivos.

A. from time to time purchased debentures, amounting altogether in value to between £2000 and £3000, and deposited them with B., who lived with him as his wife. As they were purchased B. received the stockholder's receipts. She cut off the Coupons as they were wanted, and accompanied A. to receive the dividends. By the evidence it appeared that before purchasing the debentures A. had promised them to B., and had said she must keep them; and that subsequently he had frequently alluded to them as her property. A. bequeathed £3000 to B. during her life and widowhood, and £3000 for her daughter by him.

Held, that there was a good gift *inter vivos*.

V. C. W. RE THE ERA ASSURANCE SOCIETY. *Nov.* 8, 15.

WILLIAM'S CASE.

THE ANCHOR ASSURANCE COMPANY'S CASE.

Joint Stock Company—Amalgamation—Illegality—Liabilities—assumed by purchasing company.

In the absence of any special power for that purpose in their deeds of settlement an amalgamation between two joint stock companies is *ultra vires* and invalid, and the obligations and liabilities arising out of such attempted amalgamation and assured by the directors of the purchasing company, cannot be enforced against the shareholders of such company.

M. R. GOVER v. DAVIS. *Nov.* 19.

Will—Construction—"Money,"—Reversionary interest in stock—General words not restricted by words of enumeration.

A testator by his will gave as follows:—"To my wife I hereby bequeath the whole of my pay, balance of pay, clothing, balance of clothing, money that may be now due or may become due to me at my decease; also the whole of my property and effects—that is to say, my box, clothes, bedding, &c. &c., I bequeath to my wife." At the time of his death the testator was entitled to certain reversionary interests in certain sums of stock.

Held, that the words under the *videlicet* did not restrict the general words which preceded them, and that the stock in question passed by the will.

V. C. S. QUINN v. RATCLIFF. *Nov.* 22.

Practice—Affidavit as to documents—Evidence of title.

Defendants by their answer stated that certain documents made out their title, and did not shew any title in the plaintiff.

Held, that the defendant must make the common affidavit of documents in their possession, stating whether any and which of them related to the plaintiff's pedigree.

V. C. W. APPLIN v. CATES. *Nov.* 12.

Debtor and creditor—Assignment of debt—Costs.

A. being indebted to B., a letter of license was granted to him upon condition of paying off the debt by monthly instalments. B. subsequently assigned the debt to C., who served A. with notice of the assignment and claimed from him an assignment of the instalments.

A. however was informed by B. that the assignment was disputed, and that if the instalments were not paid to him (B.) as before, the letter of license would be revoked.

A. thereupon declined to pay C. until a bill had been filed and an injunction obtained.

Held, that A. was justified in withholding payment from C. until the injunction had been obtained, and that he was entitled to retain his costs of suit out of the future instalments before payment to C.

V. C. W. *Nov.* 14, 16.

COTTAM v. THE EASTERN COUNTIES RAILWAY AND OTHERS.

Vendor and purchaser—Invalid transfer—Notice—Forged signature.

Trust monies standing in the names of three trustees were invested in railway debentures under the authority of the trust deed. These debentures were subsequently transferred to a purchaser for value by one of the three trustees, who forged the signatures of his co-trustees to the instrument purporting to effect the transfer, and absconded with the proceds.

Held, that the purchaser who had taken the transfer with notice of the trust, and without inquiring into the circumstances attending the alleged signatures, could not insist upon his purchase as against the co-trustees, who were entitled to have such forged transfer cancelled.

L. C. BOWSER v. MACCLEAN.

Demurrer—Pleading—Averment of Title—Jurisdiction—Relief in Equity against Trespass.

B. was seized of Y. estate, which was customary freehold of a certain manor, the surface being demised. The lord demised the coal mines within the manor to M., who was also working the coal mines of an adjoining estate Z. Bill by B. alleging these facts; and also that M. had sunk a shaft on a part of the lord's land other than Y., and conveyed coals from Z. by and underground tramroad through Y. for the purpose of drawing such coals to the surface by the said shaft.

Demurrer, upon the grounds—1st of want of averment of title or possession; 2nd want of averment of injury; and 3rd of want of jurisdiction in the Court.—Overruled.

V. C. K. DAY v. BARNARD. *Dec.* 7.

Will—Construction—"Unmarried."

A testatrix bequeaths personal estate to trustees in trust for such persons as R., a single woman, should by will appoint, and in default for such persons as should at the time of the death of R. be entitled to her personal estate under the statutes of distribution, as if she had died intestate and unmarried. R. married, had eight children, and survived her husband, dying a lunatic and never having exercised the power of appointment. Upon the question whether the word "unmarried" under the circumstances, signified R. dying a *femme sole*, or simply not having a husband at the time of her death.

Held, that the latter sense was that in which the testatrix intended to use the word.

V. C. W. GIBBS v. LAWRENCE. *Nov.* 20.

Will—Construction—"Goods chattels and effects."

A testator gave all his household furniture, plate, linen, china, pictures, and other the goods, chattels, and effects which should be in, upon, or about his dwelling house and premises.

Held, that bank notes and gold did not pass under this bequest.

M. R. LYWOOD v. WARWICK. *Nov.* 23. 24.

Will—Construction—"Issue Male"—Males claiming through females excluded.

Gift of stock to A. for life, and after his death unto and amongst his issue male.

Held, that the words "issue Male" meant "Issue male claiming through males" and that males claiming through females were excluded.

COMMON LAW.

EX. LEGH v. LILLIE. *Nov.* 9.

Lease—Covenant to pay increased rent—Pleading.

Where in a lease there was a covenant that straw, &c., should not be carried off the farm without the consent of the plaintiff (the lessor), unless an increased rent of £10 for every ton &c., so carried off should be paid to the plaintiff.

Held, that a declaration upon this covenant, which alleged that straw, &c. was taken off the farm, but did not allege that the increased rent was not paid, was bad.

C. C. R. REG. v. GEORGE OLIVER. *Nov.* 10.

Common Assault—Verdict of—Indictment for inflicting grievous bodily harm—Arrest of Judgment.

Where a prisoner was found guilty of a common assault upon an indictment for inflicting grievous bodily harm, and actual bodily harm, the conviction was held good.

C. C. R. REG. v. HENRY SPARROW. *Nov.* 10.

Assault with grievous bodily harm—Common Assault—Verdict of "aggravated assault"—Malice.

Upon an indictment containing counts for assaulting and maliciously inflicting grievous bodily harm, and a count for a common assault, after evidence of grievous injuries inflicted by the prisoner, the judge told the jury there was evidence to go to them of grievous bodily harm; and that the question of whether the prisoner intended to inflict grievous bodily harm did not arise. The jury found the prisoner guilty of "an aggravated assault" without premeditation, under the influence of passion.

Held, that the assault was intentional in the understanding of the law; that upon the facts the jury were justified in finding the defendant guilty of an assault with grievous bodily harm; and that the prisoner was properly convicted of that offence.

C. C. R. REG. v. HOLT. *Nov.* 10.

False pretences—Evidence of an obtaining money not charged—Inadmissible—Intent.

Upon an indictment for obtaining money from H. by false pretences, it appeared that the defendant was employed to take orders for goods, but had no authority to receive the price; and that eleven days after he was so employed he obtained the money from H, by representing that he was authorized by his employer to receive it for goods delivered in pursuance of an order which the defendant had taken. Evidence of an obtaining by a similar representation from another person, within a few days of the time when the monies were obtained from H, not charged in the indictment, was tendered for the prosecution to prove the intent; and after objection, admitted.

Held, that the evidence objected to was inadmissible.

C. C. R. REG. v. JAMES TONGUE. *Nov.* 10.

Embezzlement as servant—Secretary of money club—Suing on a note by direction of a club and appropriating proceeds—Isolated employment to receive money.

The prisoner, being the secretary of a money club regulated by rules, which, as well as the practice of the club, were stated in the case, was directed by the club to sue upon a joint promissory note, the property of the club, or get better security; and the note was handed to him by W., the Treasurer, who was not a member of the club, and who, at the same time, desired that his name should not be used in legal proceedings. The prisoner indorsed W's name on the note, employed an attorney who issued a writ, and in consequence of the action money was paid to the prisoner by one of the joint makers, which he fraudulently withheld from the club and appropriated.

The duties of the prisoner stated in the rules of the club, comprised duties cognate to that of receiving money for the club, but not expressly that duty.

Held, (Crampton, J., *dubitante*), that the prisoner had received the money as servant for the use of the club, and that he was properly convicted of embezzlement.

Held, also, that the employment to receive money was sufficient, though receiving money was not the prisoners usual employment, and it was the only instance in which he was so employed.

C. P. EVANS v. REES. *Nov.* 17.

Costs—Slander.

In an action of slander in which the plaintiff gets less than 40s. damages, the judge cannot certify to give him more costs than damages, the 21 James 1, c. 16, s. 6, not being repealed by the 8 & 4 Vict., c. 24.

C. P. PARIS v. LEVY. *Nov.* 16.

Libel—Comment on handbill—Publication in writing of oral comment on handbill.

If an oral criticism be made on the contents of a handbill, and that oral criticism be published in a newspaper, in an action against the proprietor of the newspaper for a libel for so publishing, it is for the jury to say whether the criticism was fair and reasonable, and not reflecting on the plaintiff's private character. If the action be for publishing an article in the newspaper reflecting on the tendency of the contents of the handbill, the same question as above is for the jury as to the criticism in the article.

Q. B. SAUNDERS v. EPPE. *Nov.* 9.

Will—Construction—Contingent remainder—Trustee to preserve.

A testator devised an estate to his wife for life, and upon the determination of that estate by forfeiture or otherwise to a trustee to preserve contingent remainders, nevertheless upon trust for his wife for life, and after her death he gave, devised, and bequeathed the rents to his two daughters in equal parts for life; and in case of the death of either without leaving issue, then to the survivor; but if either daughter should leave issue, such issue to be entitled to the mother's share, and on the death of both daughters, then he devised one moiety to the issue of each daughter or the whole to the issue of one, if the other should die without issue.

Held, that the legal estate was in the trustee until the death of both daughters.

C. P. ST. LOSKEY AND LEVY v. GREEN AND ANOTHER. *Nov* 7.

Amendment—Real question in controversy between the parties—Statutes of amendment—Costs of amendment—Common Law Procedure Acts.

A judge is bound to amend the pleadings so as to raise the real question in controversy between the parties. Where an amendment was made in the declaration, the costs were made defendant's costs in the cause.

Q. B. CRAMPTON v. WALKER. *Nov.* 20.

Pleading—Set off—Action on indemnity against a Bill of Exchange.

In an action on an indemnity against a Bill of Exchange, the plaintiff alleged generally, as damages, that he had been compelled to pay the Bill with interest, and the costs in an action brought by the holder of the bill, and had incurred costs himself in defending the said action.

Held, that each of these heads of damage constituted a distinct cause of action, and that the plaintiff could not, by declaring in the above form, deprive the defendant of his right of pleading a set off to that portion of the of the damage which was liquidated; that a set-off therefore which was confined to the amount of the Bill and interest only was well pleaded.

EX. *Nov.* 14.

GEE AND ANOTHER v. LANCASHIRE & YORKSHIRE RAILWAY.

Damages, measure of—Contract—Misdirection—New Trial—County Court appeal—Costs.

In an action against a railway company for delay in carrying and delivering goods where there was no special contract, the judge directed the jury to find a certain sum for the wages of the plaintiff's servants who were kept out of employment by the non-arrival of the goods; and also left it to the jury to name the amount the plaintiff's should recover by the loss of profits from the same cause.

Held, to be a misdirection.

In a county court appeal, the appellant begins:—

When new trial granted on ground of misdirection, no costs allowed.

Q. B. MYERS v. SARL. *Nov.* 20.

Evidence—Custom—Written Instrument.

A contract contained a clause in which it was stipulated that "a weekly account of work done" should be delivered. A weekly account was delivered, but of a portion of the work done only.

Held, that parol evidence was admissible to shew that in the trade to which the contract had reference the term was applicable to work only of a peculiar kind.

Where in a particular class of dealing words have acquired a peculiar meaning, well established, parties contracting with reference to that class of dealings who use those words, must be taken to have used them in the acquired, and not in the ordinary and popular meaning. Where a clause stipulated for all extra work written directions should be given, under the hand of the architect.

Held, that a sketch made by the architect, and not signed by him, was not such a direction as complied with the contract.

B. B. BAILEY v. OWEN. *Nov.* 24.

Common Law Procedure Act, 1852, *ss.* 10, 11, 222—*Re-sealing of writ of summons—Statute of limitations.*

The court will not allow a writ re-sealed too late to take a cause out of the provisions of the statute of Limitations by mistake of the attorney to be re-sealed *nunc pro tunc* for this purpose.

B. C.

COOK ET AL. v. JONES (In the matter of a plaint in the County Court of Montgomeryshire).

County Court—Rule to enter verdict—Time for application

Where, on the 20th of April, 1860, a cause was tried in a County Court, and the jury having found a verdict for £10, the judge directed the Registrar to enter a verdict for nominal damages only; an application on the 4th of May, 1861, for a rule *nisi* to enter the verdict for the sum found by the jury, was held too late.

REVIEWS.

SKETCHES OF CELEBRATED CANADIANS AND PERSONS CONNECTED WITH CANADA FROM THE EARLIEST PERIOD IN THE HISTORY OF THE PROVINCE DOWN TO THE PRESENT TIME: by HENRY J. MORGAN, compiler of the Tour of H. R. H. the Prince of Wales. Quebec: Printed and Published by Hunter, Rose & Co.

This is the title of a very handsome volume containing 800 pages, recently issued in Lower Canada. The author is a young man occupying a subordinate place in the public service, who, instead of wasting his time, in idleness or dissipation, has sufficient good sense to turn it to better account.

The author does not presume to advance any claims to originality with respect to a great portion of the contents of the work, derived, as they have necessarily been, from various home and local publications, a list of which he publishes. The author at the same time expresses himself sensible that his work is imperfect not only in its details, but in the exclusion from its pages of numerous names which ought to have figured in, and graced the work. For these he pleads the inexperience and incapacity of youth in matters with which he has perhaps prematurely grappled, the difficulty of obtaining accurate information, and the long period of time which the work covers.

The author having said this much, has nearly disarmed criticism. Indeed it would be cruel and unfair when we know the circumstances under which the work was written, and the comparative inexperience of the writer, to do or say anything which might have a tendency to crush such praiseworthy endeavors. The work does not profess to be a complete biography of every celebrity, or complete in details as to those whose lives do appear. It is called "Sketches of Celebrated Canadians." In it will be found much to interest and much to entertain. It will be found a much more pleasing and instructive railway companion than the trash which is generally dealt out by news venders on railway trains. It will be found very opportune to wile away the leisure hour either on car or boat, or at the fireside. The reading matter is not heavy. The mind will not be burdened by details about which it cares nothing. No one is obliged to read all the lives published in the volume. A selection may be made, and by random snatches time may be pleasantly, if not profitably beguiled.

Some readers may be disappointed in not finding lives which they may have good reason to expect. Such readers must remember the circumstances under which the book was written, instead of hastily condemning it. The book certainly does not for the present profess to give a sketch of the life of every celebrity. It is wonderful that under the circumstances mentioned by the author, so much has been done. No doubt in the future editions of the work he will avail himself of such information as can in the meantime be collected towards supplying acknowledged omissions.

The work is a credit to the author and a credit to the publishers, It reflects as much on the industry of the one as it does on the enterprize of the other. It is an effort that deserves encouragement at the hands of all Canadians and all interested in Canada. We are glad to learn that so far neither the expectations of the author or publishers have been disappointed.

APPOINTMENTS TO OFFICE, &c.

REGISTRARS.

WILLIAM GEORGE DRAPER, Esquire, to be Registrar of the City of Kingston.—(Gazetted, 18th January, 1862.)

NOTARIES PUBLIC.

ROBERT SMITH, of Stratford, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, 18th January, 1862.)

TO CORRESPONDENTS.

"A SUBSCRIBER"—Under "Division Courts."

"LEX"—Under "General Correspondence."

DIARY FOR MARCH.

2. SUNDAY ..... *Quinquagesima.*
3. Monday ..... Last day for notice of trial County Court.
4. Tuesday ..... *Shrove Tuesday.* Ch. Ex. Term London and Belleville com. Last day for notice Brantford and Kingston.
5. Wednesday ..... *Ash Wednesday.*
9. SUNDAY ..... *1st Sunday in Lent.*
11. Tuesday ..... Quarter Sessions and Co. Ct. Sittings in each County. Last day for Notice of Chancery Examinations, Hamilton and Brockville.
16. SUNDAY ..... *2nd Sunday in Lent.*
18. Tuesday ..... Chancery Examination Term Brantford and Kingston commences. Last day for Notice for Barrie and Ottawa. Last day for Writ for York and Peel Assizes.
23. SUNDAY ..... *3rd Sunday in Lent.*
25. Tuesday ..... Chancery Examination Term Hamilton and Brockville com. Last day for Notice for Goderich and Cornwall.
28. Friday ..... Declare for York and Peel Assizes.
30. SUNDAY ..... *4th Sunday in Lent.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

MARCH, 1862.

PATENTS FOR INVENTIONS.

Our Legislature will soon be in session. It is to be expected that we shall have some useful laws, or amendments of existing laws. In our last issue we pointed out the necessity for some amendment in the law as to payment of Crown witnesses; in this issue we propose to direct attention to the law regulating letters patent for inventions.

In Canada we have a law which authorizes the issue of letters patent for inventions to certain persons, and under certain circumstances. Some, say that no such law should exist, while the many say that it is not sufficiently comprehensive. The good of the public is the aim of each of these classes of objectors, but each seeks to attain that good by means very different from that of the other.

Why should not *every* inventor or discoverer receive a patent for his invention or discovery? This is the question which we propose briefly to consider.

The man who builds a house or makes a pin is entitled to be paid for his labour. The reason is, that the product of his labour is useful, and it would be unjust for any member of society to deprive a fellow-man of the fruits of his labour without some compensation. So the man who by study has produced something useful to society, in the shape of labour-saving machinery or other invention, should not be deprived of the fruits of his study without compensation. He is under no obligation, even if the discovery be the result of accident, to disclose it to the public.

Matter is inert, and the laws of nature are fixed and unchangeable; but by new combinations of matter, great results are often produced. The man who either discovers or invents these new combinations, and proves them to be useful, is certainly entitled to some compensation from the public, before he ought in reason or in justice to be deprived of the fruits of his invention or discovery.

This is the foundation of a patent law, when correctly understood. Such a law is in the nature of a contract between the inventor and the public. The inventor makes known his invention to the public, under the protection of a patent. The exclusive use, and right to sell to others to use, is the consideration for the bargain. The Government, representing the public, says, "Explain to us the nature of your invention; and if it be useful, we shall guarantee to you the exclusive use of it for a term of years, at the end of which time the invention shall become the property of the public, whom we represent." In this bargain there is mutuality. The public grants the exclusive right to use for a term of years, and in consideration thereof, at the end of the term, the inventor foregoes all claim in favour of the public. The right to exclusive use for the term of years is a bonus in favor of the inventor—the inducement to make known to the public that which before was known only to himself.

This is a bargain by which the public lose nothing, and in the end may gain much. It is unlike a monopoly. The right exclusively to manufacture an article formerly well known to the public, is a monopoly; but the right, for a limited time, to do that of which the public before knew nothing, is no injury to the public, and in the end a positive gain. This is the distinction between a patent right and a monopoly. No man has the right, in justice, to make use of the fruits of another man's brains, any more than the fruits of his labour—without payment. The attempt so to do is a violation of the rules of honesty.

These principles have been fully acknowledged in modern times by all civilized powers. The result is, that each power has its own patent laws, more or less comprehensive. There is no difficulty in carrying out the principles of justice as between subjects of the same power, but the difficulty is in applying them as between subjects of different powers. Each Government may command and enjoin its own subjects, but has no authority over those of another Government. The consequence is, that when a subject makes public his invention to his own Government under the protection of a patent, the subjects of other Governments, in the absence of an international law, are at liberty to steal that invention.

The discovery, it may be, is of use, not merely to the people of one power, but to all mankind. Why, therefore,

should not the inventor be allowed to make known his invention to the people of every Government, and from every Government receive his reward? A contrary course is not merely unjust to the inventor himself, but unwise so far as the interests of mankind are concerned. It is to the interest of every nation and every people to encourage genius in the pursuit of that which is useful. Those who minister to the wants or convenience of mankind, are entitled to be paid for their services.

It may be said, so far as we in Canada are concerned, that if we were to throw open our market to American inventors, whose inventions of labour-saving machinery are prodigious, our infant manufactures would be crushed, and our operatives left without employment. There may be something in this argument, but we do not think that it should be pushed so far as to exclude the American inventor from the benefit of our Patent laws. We do not exclude either the British or foreign author; we acknowledge his rights—give him protection for a term of years, provided he print and publish in this Province. Why not allow the British or foreign inventor to claim a like protection, provided he manufactures in this Province? This at all events would be an improvement on the existing law—a step in the right direction.

The law as it stands is very narrow in scope, and in consequence we think very defective. None but subjects of Her Majesty resident in the Province are entitled to obtain letters patent from our Government for inventions or discoveries. The result is, that British subjects resident abroad, and all foreigners, are excluded from its operation. It is not possible for any such, upon any terms whatever, to obtain letters patent. Surely this is too restrictive. It challenges the attention of foreigners, and is only challenged to be condemned. In the United States any man, no matter of what creed or country, with one exception, can for a trifle obtain letters patent for an invention. That exception, we are sorry to say, is the Canadian. If *he* desires a patent, he must pay five hundred dollars before his application can be entertained. He may thank the Provincial Legislature for this invidious distinction. The distinction is evidently made with a view if possible to compel reciprocity. We do not see why compulsion should be necessary. We think reason and justice both demand a modification of our Patent law. Indeed we also believe that self-interest joins in the demand.

OUR COLONIAL COURTS.

We are glad to find that the courts in England, since the blunders made by the Queen's Bench in the Anderson case, are disposed to hold that Colonial Legislatures and Colonial Courts are not, in the mother country, to be deemed mere nonentities.

Not long since we had occasion to refer to the extraordinary conduct of the English Court of Queen's Bench, which apparently ashamed of its rashness in ordering the *habeas corpus* in the Anderson case, afterwards in *ex parte Massenger* was oblivious to the fact, and refused to acknowledge that they ever considered such a jurisdiction as existing.

Now we have the satisfaction of learning that the able and much respected Vice-Chancellor Wood has scouted the idea of the English Courts having jurisdiction in questions affecting realty situate in the Colonies.

It would (says the V. C.) be a great surprise to the various colonies if they were to be told, that by an Act passed in England, to which they were not consenting parties, the courts of this country were authorized to determine the rights of property in the colonies as against the Colonial Legislature.

We yield to none, in respect for the English courts one and all, but we hate that feeling of cockneyism which leads some men to think that London is the world and the colonies—beyond the pale of civilization.

The occasion of these remarks is a case of *Holmes* v. *The Queen*, reported in other columns. The facts were as follows: In 1801 certain lands in Upper Canada were granted by the Crown to a Mrs. McQueen. In 1827 the Rideau Canal Act was passed. It authorized, on given terms, the assumption by the Crown of lands through which the canal passed. It passed through the lands of Mrs. McQueen. In 1832 Colonel By purchased from the heir at law of Mrs. McQueen all the lands granted by the Crown to her, and of which she had made no disposition. In 1843 the 7 Vic. cap. 11 was passed, which, by sec. 29, provided that all lands taken under the authority of the Rideau Canal Act from private owners for the uses of the canal, and not used for that purpose, should be restored to the parties from whom taken. In 1856 the statute 19 Vic. cap. 45, was passed, for the purpose of vesting the canal and other ordnance property in Her Majesty for the use of the Province. Petitioners representing the estate of Colonel By in this Province filed a petition of right, claiming the restoration of so much of the land formerly belonging to Mrs. McQueen, taken for the use of the canal, as had not been used for that purpose. To this petition the Attorney General demurred for want of jurisdiction, and the demurrer was sustained.

It is difficult to conceive upon what ground the petitioners hoped to sustain their claim before an English tribunal. It was indeed contended by counsel *arguendo*, that the Court having jurisdiction *in personam*, and the Queen,

the trustee, being resident within the jurisdiction of the court, was subject to the authority of the court. But what an absurd doctrine, seriously, to broach to any court! It might have been well enough were the land vested in Her Majesty in her own right as an individual, but when it is by Act of the Colonial Legislature vested in her in right of the Crown, the argument entirely fails. Queen Victoria, the woman, is resident in Great Britain, but the body corporate, the Crown, of which Queen Victoria is the *locum tenens*, if resident anywhere is as much resident in Canada as in Great Britain, and for the purposes of the application on the facts laid before the court much more resident in Canada than in Great Britain.

The following is the language of V. C. Wood in disposing of this argument, "assuming that a trust existed, that the claim was not merely legal, and that Courts of Equity could exercise jurisdiction in matters relating to lands in a foreign country, still it is necessary that the trustee should be within the jurisdiction to give any operation in this court. The land was unquestionably vested in Her Majesty by the Act of 1856 for the benefit of the Province, and in that point of view Her Majesty was just as much present in Canada as in England. For the purposes of the Act and the doctrine of this court acting in *personam*, Her Majesty could not be taken to be within the jurisdiction of this court in respect of lands situate in Canada and held by her, not in virtue of her prerogative, but under the Act of the Colonial Legislature."

The decision in a colonial point of view is important. We apprehend there can be no doubt of its soundness. It squares with the dictates of reason. We are glad of it. It acknowledges the permanent authority of our Colonial Legislature in matters of local concern, and refers petitioners to our Colonial Courts, whose authority in such matters is also abundantly acknowledged.

JUDICIAL CHANGES.

We believe there is no doubt of the fact, that the Chief Justice of Upper Canada, Sir J. B. Robinson, Bart., has tendered his resignation to the government. The step was one which, after a long, most useful and brilliant career, was due to himself and his family, but one which will be learnt with regret by all who have had the good fortune to have had professional intercourse with him. Great was the responsibility of the step, and very great will be the responsibility of supplying the gap created by it. It will require a man of no ordinary ability to take the place of so distinguished a judge.

It is rumored that the present Chief Justice of the Common Pleas will be his successor. We hope the rumor is well founded. We know of no man in Upper Canada so fitted for the place.

It is also rumored that Mr. Justice McLean, after a long and faithful career, contemplates retirement at an early day. We should like to see him before the close of his judicial career, promoted to the office of Chief Justice of one or other of the courts. Such a step would be a proper tribute to the worth of that venerable and much respected judge.

Sir J. B. Robinson will no doubt be enabled to retain his seat in the Court of Error and Appeal. The country will in that, the highest court of Upper Canada, still continue to have the benefit of his great learning, only equalled by his extraordinary industry. We hope the divine dispenser of events will for many years yet to come be pleased to spare Sir J. B. Robinson to his family and to his country. Too often we fail to appreciate the services of a really great or good man till deprived of them.

WORK FOR PARLIAMENT.

In Upper Canada there are two common law courts of co-ordinate jurisdiction, the Queen's Bench and the Common Pleas. Both command great respect, and, as a general rule the proceedings of both are harmonious.

There are, however, at present at least three questions about which the two courts are at issue. The first is the effect of a bill of sale or chattel mortgage filed within the five days mentioned in the statute upon an execution placed in the hands of the sheriff during the five days. The second is the effect of either party calling his opponent as a witness in the cause, so far as regards the consequent right of cross-examination. The third is as to the right to try questions of boundary in actions of ejectment.

As to the first: The Queen's Bench hold that the filing of a bill of sale or chattel mortgage within the five days allowed by the statute has relation to the date of the instrument, so as to protect the chattels assigned from the effect of intermediate writs of execution. The Common Pleas hold the reverse.

As to the second: The Queen's Bench hold that if either party to a cause call his opponent as a witness, that the right of cross-examination is restricted to the subject matter of the examination in chief. The Common pleas hold the reverse.

As to the third: The Queen's Bench hold that a question of boundary may be properly tried in an action of ejectment. The Common Pleas hold the reverse.

It is really a matter of little consequence, so far as these questions are concerned, which side is supported as law, but it is a matter of great consequence that the law should be settled one way or the other, and that without delay.

The most expeditious mode of having the law on each point settled, is for the high court of Parliament at its coming session to declare in regard to each what the law is, and so set at rest the conflict between the courts.

Conflicts of decision between courts of co-ordinate jurisdiction are not peculiar to Upper Canada, or to any country or people. They arise from the imperfections of our common humanity. Often do the courts of Queen's Bench, Common Bench, and Exchequer in England, take different views of the law. The embarrassment resulting from such a state of things is very often removed by legislative interference.

CANADIAN LEGAL AND GENERAL AGENCY.

Mr. William Lapenotiere, formerly a well known solicitor in Woodstock, C. W., and Clerk of the Peace for the County of Oxford, has established a Canadian legal and general agency in London, England. His card will be found in other columns. Mr. Lapenotiere is not only a Canadian attorney but an English solicitor. The advantages of Canadians having business to transact in England employing such a person as Mr. Lapenotiere are too evident to need any recommendation from us. We are glad to learn that he has already charge of more than one appeal from Canada in the Privy Council. His knowledge of Canadian laws in a matter of that kind will give him an immense advantage over other solicitors in London. He does not, however, intend to confine his attention to appeals from Canada or other business of a strictly legal character. He will keep a book in which he will enter descriptions of lands in Canada entrusted to him for sale. When he has a sufficient number of farms for sale to make it worth while he promises to give publicity to them in the *Times* and other London newspapers. The description of each lot entrusted to him for sale must be accompanied by a post-office order for 5s. sterling, payable to him at the Bloomsbury Postal District Office, Holborn, W. C., London. Commission on sales and other charges to be learnt upon application to him by letter, post-paid. He is also prepared to negotiate the sale of Canadian securities. To enable him to do so he requires to be informed of the assessed value of the municipality, the municipal debt, and the current annual rate of assessment, together with the present population as compared with the population ten years previously.

SPRING ASSIZES.

The following table, compiled by Mr. Hallowell, a law student of the City of Toronto, showing last day for service of writ, declaration, and notice for trial for each assize, will, we think, be found most useful. We have been assured of its accuracy, but have not ourselves had sufficient time to test it. We trust that this will not be the last table of the kind compiled by Mr. Hallowell. Perhaps in course of time he may be induced to embark on some work of greater magnitude for the benefit of the profession. There is nothing like a beginning.

SPRING ASSIZE LIST 1862.

Circuits.	Serve Writ.	Declaration.	Notice Trial.	Commencement Day.
TORONTO & YORK, c. Peel.				
Hon. Mr. Justice HAGARTY				
Toronto	14th Feb.	24th Feb.	4th Mar.	Wed., 12th Mar.
York and Peel	18th Mar.	28th Mar.	5th April	Mon., 14th April.
EASTERN.				
Hon. Mr. Justice RICHARDS.				
Brockville	12th Mar.	22nd Mar.	31st Mar.	Tues., 8th April.
Perth	19th "	26th "	7th April	" 15th "
Cornwall	26th "	4th April	12th "	Mon., 21st "
Ottawa	2nd April	12th "	21st "	Tues., 29th "
L'Orignal	10th "	21st "	29th "	Wed., 7th May.
MIDLAND.				
Honble. Mr. Justice BURNS.				
Whitby	25th Feb.	7th Mar.	15th Mar.	Mon., 24th Mar.
Peterborough	4th Mar.	14th "	22nd "	" 31st "
Cobourg	12th "	22nd "	31st "	Tues., 8th April.
Belleville	26th "	5th April	14th April	" 22nd "
Picton	9th April	19th "	28th "	" 6th May.
Kingston	15th "	23rd "	1st May.	Frid., 9th "
HOME.				
Hon. Chief Justice DRAPER.				
Milton	14th Feb.	24th Feb.	4th Mar.	Wed., 12th Mar.
Barrie	18th "	28th "	8th "	Mon., 17th "
Welland	26th "	8th Mar.	17th "	Tues., 25th "
Hamilton	4th Mar.	14th "	22nd "	Mon., 31st "
Niagara	8th April	18th April	26th April	" 5th May.
Owen Sound	16th "	26th "	5th May.	Tues., 13th "
OXFORD.				
Hon. Sir J. B. ROBINSON, C.J.				
Stratford	15th Feb.	25th Feb.	5th Mar.	Thurs., 13th Mar.
Guelph	19th "	1st Mar.	10th "	Tues., 18th "
Berlin	27th "	10th "	18th "	Wed., 26th "
Brantford	6th Mar.	17th "	25th "	" 2nd April.
Woodstock	25th "	4th April	12th April	Mon., 21st "
Simcoe	2nd April	12th "	22nd "	Tues., 29th "
WESTERN.				
Hon. Mr. Justice MCLEAN.				
Sarnia	15th Feb.	25th Feb.	5th Mar.	Thurs. 13th Mar.
London	20th "	3rd Mar.	11th "	Wed., 19th "
St. Thomas	5th Mar.	15th "	24th "	Tues., 1st April.
Chatham	14th "	22nd "	31st "	" 8th "
Sandwich	19th "	29th "	7th April	" 15th "
Goderich	26th "	5th April	14th "	" 22nd "

JUDGMENTS.

QUEEN'S BENCH.

Present: ROBINSON, C. J.; BURNS, J.

5th February, 1862.

Brown v. *Erie and Ontario R. Co.*—Judgment for defendant on demurrer.

Campbell v. *Holmes.*—Judgment for defendant on demurrer.

Shire v. *Gates.*—Judgment for defendant on demurrer.

Regina v. *Ewing.*—Judgment arrested.

Mewburn v. *Street.*—Judgment for defendant on demurrer.

Regina v. *Roblin.*—Judgment for the Crown.

Commercial Bank v. *Merritt.*—Rule discharged.

Burnham v. *Burns.*—New trial without costs.

Present: ROBINSON, C. J.; BURNS, J.

March 3, 1862.

Tinning v. *Hindson.*—Rule absolute for new trial without costs.

Corporation of Perth v. *McGregor.*—Rule nisi discharged.

Ranney qui tam. v. *Jones.*—Rule for nonsuit made absolute.

Boyd v. *Bartram.*—A defendant in custody in an action for seduction on a judgment for damages held to be "a judgment debtor" within meaning of Con. Stat. U. C., cap. 26, s. 7, and discharged from custody.

Row v. *Quinlan.*—Ejectment—confession given before trial and notice thereof served on plaintiff, but not on his attorney, before trial. Rule nisi to set aside verdict discharged.

In Re Thompson and United Townships of Bedford, Olden and Oso.—Bylaw quashed with costs.

Tanner v. *Bissell.*—Rule nisi for new trial discharged.

Bank of Upper Canada v. *Lynn.*—Rule absolute to add an equitable plea. Costs to be costs in the cause.

Small v. *The Corporation of Toronto.*—Rule nisi for new trial discharged.

Hurrell v. *Simpson.*—Rule for new trial without costs.

Nicholls v. *Golding.*—Action for seduction. Action within six months by Master, in his declaration averring loss of service. Plea not guilty. Loss of service proved. Verdict $425. Rule nisi for new trial or to arrest judgment on ground that it was not averred in the declaration nor proved at the trial that neither father nor mother living, so as to entitle Master within six months to sue. Rule nisi discharged.

The Attorney General v. *The Corporation of the County of Bruce.*—Rule absolute for mandamus nisi.

Harmer v. *Muma.*—Rule absolute.

In Re Smith and School Trustees of Dummer and Burleigh.—Rule discharged with costs.

Doe Dem Day v. *Bennett.*—Rule discharged with costs.

Van Every v. *Grant.*—Rule discharged.

Murphy v. *Case.*—Rule absolute for new trial. Costs to abide the event.

Shipman v. *Henderson.*—Rule absolute for entering verdict for defendant.

In the matter of the heirs of McLean.—Judgment for partition according to prayer of petitioners.

The Queen v. *Thomas Morris.*—Motion to quash conviction or order made under s. 86 of Con. Stat. U. C., cap. 55. Held, that no formal conviction is necessary under that section—a warrant in the first instance being all that is required. Rule nisi discharged without costs.

Girdlestone v. *O'Reilly.*—Stands for further consideration. If not again mentioned, rule absolute to reduce the verdict.

Hickey v. *G. T. R. Co.*—Rule discharged.

The Queen v. *John Craig.*—Rule absolute to quash conviction.

Evans v. *Morley.*—Rule discharged.

Dusenbury v. *Palmeter.*—Rule to enter verdict for plaintiff absolute.

Patton v. *Cameron.*—Held, that under Stat. 24 Vic., cap. 53, plaintiff in ejectment may lay his venue either in the County of the City of Toronto or the United Counties of York and Peel. Rule nisi discharged.

Powell v. *Heron et al.*—New trial. Costs to abide the event.

Present: ROBINSON, C. J.; BURNS, J.

March 3, 1862.

Corporation of Lambton v. *Pourrett.*—Judgment as to fees to which Clerk of Peace entitled.

Middlebrook v. *Kernahan.*—Rule absolute for nonsuit.

Young v. *Daniell.*—Judgment for defendant on demurrer to declaration.

Moore v. *Sullivan.*—Judgment for plaintiff on demurrer.

Cotton v. *McCulley.*—Rule discharged.

Keenahan v. *Preston.*—Rule discharged without costs.

Agnew v. *Stewart.*—Judgment for defendant on demurrer.

Brown v. *Livingston et al.*—Judgment for defendants on demurrer.

Irvine v. *Sager.*—Rule absolute for new trial without costs. Held, under the circumstances, that a boundary question may be tried in ejectment.

Sexton v. *Paxton.*—Ejectment—rule absolute for new trial without costs.

Boules v. *Taughaly.*—Ejectment—rule absolute for new trial with costs.

Teer v. *Smith.*—Judgment for defendant.

Smith v. *Teer.*—Judgment for plaintiff.

Steen v. *Steen.*—Verdict for plaintiff to be reduced to £8 3s. 6d.

The Queen v. *Plunkett.*—Defendant improperly convicted.

In the matter of the Chief Superintendent of Schools and McLean.—Judgment reversed, without costs.

Shaw v. *Shaw.*—Appeal from County Court of Frontenac, Lennox and Addington. Judgment of Court below reversed.

Crawford v. *Fraser.*—Rule discharged.

Armour v. *Jeffrey.*—Plaintiff's rule for a new trial discharged—defendant's rule for nonsuit absolute.

Gildersleeve v. *O'Reilly.*—Verdict reduced by striking off excess of interest beyond six per cent.

Hartman v. *Snider.*—Defendant to secure verdict and costs to satisfaction of plaintiff's attorney or master within a month, and consent to evidence of plaintiff's witnesses being read if any absent, and pay of costs of this application within a month, then rule absolute, else discharged.

Wilson v. *McNab.*—Rule absolute for nonsuit.

Rutten v. *Beamish.*—Rule absolute on payment of costs.

Clark v. *Hatch.*—Rule absolute without costs.

McKenzie v. *Scott.*—Rule absolute. Rule nisi to be handed till 10th April.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

3rd February, 1862.

Reed v. *Inglis.*—Held that 1st and 2nd pleas good—last plea bad. Leave to amend on terms.

Kent v. *Mercer.*—Judgment for plaintiff on special case.

Hamilton v. *Holcomb.*—Judgment for defendant as to third plea, and for plaintiff on demurrer to replication and other pleadings.

Ross v. *Massenburgh.*—New trial without costs.

Ryland v. *King.*—Rule absolute to enter judgment *non obstante.*

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

March 3, 1862.

Ward v. *Northumberland and Durham.*—Rule absolute to enter non-suit.

Farr v. *Robins.*—Rule absolute to enter non-suit.

Thayer v. *Street.*—Defendant to pay $1000 and costs within two weeks, in which case rule absolute. If this not done rule discharged.

Comstock v. *Tyrrell.*—Rule discharged.

Whiting v. *Kernahan.*—Rule discharged.

Brown v. *Drury.*—Rule absolute, without costs.

Barber v. *Daniel.*—Judgment for demurrer, with leave to apply within a fortnight to amend.

Scobell v. *Hewson.*—A party not allowed to set up his own iniquity to avoid his deed. Judgment for plaintiff on demurrer.

Proudfoot v. *Bush.*—Rule discharged with costs.

Lawrason v. *Glass.*—Appeal allowed.

Stephens v. *Scott.*—Appeal dismissed with costs.

Preston v. *Johnston.*—Appeal dismissed with costs.

Clark et al. v. *McKellar.*—Rule absolute for new trial without costs.

Hawley v. *Miller.*—Rule discharged.

Buchanan v. *The Corporation of the Town of Galt.*—Rule absolute for new trial without costs.

Barry v. *Halliday.*—Plaintiff non-suited. No judgment therefore on demurrer set down by him.

Jaggard v. *McInnes.*—Judgment for plaintiff on demurrer.

Low v. *Owen.*—Appeal allowed. New trial without costs.

Stephenson v. *Culbertson.*—Rule absolute to enter verdict for plaintiff.

Parker v. *Stevens.*—Rule absolute.

Curtis v. *The G. T. R. Co.*—Rule discharged.

Colby et al. v. *Smith.*—Rule absolute for new trial, with costs to abide the event.

Fortune v. *Boomer.*—New trial on payment of costs.

Fisken v. *McMillan.*—Rule discharged.

Burnham v. *The Town of Peterboro'.*—Appeal allowed—judgment for defendants on demurrer. Held, that an attorney, being a member of a Municipal corporation, cannot recover for services performed by him as an attorney for such corporation.

Present: DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

March 8, 1862.

The Queen v. *Bryant.*—Conviction affirmed—Hagarty, J., dissentiente.

Boulton v. *McKay.*—If plaintiff consents to reduce verdict to $466 02, rule discharged, otherwise rule absolute on payment of costs. Plaintiff at once consented to reduce verdict.

Brown v. *Beaty.*—Judgment for plaintiff on demurrer to first plea and for defendant on demurrer to second plea. Leave to defendant to apply to amend, leave to plaintiff to withdraw demurrer to last plea.

Sargeant v. *The City of Toronto.*—Judgment for plaintiff on special case.

Niagara District Fire Insurance Company v. *Lewis.*—Appeal allowed, new trial without costs in court below.

Osser v. *Provincial Insurance Company.*—Rule discharged.

Corporation of Essex v. *Park.*—Rule refused.

Dollery v. *Somerville.*—Writ of prohibition refused.

McInnes v. *Benedict.*—Appeal from decision of Judge of County Court of Elgin allowed. New trial ordered without any direction as to costs.

Toland v. *Adams.*—Appeal from County Court of Frontenac, Lennox and Addington dismissed with costs.

Hunter v. *Foot.*—Appeal from County Court of Middlesex. Judgment of Court below reversed, with leave to plaintiff to take issue on plea on payment of costs, otherwise judgment to be entered for the defendant on the demurrer.

Johnson et al. v. *Parks et al.*—Rule discharged on plaintiffs reducing damages to nominal amount—otherwise rule absolute for new trial.

McMillan v. *McMillan.*—Rule absolute for new trial without costs.

Baskerville v. *Doan.*—Rule absolute for new trial on payment of costs.

Land v. *Savage.*—Rule discharged, but leave to defendant, upon payment of costs, to withdraw appearance and let plaintiff take judgment by default. Held, that an action of ejectment is not a fit action to try questions of boundary where plaintiff's title to the land described in the writ is admitted.

Lund v. *Nesbitt.*—Similar case—similar judgment.

UPPER CANADA LAW SOCIETY.

TRINITY TERM, 1861.

EXAMINATION FOR ADMISSION.

WILLIAMS ON REAL PROPERTY,

1. How are deeds divided?
2. Distinguish between a "use" and a "trust."
3. What changes have been effected by statute in the mode of conveying or assuring an estate?
4. Wherein does the law of Canada as to dower differ from that of England?
5. Explain the object and effect of the different covenants in an ordinary conveyance of an estate in fee simple.

STORY'S EQUITY JURISPRUDENCE.

1. What is meant by "accident" as one of the heads of equitable relief?
2. What is "auxiliary" equity?
3. When does equity relieve against the breach of a condition? and give instances.
4. How does our registry law affect the principle of "tacking?"
5. What relief does equity afford to sureties?

BLACKSTONE'S COMMENTARIES.

1. What private relations will justify a battery in defence of another?
2. What is the presumption, as regards the age, at which persons are criminally responsible for their acts?
3. In what light does the law of England regard Marriage?

SMITH'S MERCANTILE LAW.

1. Is a verbal acceptance of a bill of exchange binding on the acceptor? Does this depend upon common law or statute?
2. What are the rights of the debtor and creditor, respectively, with regard to the appropriation of payments made by the debtor?
3. To what extent is an auctioneer an agent of the purchaser, to bind him, where the Statute of Frauds requires a signed memorandum? Does this depend upon who is suing on the contract?
4. What is the effect upon a lien, of the debt for which it is held being barred by the Statute of Limitations?

STATUTES, PLEADINGS AND PRACTICE.

1. What was the effect of the registration of a judgment, and how has this been changed by a recent statute?
2. What are the different modes in equity of preferring a case and setting up a defence respectively?
3. In what cases is a guardian *ad litem* necessary, and how appointed?
4. When should a married woman answer separately from her husband, and what is the practice in this respect?
5. Within what time must a new trial be moved for in criminal cases?
6. What steps must be taken to enforce an award,—1st. Where a verdict is taken subject to an award; 2nd. Where no verdict is taken, but the submission is made a rule of court?
7. In what cases will judgment be arrested, or judgment *non obstante veredicto* be given?
8. What is the effect upon the plaintiff's costs of suing th several parties to a bill or note in distinct actions?
9. If a plaintiff, in an action of trespass or case, recover less than $8 in the Superior Court, what certificates are necessary to entitle him to full costs?

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. What estate has a tenant for life?
2. How are springing or shifting uses created?
3. What acts of the vender will destroy his lien for the unpaid purchase money?
4. What was enacted by the statute *Quia Emptores?*
5. What is a tenant in special tail?

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between "legal" and "equitable" assets.
2. In what instances will equity decree specific performance in cases of chattels?

3. What is "apportionment" and "contribution?" and give instances.

4. When will an agreement to enter into a partnership be specifically performed? and when not?

5. What is "equitable set off?"

BYLES ON BILLS.

1. What is a qualified acceptance, and how may it be evidenced?

2. When is a renewal bill a satisfaction of the original bill?

3. When does the taking of a bill operate as a waiver of a lien?

4. What is presumptive evidence of payment of a bill or note?

TAYLOR ON EVIDENCE.

1. Give instances of conclusive presumptions.

2. What are *res gestæ*, and how do they effect the admissibility of evidence?

3. How far can a party impeach his own witness?

4. Explain the principles by which the evidence of "experts" is regulated.

STEPHENS ON PLEADING.

1. In what cases, in pleading a conveyance, should such conveyance be alleged to be in writing?

2. What is a new assignment, and what alteration has been made by the Common Law Procedure Act in new assigning, where several pleas are pleaded to the declaration?

3. Is a plaintiff entitled to judgment *non obstante veredicto* in every case in which the issue found for the defendant is no answer to the declaration; if not, in what cases is he entitled to such judgment, and what, if any, is his remedy in cases where such issue being found for the defendant he is not entitled to such judgment?

ADDISON ON CONTRACTS.

1. What is a sufficient consideration for a promise? Must it of necessity be an advantage to the person promising?

2. Is an infant liable on a bill of exchange given for necessaries? Give your reasons.

3. Is their any, and if so, what difference between the right of a principal to adopt a *contract* made by his agent, and an *act* ex gr. a demand to found an action of trover?

SMITH'S MERCANTILE LAW.

1. Can there be, and if so under what circumstances, a total loss of a vessel or goods while they retain their original form?

2. How will a lien be effected by the fact that the person upon whose goods such lien is claimed has a set off to an amount equal to the debt for which such lien is held? Give your reasons.

3. Is the right to bind the firm by negotiable instruments an incident of every partnership? if not, what is the limitation?

STATUTES, PLEADING AND PRACTICE.

1. What are the statutory limitations as to suits in equity?

2. Mention the different statutory enactments in relation to the rights of mortgagee and mortgagor, in respect of the mortgaged estate.

3. When should a demurrer, and not an answer be filed?

4. What is the doctrine of "representation" in equity pleading?

5. What is "publication," and the practice relating thereto?

6. In what cases can a reference to arbitration be made a rule of court?

7. In what cases will replevin lie in this Province; and in what cases is a judge's order necessary prior to issuing the writ?

8. Under what circumstances can the master of a female servant still maintain an action for the seduction of such servant?

9. What is the statutory rule with regard to speeches of counsel at *nisi prius*?

10. What is the effect of withdrawing a juror at the trial?

SELECTIONS.

THE MASON AND SLIDELL CASE.

From "The Jurist."

The answer of the Government of the United States of America to the demand of the British Government in the affair of The Trent mail packet has arrived, and proves of such a character as effectually to remove all causes of dispute between the two nations on that matter. In our recent article on this subject we expressed our conviction that such would be the result, if law and reason, not interest and passion, were listened to; and we are happy to find that our opinion has received such effectual confirmation.

But although the affair of The Trent is at an end, the important questions of international law involved in it are not; and indeed, from the ground taken by the American Government, it is extremely probable that they, or at least some of them, will present themselves on future occasions, and perhaps in disagreeable and dangerous forms. For this reason we now propose to examine the case of The Trent as it stands on the facts as admitted on both sides.

The published correspondence on this subject is too long for insertion in *The Jurist*. It consists chiefly of the following letters:—

1. A letter from the American Minister of State at Washington to the American Minister at London incidentally referring to the subject.

2. A letter from Earl Russell to Lord Lyons, the English Ambassador at Washington, containing the demand of satisfaction for the alleged aggression.

3 (And principally). A very long letter from the American Minister of State at Washington to Lord Lyons, stating the American view of the question, and giving the satisfaction desired.

4. A letter from Lord Lyons acknowledging the receipt of the preceding, &c.

5. A letter from the Prime Minister of France to the French Consul at Washington, directing him to move the American Government to accede to the demands of England.

6. A letter from the American Minister of State at Washington to the French Consul, informing him that before the receipt of his communication the matter had been arranged with the British Government.

The communication of the British Government was in substance:—"You, the Government of the United States, have offered an affront to the British flag, and committed a violation of international law, in this,—one of your frigates, The San Jacinto boarded our mail steamer Trent, when proceeding on a lawful and innocent voyage from the Havanna to England, and took from her by force (a constructive force, however, the Trent not offering, and being unable to offer, any resistance), four persons who were her passengers; and this act was aggravated by the manner of its performance—for, in order to induce The Trent to bring to, a round shot and a shell were discharged across her bows. We, therefore, demand the liberation of those four persons, in order that they may again be placed under our protection, and a suitable apology for the aggression."

The American answer is:—"It is true, we boarded your ship, and took from her, in the manner described, the four persons mentioned; but we did so for the following reasons:—We were at the time attempting to repress an insurrection raised against our supreme authority by certain of our States which profess themselves independent, in which contest Great Britain had declared herself neutral. The four persons in question are citizens of the United States, and when they embarked on board The Trent one of them was proceeding to England in the affected character of a minister plenipotentiary to the British Court from the insurrectionary States; and another of them was going to Paris on a similar mission to the French Court; the other two persons being their respective secretaries: of all which the owner and agent and officers of The Trent had knowledge before the embarkation. It was presumed that these persons bore pretended credentials and instructions, which papers are in the law known as despatches; and we are informed that these documents, having escaped the search of The Trent, were conveyed and delivered to the emissaries of the insurrection in England. Under these circumstances those four persons were contraband of war, and The Trent, by carrying them, became liable to arrest and capture as a neutral vessel carrying contraband of war for the use of one of the belligerent parties." "With respect to the manner of proceeding, the American Government assert that the shot was fired intentionally, in a direction so obviously divergent from the course of The Trent that it should be regarded as a blank shot and a mere signal; and that when the shell was fired The Trent seemed to be moving under a full head of steam, as with a purpose to pass the frigate. For the above reasons the American Government say, that although they did not order the captain of the frigate to act as he did, still The Trent was a wrong-doer, and the captain of their frigate would have been justified in capturing and bringing her into port, to have the question decided by a competent tribunal; but they consider that he was not justified in taking persons out of her; and therefore deeming the act of their officer illegal in that respect, they consent to deliver up the prisoners to the British Government, and make the required apology."

The American Minister, in order to make out his view of the case, lays down five distinct and formal propositions. One of these—namely, the third—"Did Captain Wilkes" (i. e. the commander of The San Jacinto) "exercise his right of search in a lawful and proper manner?"—we do not propose to notice, as it involves questions of *fact* which cannot be looked on as admitted—viz. the mode in which the gun and shell were fired, and also the rate of speed at which The Trent was approaching the frigate. The other four propositions are as follows:—

1. Were the persons named, and their supposed despatches contraband of war?

2. Might Captain Wilkes lawfully stop and search The Trent for those contraband persons and despatches?

3. Having found the contraband persons on board, and in presumed possession of the contraband despatches, had he a right to capture the persons?

4. Did he exercise that right of capture in the manner allowed and recognised by the law of nations?

With respect to the first of these—"Were the persons named and their supposed despatches contraband of war?"—a question which the American Minister resolves in the affirmative—it may be doubted whether the expression "contraband of war" is here used with technical accuracy—whether that expression is strictly speaking, applicable to "persons," and not altogether confined to "things." But the context clearly shews the sense in which the word is used, namely, that The Trent was carrying a subject-matter—persons or things—which by the law of nations she was not allowed to carry. He says, "Persons as well as property may become contraband, since the word means, broadly, 'contrary to proclamation,' 'prohibited,' 'illegal,' 'unlawful.' All writers and judges pronounce naval or military persons in the service of the enemy contraband."

The latter position here laid down is fully borne out by authority. (See *The Hendrik and Alida*, Marr. Adm. Dec. 96; *The Friendship*, 6 Rob. Adm. 420; &c.) There is also some authority for the position that this rule is not confined to *military* persons, but may, in certain cases, extend to persons in the *civil* service. In *The Orozembo* (6 Rob. Adm. 434), Lord Stowell said, "In this instance the military persons are three, and there are besides two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, *on principle*, to be but reasonable, that whenever it is of sufficient importance to the enemy that such persons should be sent out on public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations." It is certain that a belligerent party may intercept the ambassador of his enemy proceeding to a neutral power (Vattell, book 4, c. 7, s. 85; *The Caroline*, 6 Rob. Adm. 468); and if this holds in the case of a real ambassador, may it not also in that of a pseudo one?—the principle of all these cases being as we take it, that the carrying such persons or things is assisting one of the belligerent parties to the prejudice of the other, and consequently converting the neutral into a belligerent. (See the judgment of Lord Stowell in *The Atalanta* 6 Rob. Adm. 459, 460). The presence of an ambassador in a country may, under particular circumstances, be productive of the most important results, and prove the greatest possible good or evil to other countries; and in this very case the American Secretary of State, in the first letter in the correspondence in question, states as his conviction—"The life of this insurrection is sustained by its hopes of recognition in Great Britain and France. It would perish in ninety days if those hopes should cease."

And here it is essential to observe, once for all, that questions of international law are not determined by any written code. Like the common law of England, the immense bulk of the law of nations is a "lex non scripta," in which men must be guided by principles, and the reason of things, not by a determinate number of words set down by a legislator. The expression, therefore, which we so often hear, that some particular act does or does not come within the "*letter* of the law of nations," is in almost all cases improper, and not unfrequently arises from a total ignorance of the nature of that law in the persons by whom it is used.

It has, however, been urged that the rules of international law relative to the conveyance of contraband of war by neutral ships do not hold where the ship is conveying it from one neutral country to another. This view is expressly put forward by the French Minister in his letter already referred to, and has been insisted on by many persons in this country. Admitting at once that the conveyance of contraband of war under such circumstances is prima facie an innocent act, the proposition must, we think, be guarded with the qualification that the transit is a bonâ fide one, and not in fraudem legis. Suppose countries A. and B. are at war, and countries C., D. and E. neutral. Is a vessel belonging to C. justified in *knowingly* carrying contraband of war, which she has received from an agent of A., from D. to E., and there delivering it to an agent of A. to be immediately shipped by him to his own country? Or to take a closer example, suppose several of the northern provinces of France were to declare themselves independent of the Imperial Government, and proceed to assert their independence by arms, would an English ship be justified in carrying contraband of war from London to the Channel Islands, to be there shipped to the northern coast of France? We think not; and if we are right in this, an important

question in The Trent case is—supposing the four persons seized by The San Jacinto were contraband of war, were the captain and owners of The Trent aware of the destination and objects of those persons when they became passengers in The Trent?

The case of *The Hendrik and Alida* (Marr. Adm. Dec. 96) is much relied on in support of the unqualified right of neutrals, as above stated; but it appears to be rather to negative it, as there the scienter was unproved, if not disproved. That case arose during the war of independence between England and the United States of America. A Dutch ship, bound from Holland to St. Eustatia, having on board gunpowder, *&c.*, and military officers in the service of Congress, was seized by an English cruiser, and brought to England, with the view of condemning her as a prize. The judge of the Admiralty Court (Sir G. Hay), in delivering judgment says, "It would be too high for such a court of justice as this to assert that the Dutch may not carry on, in their own ships, to their own colonies and settlements, everything they please, whether arms, or ammunition, or other species of merchandise, provided they do it with the permission of their own law. . . . . *The gunpowder cannot be proved to be going directly for the use of the rebels.* . . . . The master could not give much account of the owners of the ship and cargo, as he took the command but eight days before she sailed. . . . . But the condition of the ship, being armed, and having officers going to the provincial army, is a great point against the claimants for costs. . . . . *If it was clear that she was going to New England, touching at St. Eustatia, that would never do.* All ships trading thither are confiscable, and the act of Parliament is notice to all the world, and so was the former act in the case of naval stores. The declaration of Rousman, the former master and part owner, as to this illicit destination, is well proved; and the strong suspicion arising from that, and the armed state of the ship, and the character of the passengers, are all circumstances that concur fully to justify the seizure. . . . . I cannot direct any part of this cargo to be sold. I restore, therefore, the ship and cargo, and decree just cause of seizure, and expenses in favour of the captor."

In our previous notices on the affair of The Trent we considered the first four propositions in the despatch of the American Minister, with the intention of considering the remaining one on some future occasion. Since those notices, however, a most important document has appeared, namely, a despatch from the British Minister for Foreign Affairs to the British Ambassador at Washington, acknowledging the satisfaction given by the American Government in that affair, but strongly combatting several of the principles of international laid down by the American Minister. The contents of this document are of such importance, that even at the risk of repetition we are compelled to return to some of the ground already gone over by us.

In the fifth and last proposition of the American Minister, where he states his reasons for giving up the four persons taken out of The Trent, the British Minister apparently concurs, perhaps rather hastily, as it appears to amount to an admission likely to be productive of inconvenience hereafter. Moreover, the cause of complaint founded on the *manner* in which The Trent was compelled to bring to, and submit to be searched, which is the subject of the third proposition of the American Minister, is passed over by the British Minister sub silentio—either from a conviction that after the explanation given by the American Minister the charge was not borne out by the facts, or that, even deeming that explanation unsatisfactory, the charge was too trivial to be worth persisting in.

So with respect to the second question raised by the American Minister—whether the captain of the San Jacinto had a right to search The Trent for contraband of war—the British Minister declines to indorse the somewhat popular but absurd position, that a British ship, as such, is exempt from the right of search for contraband of war to which, by the well-known law of nations, every merchant vessel is subject; or the almost equally absurd position contended for by some modern jurists, and on which we commented in our last, that mail packets are exempt from such a search and privileged to violate the law of nations at pleasure—a privilege which would convert those vessels into a degalized international nuisance. He contents himself with claiming for them "peculiar favour and protection from all Governments in whose service they are engaged;" and adds, "To detain, disturb, or interfere with them, without the very gravest cause, would be an act of a most serious and injurious character, not only to a vast number and variety of individual and private interests, but to the public interests of neutral and friendly Governments. To this we fully subscribe, but take leave to suggest that, in return for this peculiar favour and protection, those vessels ought to exhibit an additional amount of caution and circumspection, not only in carefully eschewing all acts in violation of international law, but in exhibiting an inclination towards either belligerent party to the prejudice of his adversary. Whether this degree of caution and circumspection was displayed by the authorities of The Trent on the present occasion is a matter which the facts disclosed render very questionable.

In our last we adverted to a difficulty of a singular character said to be raised by some persons, namely, that as England has not recognized the independence of the Confederate States, the rules of international law cannot be applied to the present or similar cases which may arise during the present conflict. This matter is thus summarily disposed of by the British Minister:—"This is, in fact, the nature of the question which has been, but happily is no longer, at issue. It concerned the respective rights of belligerents and of neutrals. We must, therefore, discard entirely from our minds the allegation that the captured persons were rebels, and we must consider them only as enemies of the United States at war with its Government, for that is the ground on which Mr. Seward ultimately places the discussion. It is the only ground upon which foreign Governments can treat it."

But on the chief question raised by the despatch of the American Minister, and on which, indeed, the rest virtually depend—"Were the persons named, and their supposed despatches, contraband of war?"—the British Minister declares that Her Majesty's Government entirely differ from him. This is certainly the strong part of the British Minister's case, and he puts his position very forcibly and fairly. He resolutely contends for the general right of a neutral nation to keep on terms of amity with both the contending parties, and carry on its communications and relations with each without molestation from the other. He cites, in support of this, the observations of Lord Stowell in *The Caroline* (6 Rob. Adm. 461), and Wheaton's Elements, part 4, c. 2, s. 22; and then proceeds:—

"That these principles must necessarily extend to every kind of diplomatic communication between Government and Government, whether by sending or receiving ambassadors or commissioners personally, or by sending or receiving despatches from or to such ambassadors or commissioners, or from or to the respective Governments, is too plain a road argument; and it seems so too clear that such communications must be as legitimate and innocent in their first commencement as afterwards, and that the rule cannot be restricted to the case in which diplomatic relations are already formally established by the residence of an accredited minister of the belligerent power in the neutral country. It is the neutrality of the one party to the communications, and not either the mode of the communication or the time when it first takes place, which furnishes the test of the true ap-

plication of the principle. The only distinction arising out of the peculiar circumstances of the civil war, and of the non-recognition of the independence of the *de facto* government of one of the belligerents, either by the other belligerent power, or by the neutral power, is this—that 'for the purpose of avoiding the difficulties which might arise from a formal and positive solution of these questions, diplomatic agents are frequently substituted, who are clothed with the powers and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honours).' Wheaton's Elements, part 3, c. 1, s. 5.) Upon this footing Messrs. Mason and Slidell, who are expressly stated by Mr. Seward to have been sent as pretended ministers plenipotentiary from the Southern States to the courts of St. James's and of Paris, must have been sent, and would have been, if at all, received; and the reception of these gentlemen upon this footing could not have been justly regarded, according to the law of nations, as an hostile or unfriendly act towards the United States. Nor, indeed, is it clear that these gentlemen would have been clothed with any powers, or have enjoyed any immunities, beyond those accorded to diplomatic agents not officially recognised.

"It appears to her Majesty's Government to be a necessary and certain deduction from these principles that the conveyance of public agents of this character from Havannah to St. Thomas's, on their way to Great Britain and France, and of their credentials or despatches (if any), on board The Trent, was not and could not be a violation of the duties of neutrality on the part of that vessel; and both for that reason, and because the destination of these persons and of their despatches was bonâ fide neutral, it is, in the judgment of her Majesty's Government, clear and certain that they were not contraband."

The British Minister then adverts to the authorities which are cited by the American Minister to shew that a belligerent may stop the ambassador of his adversary on his passage—namely, Vattel, book 4, c. 7, s. 85, and *The Caroline* (6 Rob. Adm. 468); and that civil functionaries, if sent out for a purpose intimately connected with hostile operations, may fall under the same rule with persons whose employment is directly military. (*The Orozembo*, 6 Rob. Adm. 434.) Those authorities, he contends, have been misunderstood, and must not be taken as referring to the conveyance of such parties in a neutral vessel bonâ fide proceeding to the neutral country to which they are sent. Without saying that this reasoning is erroneous, or denying that the law of nations is as here stated, we confess we are not quite satisfied on the subject. It is true, that in the cases cited the ship was not a neutral vessel proceeding with the alleged contraband to a neutral port; but the question remains, whether the *principle* of those decisions does not cover such a case. The principle we take to be, that the neutral vessel that acts in any of the ways described has *interfered* in the contest between the belligerents, has committed an act of *hostility* against one of them, and consequently has no cause to complain if she finds herself treated as a belligerent. Now, is this applicable to the case before us? Two nations are on terms of amity. A portion of one revolts against its own Government, declares its independence, and resorts to arms to enforce it. Pending the contest a ship of the other nation conveys to its own shores an alleged ambassador of the revolting portion, whose instructions are to endeavour to induce that State to recognise their independence—a recognition inconsistent with the amity existing between the two Governments, and which would most probably be followed by the rupture of diplomatic relations between them, if not by a declaration of war. The case is so unusual that it is not easy to find any express authority. But suppose (*De omen avertant*) that Ireland or Scotland was to declare itself independent of the British Government, and send in a French vessel a pretended ambassador to France, then at peace with England, to induce that country to recognise its independence, would the English cruisers be bound by the law of nations to allow that vessel, with such a freight, to cross the Channel? We doubt it.

The British Minister puts a case which he evidently deems an argumentum ad absurdum—"In the present war, according to Mr. Seward's doctrine, any packet ship carrying a confederate agent from Dover to Calais, or from Calais to Dover, might be captured and carried to New York." We would ask, suppose, instead of a confederate agent, the packet ship carried a body of confederate troops, with the knowledge and intent that on her arriving at Dover they should be transhipped to another vessel and forwarded to America without delay, would she *not* be liable to such capture? If she would, the question then comes round to the former one, does the carrying pseudo ambassadors, like those which were carried in The Trent, fall under the same rule as the carrying the troops, &c., of a belligerent?

Want of space compels us to abandon, for the present at least, our intention of discussing the fifth proposition of the American Minister.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office.

All other Communications are as hitherto to be "The Editors of the Law Journal. Toronto."

SPLITTING THE PLAINTIFF'S DEMAND.

It has been suggested to us that a notice of some of the leading English cases on this point would be acceptable to our readers. The English Act 9 & 10 Vic., cap. 95, sec. 95, enacts, "*that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts.*" The 59th section of the Division Courts Act is almost identical in terms. It provides that "*A cause of action shall not be divided into two or more suits, for the purpose of bringing the same within the jurisdiction of a Division Court.*"

The meaning of the term "cause of action," in the English act, was the subject of much discussion, and the principles which govern the construction are now pretty plainly laid down.

The old cases on the subject of splitting a demand have little weight in deciding the question on the enactment referred to, since the decision in *Grimbley* v. *Aykroid*, to which we shall presently advert at length. They would indeed go the length of establishing the position, that each item in an account ordered at different times is a distinct cause of action; but, as observed by a careful text writer, the practitioner must be careful not to apply the decision in *Grimbley* v. *Aykroid* too largely, as it is strictly applicable only to the case of a tradesman's accounts, and perhaps other running accounts of a similar nature. We shall therefore briefly direct attention to a few of the earlier decisions.

The 36 Geo. III., cap. 25 (Irish), provided that no cause

should be "split or divided" into two or more actions, to bring a case within the jurisdiction of the Civil Bill Courts. Under this act it was held, in *Hamblin* v. *Hamblin*, before Chief Justice Bush (Nap. C. B. 38), upon appeal, that when two gales of rent were due, which, taken together, exceeded the jurisdiction in amount, but taken separately were within it, that the plaintiff might split the two gales of rent and bring a separate action for each. And in *McCarter* v. *McConnell* (Nap. C. B. 39), it was decided, upon appeal, by Baron McClelland, that even where two actions were brought at the same sessions—one for one half year's rent, and the other for another half, due out of the same holding, both past due—it was not a splitting within the meaning of the act. Again, before Baron Pennefather (Nap. C. B. 38), it was held that when A. lent B. a sum of money, and about four months afterwards another sum of money in another county, A. might sue for each sum separately after both were due. In *Cairns* v. *Whelan* (1 Hud. & B. 552), it was held to be a splitting of the cause of action where a coal-meter, who claimed a fee of 6d. per ton for measuring each cargo of coals imported into the port of Dublin, made a rest whenever he had earned 30s., and demanded payment of that sum, and then sued for it in the Court of Conscience.

In the first three cases referred to, it will be seen that the division was in effect the result of mutual stipulation, and not an *ex parte* and arbitrary division of the plaintiff's claim; while in *Cairns* v. *Whelan* the cause of action was founded on the measurement of the entire cargo, and a rate per ton was only a mode of calculating the remuneration. Parties may also possibly by their own conduct unite various causes of action, so that it can be treated only as one cause of action. Thus, if "an account" be stated between them; though it is to be observed that although there is a new consideration arising from the accounting, the original one remained, and the old is not necessarily merged in the new.

The English decisions.—In *Kitchen* v. *Campbell* (3 In. Co. 308), it was said by DeGrey, C. J.: "What is meant by the same cause of action, is where the same evidence will support both the actions." In *Leddon* v. *Sutor* (6 T. R. 108), the plaintiff recovered in a second suit for a cause of action which might have been included in the first; and it was decided that the true enquiry was, "whether the same cause of action had been litigated and considered in the former action;" and the same principle was admitted in *Lord Bagot* v. *Williams* (3 B. & C. 235). The case of *R.* v. *Sheriff of Herefordshire* (1 B. & A. 672) is an early leading case on the point, but was declared in *Grimbley* v. *Aykroid* to be at variance with the other authorities.

The subject has been fully considered in *Ex parte Aykroid in re Grimbley* v. *Aykroid* (1 Ex. R. 479; 1 Cox & Mac., 77), and the meaning of the phrase "cause of action" defined. It is a leading case on the 95th sec. of the 9 & 10 Vic, cap. 95.

(*To be continued.*)

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

Dear Sirs—A. has a judgment against B., on which a return of "nulla bona" has been made in the cause. Some time afterwards B. removes to an adjoining Division in the same County. A. finds out that the Bailiff of another Division has been collecting from B. by virtue of executions. So A. orders me to forward a "transcript and certificate" to the Clerk of said Division (although not the Division where defendant B. resides) in order that an execution may be placed in the hands of the Bailiff, who *understands* B.'s affairs, and can make the money for A. Accordingly I sent a "transcript and certificate" to the Clerk of the Division where plaintiff desired it to be sent. The Clerk returned the said transcript to me, saying that "he could take no action upon it, and that every Bailiff must do the business of their own Divisions." It would appear, according to the 79th section of the Division Courts Act, that a Bailiff is not compelled to serve processes out of his respective Division. It is my impression that a plaintiff is allowed to transfer his judgment to *any* Division he chooses, and it is the duty of a Clerk, on receiving a "transcript and certificate" from any other Division, to enter the same in his book and, if required, issue an execution thereon, and leave the Bailiff to make whatever return he chooses in accordance with his duty. What is your opinion?

Yours, &c.,

Clerk 3rd Division Court, Co. Norfolk.

Port Rowan, Feb. 17, 1862.

[Our correspondent's view is the correct one. A Clerk to whom a transcript of judgment is sent has no discretion, but must, on receipt, enter it as provided for by the Act and proceed in the ordinary way to issue execution to the Bailiff if required.

The officer who has a mere ministerial duty to perform, as in the instance mentioned, would best consult his own interests by following out the plain requirements of the law.—Eds. L. J.]

I am Clerk of a Division Court. A sues and gets judgment against B. on a note. I have an office some distance from my residence and keep a Clerk there to do business in my absence. B. the defendant comes to the office along with one H., a party who originally held the note against B., but who afterwards transferred it to A., from whom I received it for suit and in whose name the judgment is recorded; and as my Clerk was not there the defendant requested the wife of my Clerk to see what the amount of the judgment A. held against him, B., was, stating that H. and himself had agreed to settle the same. B. the defendant then paid over to my Clerk's wife the amount of the judgment and costs, which H. demanded and received. As he had no right to do so, what is the proper course for me to pursue. Can I take the ground that the Clerk's wife had no authority from me to transact the business, or would such a payment to her hold me liable, and if so, have I recourse against H. and what? E. R. K.

[In our opinion the judgment has not been duly satisfied and A. may sue out an execution. The payment to your

Clerk's wife cannot be considered a payment to the Clerk of the Court. If such a step be taken the question might come up on an application by B. to the Judge to set aside the execution and enter satisfaction.—EDS. L. J.]

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN—Your opinion is respectfully requested in the next number of the *Law Journal* to the following queries, viz:—

1st. Has a Clerk of a Division Court the right to charge for a certificate given under the Seal of his Court of a return of Transcript of Judgment as to what has been done under said Transcript?

2nd. Has a Bailiff the right to charge his mileage more than once in travelling to serve a summons, viz: if he goes twice to serve said summons, fails each time to do so, but the third time succeeds in serving, is he (the Bailiff) entitled to charge mileage three times, viz: twice endeavouring to serve, and the third time for actual serving?

3rd. Has a Bailiff the right to charge mileage in endeavouring to levy under an execution, but in which levy he fails, and returns the execution to the Clerk, "no goods," or "nulla bona?"

4th. Has a Bailiff the right to charge for a schedule of property seized in execution, as in cases of attachment?

Yours respectfully, SCRUTINIUS.

[We are in some doubt about the first question, and do not quite understand our correspondent's meaning. If the certificate is one required for use in the County Court it should of course be charged for—if not so required, we suppose no charge could be made, unless perhaps as for a search.

To the other questions we have no hesitation in answering that no such charges are allowable.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by CHARLES ROBINSON, Esq., *Barrister-at-Law.*

IN RE HIGGINBOTHAM V. MOORE.

Division court—Jurisdiction—Prohibition.

Plaintiff sued in the division court, stating his claim to be, for goods sold £26 14s., and four years' interest thereon, and for two promissory notes, £15 each, and interest, in all £78, and giving credit for cash payments of £46, abandoning the excess of the balance above £25. At the trial defendant objected to the jurisdiction, and judgment having been given against him, he afterwards obtained a new trial on affidavit of merits. In granting it the judge allowed the plaintiff to amend his claim, and the account then rendered claimed only the balance due on the notes, in all £49, gave credit for £23, and abandoned all but £25 of the balance. The defendant moved for a prohibition.

Held, that as amended the claim was clearly within the jurisdiction, and that if the amendment were improperly allowed, that would form no ground for prohibition.

(E. T., 24 Vic.)

R. A. Harrison obtained a rule on the judge of the county court of the county of Wellington, being *ex officio* judge of the first division court of the county of Wellington, to shew cause why a writ of prohibition should not issue to him against any further proceedings on his plaint between these parties.

Moore made affidavit that Higginbotham had sued him in the first division court of the county of Wellington for $100, which sum was the balance of an unsettled account, which exceeded in the whole $200, as the statement in the case shewed; the copy served being annexed to the affidavit; that he was advised by counsel that the case could not be entertained in the division court, on account of its being beyond the jurisdiction: that being so advised he did not attend the trial, but instructed counsel to attend and to object: that the objection was taken, but was overruled by the judge: that he afterwards applied for a new trial, on the ground, among others, that he did not expect the case would be tried; and that such an application was under consideration at the time of his making his affidavit: that no execution had yet issued, as he believed: that he had not paid the amount of the judgment, contending both against the jurisdiction of the court and against the demand; and that he did not owe the debt.

It was shewn in answer to the application for prohibition, that the plaintiff's claim, of which a copy was attached to the summons, was upon a running account, beginning on the 15th of April, 1855, and carried on to the 15th of September, 1857, for goods sold and delivered, amounting to £26 14s. Then four year's interest was added to that sum, and the defendant was in the same account charged with two promissory notes of £15 each, and interest, on one of which only a certain balance was due, the other due in full, making the debit side of the plaintiff's account in all £78 3s. 8d.

Credits were then given in the same account for various items of cash payments which with interest amounted in all to £46 15s., and reduced the plaintiff's demand to a balance of £26 8s. 8d.; and at the foot of his account it was noted that the plaintiff sued for £25, abandoning the excess, £1 8s. 8d. The plaintiff afterwards served an amended account, stating his demand to be £25, after abandoning an excess of £1 5s. 11d.

When the case came on it was defended by an agent of the defendant, only by objecting to the jurisdiction, without going into the merits, and the judge gave judgment in the plaintiff's favour for £25 and costs. A few days after, on the 30th of October, 1861, the defendant, Moore, moved for a new trial, upon an affidavit setting forth merits, giving an account of what he alleged to have been the dealings between them, asserting that he believed a small balance was really due to him, and giving as a reason for his not being able to defend himself at the trial, that he had been advised by counsel that the case was one which could not be entertained in the division court.

The plaintiff answered this by an affidavit, going also into the merits, and supporting his claim.

The judge granted a new trial; and stating that the manner in which the plaintiff's account was made out had misled the defendant, he gave leave to the plaintiff to amend his claim, as this it might not appear to be beyond the jurisdiction.

This order was made before the six days for moving had expired, namely, on the 2nd of November, 1861. The amended account stated the demand upon the current account for goods sold, and upon the notes and interest, in separate columns.

The account thus rendered made the plaintiff's account for goods sold, &c.	£20	15	1
Interest	2	8	0
	£23	3	1
And the demand upon the two notes, on one of which there had been payments	26	5	1
	£49	8	2
And it gave credits in all	23	2	3
Balance	£26	5	11
Abandoning	1	5	11
Only claimed	£25	0	0

M. C. Cameron shewed cause, and cited *Turner* v. *Berry*, 5 Ex. 858; *Wallbridge* v. *Brown*, 18 U. C. Q. B., 158; *McMurtry* v. *Munro*, 14 U. C. Q. B., 165.

R. A. Harrison, contra, cited Consol. Stats. U. C., ch. 19, secs. 55, 59, 69, 74.

ROBINSON, C. J., delivered the judgment of the court.

The 55th section of the Division Courts Act, (Consol. Stats. U. C., ch. 19,) gives jurisdiction to division courts in all cases of "claims and demands of debt, account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, *where the amount or balance claimed does not exceed* one hundred dollars."

The 59th section provides that "a cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a division court; and no greater sum than one hundred dollars shall be recovered in any action for the balance of an unsettled account; nor shall any action for any

such balance be sustained where the unsettled account in the whole exceeds two hundred dollars."

The 62th section enacts that "a judgment of the court upon a suit brought for the balance of an account, shall be a full discharge of all demands in respect of the account of which suit was for the balance, and the entry of judgment shall be made accordingly."

The 74th section also was cited by Mr. Harrison, on the part of the defendant, but we do not see that it has any material bearing, as no evidence appears to have been given of any cause of action not contained in the claim as entered, either in its original form or as amended; and this application cannot require us to go into any objection of that kind.

The plaintiff's claim, as first delivered, in stating an account of which the debit side exceeded £73, stated a case not within the jurisdiction of the court, according to the 59th section, although the balance claimed was only £25: that is, if the whole account is to be taken as an account unsettled, notwithstanding there were among the items two notes which in themselves were liquidated demands. With the moneys due on those notes, the account was much beyond £50, the sum mentioned in that clause: without them the account would be below it.

Admitting that this first statement, made out as it was, shewed an unsettled account above £50, it is to be considered that it does not stand so now in the account, for the learned judge, when he granted a new trial, allowed the statement to be so amended, adhering still to the facts, as to free the case from any possible objection in regard to jurisdiction. If there was an irregularity in allowing that amendment, still we should not award a prohibition on that account. In *Jolly* v. *Baines*, (12 A. & E. 209,) the court held that a matter of irregularity in practice only is no ground for interfering by prohibition.

The claim, as it now stands in the statement, is free from the objection we have been considering, for the whole of the plaintiff's account, including the notes, shews a sum of £49 8s. 2d. only, not so much as £50; and as there has been a new trial granted at the instance of the defendant himself, we shall allow the case to go on upon a demand, which, as it now stands, shews a case within the jurisdiction, and without perverting the facts.

Rule discharged.

MEWBURN V. STREET.

Lottery—Information to forfeit land sold—Practice.

Where an information was filed by a common informer, under 12 Geo. II., ch. 28, to forfeit lands illegally sold by defendant by lottery, the court, the plaintiff not objecting, allowed the owner of a portion of the lands, who was not in possession and had not been served with the information, to come in and defend.

Semble, however, that the interest of such owner could not have been affected by a judgment obtained against defendant.

(Q. B., M. T., 25 Vic.)

Cooper obtained a rule on the plaintiff to shew cause why Ira Spaulding, who was interested in the lands mentioned in the information filed in this cause, should not have leave to appear to and defend the suit, and why he should not have two weeks' time to plead to the information, with leave to plead double and demur, and to plead such pleas as were set forth and attached to the affidavits and papers filed.

The information was by the plaintiff, as a common informer, suing in his own person. It set forth, in substance, that lots six and seven in the fourth concession of Barton, were on the 15th of July, 1858, by defendant Street unlawfully exposed to sale and sold in the city of Hamilton by lottery, to certain persons unknown to the informant, contrary to the statute 12 Geo. II., ch. 28, against "excessive and deceitful gaming," whereby the said lands became forfeited, under the provisions of that statute, to such person as should sue for the same, &c.; and the plaintiff prayed that the said lands might for the cause aforesaid be and remain forfeited to him.

This rule was moved on an affidavit of J. W. Kerr, that he was on the 26th of October, 1861, served with a notice, as a party in possession of the lands in the information: that Ira Spaulding was at that time and still is residing in Maryland, in the United States of America, was the person entitled to the fee simple in the portions of the said lands in possession of the deponent, Kerr, as trustee of his, Kerr's, wife: that he was instructed to defend this action on behalf of Spaulding, as regarded the portion of the lands so owned by Spaulding, and that the time mentioned in the notice for pleading had expired: that he had applied for further time to plead, and it had been refused: that Spaulding was not served with a copy of the notice, and that the same was not directed to Kerr as his agent: that he believed Spaulding had a good defence on the merits, as respected that part of the land which was claimed by Spaulding, and which was in possession of deponent, Kerr.

The notice served was addressed to Kerr and twelve other persons. It informed them of the information being filed, stating its substance, and gave notice that a rule to plead to the information within eight days from service thereof was on the 18th of October, 1861, served on defendant, Street, and that this notice was served on them respectively, to the intent that if they claimed any interest in the premises, or any part of them, they might plead to the information, or procure themselves to be made defendants in this action, or take such other proceedings as they might be advised.

Another affidavit was filed by the attorney of Spaulding, in support of the application that he might be allowed to plead and demur giving his grounds for demurring, and copies of the pleas which he desired to file.

Burton appeared for the plaintiff, but did not object to the application in case the court should think it proper to be granted.

ROBINSON, C. J., delivered the judgment of the court.

There is nothing in the Common Law Procedure Act to found this application upon. New defendants may be added after pleas in abatement, upon their written assent, and by way of amendment, but the provision for that is inapplicable to the circumstances of this case.

We can find nothing in the law and practice respecting penal actions to countenance such a proceeding as is desired here, nor to shew it to be necessary. What is done in actions of ejectment is analogous, where a party having an interest to defend, either as landlord or otherwise, is enabled to prevent his being prejudiced by collusion between his tenant or other party in possession and the plaintiff in the suit. Of course the ejectment clauses have no direct application to such an action as the present.

The defendant Spaulding is in this case desirous of being made a defendant and being allowed to plead, and it is to be considered that the plaintiff does not object, but so far as he may he assents to it. On that ground we think this court may sanction what is assented to, and permit the defendant to plead and demur as he desires; but upon the condition that the demurrer shall be argued before trial of any of the issues in fact, unless indeed the same legal points, and only those, shall be brought up by the demurrer put in by Street, which is now before us, and shall have been determined on that demurrer.

I will add that I do not apprehend at present that Spaulding, or any other occupant, would be affected in any interest, legal or equitable, by a judgment of forfeiture obtained against Street, for I assume that they would be at liberty to contest the ground of forfeiture, unless indeed they hold under certain circumstances; but this need not now be considered, if we grant the order prayed, which we think by the assent given we may.

Rule absolute.

COMSTOCK ET AL. V. GALBRAITH.

Commission to take evidence—Change of day appointed.

It is no ground at the trial for excluding evidence taken under a commission, that the day first named for the examination was changed by the plaintiff and another appointed. Such an objection, if available at all, must be taken by motion before the trial.

This was an action for a small demand on the common counts, about $31, for medicines sent by the plaintiffs from New York to defendant in this country upon defendant's order.

At the trial, at London, before Robinson, C. J., to prove that the medicines were enclosed and sent from New York properly addressed to the defendant evidence was taken of a clerk of the plaintiffs, who was examined in New York under a commission.

It was objected before the evidence was read, that the plaintiffs' attorney had given defendant's attorney notice of a day for executing the commission, and that afterwards there was another day

appointed of which defendant had notice, but it was contended that the first day named could not be departed from by giving notice of another.

Relying on that objection, or for other reasons not shewn, there was no cross-examination, and the learned Chief Justice allowed the evidence to be read, on which the Jury gave a verdict for the plaintiffs.

M. C. Cameron moved for a new trial, on the law and evidence, and for the reception of improper evidence.

ROBINSON, C. J., delivered the judgment of the court.

The questions are, first, what evidence, if any, appeared in the papers themselves to make out the objection; and secondly, is there any thing in it, and ought not such an objection to be made the ground of a motion before the trial, to exclude the evidence under the commission.

The defendant shews by the notices served upon him that the day appointed for taking the evidence in New York had been in fact twice changed, and the place where it was to be taken in New York had been changed once: that notice of these changes had been given in sufficient time to allow the defendant or his attorney to cross-examine, and it is not shewn why he did not attend; nor does it appear that the defendant, who seems to rely now on the mere fact of the day first named being departed from as a fatal irregularity, took any steps by application before the trial to exclude the evidence on account of such change.

We are of opinion that the mere fact of such a change in the appointment could not be rightly held to be a good ground at the trial for excluding the evidence.

Rule refused.

CHAMBERS.

Reported by REVT. A. HARRISON, Esq., *Barrister-at-Law.*

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN.

Execution on rule of Court directing the payment of costs, &c.—From what office issued.

Rule *nisi* for a mandamus was discharged with costs. The rule discharging the rule *nisi* with costs, was issued, and costs thereupon taxed in the principal office in Toronto. Afterwards the party entitled to the costs filed the rule in the office of a Deputy Clerk of the Crown, and issued a writ of *fi. fa.* goods to sheriff from that office.

Held, that the writ was irregularly issued from the office of the Deputy Clerk of the Crown, and should have been issued from the principal office in Toronto. (Chambers, January 6, 1862.)

This was an application to make absolute a summons to set aside an execution which had been issued against the goods and chattels of one Allworth, under the following circumstances:—

A rule had been granted by the Court of Queen's Bench, on the application of counsel for Allworth, calling on the judge of the county court for the County of Elgin, to shew cause why a mandamus should not issue, commanding him to grant a summons to Allworth, and to proceed thereon according to the 289th and following sections of the C. L. P. Act of 1856.

The court, after hearing both parties, discharged the rule with costs. The rule, discharging the rule to shew cause, was issued and the costs were taxed at the principal office in Toronto, and the agent or attorney in Toronto, for the judge, sent up the rule and an allocatur of the taxation, shewing the amount of the costs to St. Thomas, the county town of the County of Elgin.

The attorney by whom it was received, acting for the judge, filed the rule with the allocatur for costs, and a precipe for *fi. fa.* in the office of the Deputy Clerk of the Crown, at St. Thomas, and sued out, and placed in the sheriff's hands a *fi. fa.* against the goods of Allworth.

This proceeding was taken under the assumed authority of the 22nd Vic. (1859), cap. 33, sec. 12.

The objection taken to this execution was, that it could not issue from the office of the Deputy Clerk of the Crown because there were not, and had not been any proceedings taken there, but that the only office from which, under the circumstances shewn, an execution could have issued, is the principal office in Toronto; and it was stated that at the very time, or nearly so, that the writ of execution was sued out at St. Thomas, the costs taxed were actually paid to the agent in Toronto.

Richards, Q. C., for the summons. *English*, contra.

DRAPER, C. J.—The statute referred to for the purpose of enforcing payment of costs (among other things,) payable by a rule of court, enables the person entitled to receive payment, to issue writs of *fi. fa.* against the property of the person to pay, "*in the same manner, and subject to the same rules as nearly as may be as in the case of a judgment at law in a civil action.*"

It is in vain to look for English authority on this question, because there no such offices as those of the Deputy Clerk of the Crown and Pleas are known. These offices are the creation of our own statutes.

The Court of Queen's Bench was erected by the statute of U. C., 34 Geo. III., cap. 2. It is plain enough that there was but one office of the court under that act, the 4th and 7th sections of the act illustrate this remark.

By the 37th Geo. III., cap. 4, sec. 1, it was enacted that the Clerk of the Crown and Pleas should have in every district, an office in which actions might be instituted, and the parties might plead to issue, and it was made his duty to furnish his deputies with blank writs, signed and sealed, to be issued as occasion should require.

In the following year, 38 Geo. III., cap. 6, sec. 8, so much of the preceding act, as relates to pleading to issue, was repealed, but the outer offices were permitted to issue writs of *ca. sa.*

Then, the 41st Geo. III., cap. 9, made all the outer offices such that all the original process might issue therefrom, and in which actions might be instituted, and all necessary proceedings had before final judgment.

Next came the 2nd Geo. IV., cap. 1, the 32nd section of which re-enacted the previous provisions, requiring the clerks of the crown to have an office in each district, the duties of which were to be discharged by deputy, in which actions in the court might be instituted, and all necessary proceedings had before final judgment, and a writ of *ca. sa.* issued after final judgment.

And so the law continued substantially unchanged in this respect until 8 Vic., cap. 36, when the deputies of the clerks of the crown were authorized to issue original and *testatum* writs of mesne and final process, excepting writs against lands and tenements, and to tax costs and enter final judgment in all suits commenced within such district where a cognovit should have been executed, and also cases of *non pros.*, and where judgment should be final in the first instance, and to issue an original or *testatum* writ of *fi. fa.* or *ca. sa.*, according to the practice, but all alias and subsequent writs of final process, and all writs against lands were still to issue out of the principal office.

These provisions were further extended by 12 Vic., cap. 68, sec. 1, authorising the deputy clerks of the crown at the election of the party entitled to judgment, to tax costs and enter final judgment *in all cases* in which the venue should be laid, the proceedings carried on, and the original pleadings filed within such district, whether the judgment were upon verdict computation, cognovit, warrant of attorney or otherwise, and whether such cognovit was given in the first instance, or after other proceedings taken, and to issue all original or teste writs, or alias or plaries writs of *fi. fa.* or *ca. sa.*

Upon this footing the law stood until the passing of the C. L. P. Act (1856), which repealed all the foregoing provisions as to offices of deputy clerks of the crown. This act is cap. 22 of the Consolidated Statutes of U. C. By section 7, in transitory actions, the writ for the commencement thereof might issue from the office of the clerk of either of the superior courts. In local actions (sec. 8,) the writ must be sued out in the proper county, and all proceedings to final judgment in actions transitory or local, must be carried on in the office from which the first process issued. (See also secs. 61, 84, 89, 128, 208, 228, 229, 236, as to entering judgment on cognovits; 243, 244, 245, since repealed; 249 as to writs of execution.) Sec. 275 authorises deputy clerks of the crown to issue rules to return writs issued out of their respective offices. The writ of ejectment is to issue out of the office for the county in which the lands lie. (Consol. Stat. U. C., cap. 27, sec. 3).

In all the preceding clauses no reference is made to enforcing rules of court by process of execution. The statute 22 Vic. cap. 33, sec. 12, first introduced this practice, and it says nothing

about the office from which execution is under such circumstances to issue.

In order to determine this, it is important to remember that the first practice was to have but one office for this court, where its rolls were kept, whence its writs issued, where its rules were made out, costs taxed, and papers and proceedings filed. Such was our original practice founded on and derived from the practice in England, and step by step altered here, and even now though more clearly expressed in the earlier statutes, each deputy's office is a limited portion of the principal office in which certain specified things may be done because the legislature has permitted them to be done.

The enquiry seems limited therefore to this—is this one of the things authorised by the statutes? and in answering the question it appears to me that the maxim *expressis unius est exclusio alterius* must apply.

It cannot be supposed that the C. L. P. Act was intended to confer the power of issuing executions on the deputy clerks of the crown in this particular case, because when it was passed no such executions could be issued out of the court at all. And as the act which authorises their being issued, is silent on this subject, we must, in my opinion go back to the old practice by which the various proceedings in a cause were governed; and according to that I think it is too clear for question that the execution must in cases of this kind issue as under the English Statute, from the principal office. The proceedings were all in term at first. Then the costs were taxed in the principal office, and from that office and that office only, as appears to me, could the execution to enforce obedience to the rule go. The previous proceedings were neither instituted nor carried on in the outer office.

It is objected, however, that the summons is confined to setting aside the execution, and that it should go higher and apply to set aside the proceedings taken in the outer office, on which the execution was founded. But beyond filing the rule, the allocatur and the proecipe, nothing appears to have been done in the outer office. There is no step or proceeding actually rendered necessary to be taken, after the rule is made for the payment of costs, as a further preliminary to issuing the executions unless the filing a proecipe for the writ. The rule is the authority, and all the proceedings terminating with the rule are in the principal office. The filing of these papers in the outer office I look upon as a nullity.

On the whole I think the order should issue as asked.

Ordered accordingly.

McCollum v. Kerr et al.

Interpleader—Duty of Sheriff as to restoration of goods when issue determined in favor of claimant—Effect of interpleader order.

It is no part of the duty of a sheriff, under an ordinary interpleader issue, which has been determined in favor of the claimant, without tender of his costs for so doing, to restore the goods seized to the custody of the claimant in the same state as they were at the time of the seizure.

The proper mode, however, of raising such a question would be in an action against the sheriff for withholding the goods and not on an application to a judge for an order on him to restore them.

The interpleader order being for the sheriff's protection only, an action would be at the suit of the claimant to recover from the execution creditor the damages incident to, or arising out of the seizure.

(6th January, 1862.)

An interpleader order was sued out on 11th October, 1861, in a cause, Kerr et al v. Fullerton et al, the plaintiff, McCollum, being claimant.

It ordered that the sheriff of Kent, on payment of appraised value of goods seized into court by claimant, or as much as might be sufficient to satisfy the execution within seven days, or on claimant's giving security within seven days, for the payment of the same amount, the sheriff should withdraw from possession. That until such payment or security he should remain in possession, and the claimant should pay possession money for the time he should continue in possession from the date of the seizure, unless the claimant should desire the goods to be sold by the sheriff, in which case he was to sell the same and pay the proceeds into court, after deducting the expenses thereof and the possession money. If no payment were made, or security given by claimant within seven days, it was provided that the sheriff might sell and pay proceeds into court. Then the order provided for the trial of an issue, and reserved the question of costs and repayment of possession money, and all further questions.

From the affidavits filed, it appeared that the goods in question were seized in a store in the village of Morpeth, which store was in the occupation of the claimant. That claimant requested the sheriff's officer to take away the goods and allow her to carry on her business in the store, and said she thought it advisable, and desired him to take the goods to Chatham, as she thought in the event of a sale they could not be well sold in Morpeth, and she did not intend to bid. Her attornies also requested the sheriff to have the goods removed to Chatham, as they would, in the event of a sale, bring a better price there, and they threatened to bring an action against the sheriff on behalf the claimant, if he did not forthwith remove the goods out of the store. As there was no place in Morpeth to which the sheriff could remove them so as to be safe, or where they could be insured, the sheriff removed them to Chatham and got them insured. No payment into court or security was given by claimant, but on 14th October claimant's attornies gave the sheriff notice to sell the goods seized. The sheriff advertised for a sale on 31st October—could not sell, and adjourned to the following Saturday, but there were no bidders, and the sale was further adjourned till the 9th November.

On the 4th November the issue was tried and found in favour of the claimant, and the defendants on the interpleader order notified the sheriff not to sell, as they would deliver them up, and there was no sale.

It appeared that on the 7th November the defendants' attorney notified the claimant's attorney that they would give up all claim to the disposal of the goods and pay the costs. The claimant was willing to take back the goods, subject to her right for damages for the seizure and resulting therefrom, and thereupon claimant applied for and obtained a summons calling on the sheriff and on the defendants to shew cause why the sheriff should not forthwith return the goods and forthwith place them in claimant's shop whence they were taken in the same manner as he found them when he made the seizure.

The defendants appeared, but offered no opposition to the restoration of the goods.

The sheriff appeared, representing he had been put to great expense in keeping the goods, in removing them from Morpeth, in insuring them, advertising for sale, &c., &c., for all which he received nothing, and he resisted being required to take the goods back to Morpeth.

Draper, C. J.—The interpleader is meant for the protection of the sheriff, though the relief and indemnity he thereby acquires is deemed so beneficial that, generally speaking, the costs of making and attending the application will not be allowed him. As to poundage, I do not understand any claim is advanced. If it were I could not sustain it, but the expenses which occurred after the interpleader order was made is a different matter.

His continuing in possession was contemplated by the interpleader order, at least until the claimant had resolved whether she would entitle herself to have the goods at once restored.

Instead of this she directed their removal to Chatham, and their sale, and now she asks for their return.

I can see no reason or justice in compelling the sheriff, under these circumstances, to carry back the goods to Morpeth—and as to so much of the summons, I think clearly it should be discharged, and as I read it, the return asked for is really a return to the claimant's store at Morpeth, and in refusing to order that, I discharge the summons.

At the same time, I think that on tender of the costs of removal to Chatham, of the expense of insuring and safe keeping, the sheriff should at once restore the goods.

I was in some doubt whether I could not with propriety, order the insurance and expenses of keeping possession to be paid by the execution creditors, but if the claimant pays them I do not see why she may not claim these, or such portions of them as are attributable to the execution creditor's conduct, in an action against them. The interpleader order though it protects the sheriff against any action, extends its protection no further.

I think, therefore, the soundest conclusion is, that the claimant should pay them; but this, is an opinion, not an order. On

a review of all the circumstances I discharge this summons. If the sheriff improperly withholds the goods now, though an interpleader issue is directed, he will give a new cause of action against himself, after demand on him.

Summons discharged.

Shepp et al. v. Forbes.

Verdict subject to a reference—Power to certify for costs—When to be exercised.

At Nisi Prius in an action for unliquidated damages a verdict was taken for $500, subject to a reference, with power to the referee to certify for costs in the same manner as a Judge at Nisi Prius. The referee reduced the damages to $33.65 and made his award without certifying for costs. It was held, that after award made and published the referee had no power to certify for costs.

Quære. Whether a referee under such a submission had power to certify for the costs of the county or intermediate court.

(7th January, 1862.)

The first count of the declaration was for selling grain seized on a distress warrant for rent before the same was out; the second on a covenant for the price of certain fences put by by plaintiffs, and for cordwood. The third, the common counts for work, labor, money, and on account stated.

The plea to first count was, not guilty; to second, payment; and to third, never indebted, payment, and set off.

The case was entered for trial at the last Kingston Assizes, and a verdict rendered for plaintiff by consent for $500, subject to the award of the judge of the County Court, to be reduced, or vacated, or a verdict to be entered for defendant for any balance due defendant; award to be made by 1st January, submission to be made a rule of court, arbitrator to have the same power to certify for costs as the judge at Nisi Prius, costs of the cause, reference, and award, to abide the event.

On the 9th Dec., 1861, the arbitrator awarded that the verdict should stand for the plaintiff on all the issues and he assessed and awarded the damages which the plaintiffs were entitled to recover at $33.65, and that the verdict be reduced to that sum.

Afterwards on the 18th Dec. he signed a paper as follows: "In the Common Pleas, Thomas Smith and William George Smith, Plaintiffs, v. David Forbes, defendant, I, Kenneth McKenzie, referee in the cause, do certify, that application hath been duly made under the 326th section of the Common Law Procedure Act for a certificate that this cause is a fit cause to be brought in the Superior Court or County Court. I decline to certify, as I am not of opinion that it is a fit cause to be brought in the Superior Court, but in my opinion it is a fit cause to be withdrawn from the Division Court and tried in the County Court, and that the Division Court had not jurisdiction to try the cause, and would certify for County Court costs if I thought I had power under the Act to certify that the cause could be brought in an intermediate jurisdiction. I therefore leave the point for the decision of an superior court judge. Dated this 18th December, 1861."

Upon these facts, and an affidavit stating that the counsel for both parties appeared before the referee, and it was arranged that referee should make the above certificate, so that the directions for taxation might be decided by a judge of one of the Superior Courts, a summons was issued calling upon the defendants to shew cause why the master should not "tax to the plaintiff Superior Court costs, or such other costs as the presiding judge should order."

It was opposed on an affidavit stating that the award was delivered on the 9th Dec., and that on delivering the award the arbitrator refused to certify for any costs, that the defendants counsel, at the request of plaintiffs counsel, went before the arbitrator on 18th Dec., and the arbitrator again refused to certify, but at the request of plaintiffs counsel signed the foregoing certificate; that it was not arranged the referee should make the certificate, that the Defendant's counsel was not an assenting party thereto; that on the 9th Dec. the referee did not reserve the matter for further consideration, but stated decidedly he would not certify; that on appearing before the arbitrators on the 18th Dec. the defendant's counsel waived no right, as he considered the arbitrator's authority at an end.

R. A. Harrison for the application. *M. B. Jackson* contra.

Draper, C. J.—Whether the arbitrator had power or not to certify for County Court costs under the circumstances, he made his award without certifying, and as to Superior Court costs refusing to certify.

If the verdict had been rendered at Nisi Prius then according to the Act, "the defendant shall be liable to County Court costs or to Division Court costs only (as the case may be), unless the judge who presides at the trial certifies in open court immediately after the verdict has been recorded," &c.

In an analagous case in England (*Spain v. Cudell*, 8 M. & W., 129,) Alderson, B. said, "No doubt the arbitrator who is invested with power by the consent of the parties must in all substantial matters follow the rules laid down in the statutes for the guidance of the judge, that is, he must give his opinion upon the matter immediately, he cannot make his award at one time and certify as to costs at a subsequent time. That is in substance the power possessed by the judge at Nisi Prius, which the arbitrator, although he cannot follow it literally, is bound to follow *ey pres*, the mode of doing which is by immediately inserting his certificate in the award." The case of *Greaves v. Gorton*, 10 Jur. 272 is strong to the same effect.

I think the case stands precisely on the same footing as if the Judge at Nisi Prius had not certified.

No application could afterwards be made to another judge to supply the defect, in consequence of the express language of the Act, and therefore I think the summons must be discharged.

Summons discharged without costs.

Higgston et al. v. Whelan.

Entry of Nisi Prius record—Con. Stat. U. C., cap. 22, s. 203, 204, 205, 23 Vic. cap. 42.

Where in a country cause the record was entered for trial before the commission day of the assizes, and afterwards before the commission day settled, the Master, upon consulting the Chief Justice of the Common Pleas, refused to allow the costs of entering the record or counsel fee.

The venue in this cause was laid in the County of Wellington, though all the proceedings were had in the principal office at Toronto.

On 8th November last the attorney for plaintiffs having made up the record sent it to his agent at Guelph, the County Town of Wellington, to be entered for trial and returned after verdict.

On 9th November the agent for defendant's attorney called upon the attorney for plaintiffs between three and four o'clock in the afternoon for the purpose of settling the suit. He was then informed that the record had on the day previous been sent to Guelph for trial. It was then agreed that the debt and costs, not including counsel fee or entry of record, should be received without prejudice, and that if plaintiffs were entitled to counsel fee and costs of entry of record on facts afterwards appearing such costs were to be paid. Immediately upon receipt of the money on this understanding a telegram was sent by the attorney for plaintiffs to his agent in Guelph that the suit was settled and not to enter the record. On same day an answer was received that the record had been previously entered.

It appeared that in the forenoon of 9th November, before any settlement had been effected, the record had been in good faith entered for trial at Guelph, though the assizes did not open till 11th November.

The question was whether the record, being in a county cause, had been properly entered before the commission day of the assize, and if so whether plaintiffs were entitled to the costs of entering the same and counsel fee.

The taxing officer refused to allow counsel fee or costs of entry of record.

R. A. Harrison appealed against his decision, contending that in country causes records may be properly entered before the commission day of the assize, and that if entered in good faith plaintiff is entitled to the costs of entering same together with counsel fee. He referred to Con. Stat. U. C., cap. 22, s. 203, 204 and 205, and 23 Vic., cap. 42.

M. B. Jackson contra.

Burns, J.—It is for the Master to decide whether the costs in dispute are or are not to be allowed. I cannot interfere.

The parties afterwards went before the clerk of the court. He thought the record was properly entered and was inclined to allow

the costs of entering it but would not allow the counsel fee unless actually paid. He said, however, that he would consult the Chief Justice of the Common Pleas and be governed by his decision.

Having seen the Chief Justice he refused on a subsequent day to tax the costs either of entering the record or counsel fee, holding that the record could not be entered so as to entitle plaintiff to costs of entry or counsel fee before the commission day of the assize.

CHANCERY.

(*Reported by* THOMAS HODGINS, Esq., *Barrister-at-Law*)

HAMILTON V. THORNHILL.

Master's office—Priority—Incumbrancers.

An incumbrancer has no right in the Master's office to impugn a prior judgment on the ground that it was irregularly obtained at law.

This was an appeal from the Master's report disallowing a claim offered on behalf of an infant petitioner, Sophia Thornhill, upon a judgment obtained by her Trustees against her father, the defendant, Richard Hall Thornhill.

The ground of the Master's judgment was that the judgment was irregular and void, inasmuch as it was obtained in an action in which the proceeding had been commenced by writ of summons specially endorsed, whereas the cause of action consisted a bond for £2000, with a condition to execute a mortgage on certain property mentioned in it for securing the sum of £1000 lent, as alleged by the trustees of Mrs. Thornhill's marriage settlement, to him, which sum of £1000 was settled on his marriage, after the death of himself and his wife, on his children absolutely, and the petitioner, Sophia Thornhill, being the sole surviving child, had become solely entitled to it after her father's death.

The Master was of opinion that the 15th section of the C. L. P. Act (19 Vic., ch. 43) did not apply to such a case, and therefore that the judgment was irregular and void. He rejected the proof on that account.

This was the sole ground of his decision.

Hard for appellant.

Howell for the plaintiff.

Blake & Wood for incumbrancers, who had proved their claims in the Master's office.

SPRAGGE, V. C.—That the judgment was irregular cannot be doubted. It was, in fact, conceded by the learned counsel for the appellant in the course of the argument, but it did not follow because it was irregularly obtained that it was void. It was, I apprehend, a perfectly valid and binding judgment against Thornhill, and it should have been admitted therefore as a claim against his estate. What position it should occupy among the incumbrances affecting the estate was another question. Upon this question I may observe that it does not appear to me that an incumbrancer has any right to impugn a prior judgment in the Master's office on the ground that it was irregularly obtained. Either he has a right to move to set it aside on that ground in a court of law or he has not. If he has not such right he cannot impugn it on that ground in the Master's office. If he has such right he should exercise it. And the Master cannot, I apprehend, reject or postpone a claim founded on a judgment merely on the ground that it was irregularly obtained, so long as it remains undisturbed at law.

The subsequent incumbrancers can shew anything that would entitle them to priority at law, but not, I apprehend, that the judgment was irregularly obtained.

If at common law, all the writs being in the Sheriff's hands, the judgment in question must have priority, why should it not have priority in equity unless it is obnoxious to some equity which postpones it? I cannot suppose that the order in this case intended to give any unusual privileges to the incumbrancers. There was no reason for imposing any unusually stringent terms upon the petitioner. Her claim—betrayed as she was by her Trustees, and defrauded by her parent—was, if true in fact, as righteous as possible. The order, I think, would have been erroneous had it given liberty to question the regularity of the judgment on technical grounds, and I cannot put such a construction upon it.

I have no objection to order a stay of proceedings on the order, that the incumbrancers may make any application that they may be advised to make to a court of common law, and they will have the right, of course, to impeach the judgment in the Master's office on any ground that would postpone the execution upon it at law, or upon any ground peculiarly cognizable in equity.

In the petition which I have perused the petitioner claims an equitable lien on the lands in question, by reason of the bond to the Trustees, and the alienation of the lands mentioned in it, in exchange for the lands in question. Such a claim certainly has a great appearance of justice. It was afterwards, as I understand, that the mortgage of the plaintiff and the different judgments were created.

It seems to have been thought that the registration of these incumbrances gave them priority over the petitioner's equitable claim. But this claim was one not affected by the registry law, and it might deserve consideration whether, under such circumstances, the infant's claim would be postponed.

It is true that notice might be a material fact to be shewn, but to what extent and as to what persons it would be material to shew it, might also deserve serious consideration.

It must be referred to the Master to review his report, without costs.

I have thought it my duty to make these observations for the benefit of the infant, without intending in the slightest degree to prejudge any point not necessarily decided on this appeal.

TULLY V. BRADBURY.

Mortgage—Assignment—Set-off—Injunction.

Upon the sale of land which was subject to a mortgage, the vendor gave a bond to indemnify the purchaser against the incumbrance, and thereupon the transaction was completed, the purchaser giving a mortgage for £500, and paying residue of purchase money in cash. The mortgage given by the purchaser was transferred to a third party for value, but with notice of the existence of the prior incumbrancer, who subsequently took proceedings at law against the purchaser, to recover the amount of his mortgage, who thereupon filed a bill in this court, claiming a right to apply the amount due by him in discharge of the prior mortgage, which was then due and unpaid. A motion for an injunction to restrain the action at law was refused.

This was a bill by Kivas Tully against James R. Bradbury, Wm. Bradbury, and Archibald John McDonell, setting forth a purchase by the plaintiff, from the defendant, James R. Bradbury, in November, 1856, of certain lands at Owen Sound, which at the time of such sale were held by his father, the defendant, William Bradbury, as trustee for him, and were at the time subject to a mortgage made by the former owner thereof in the year 1853, for securing £500, which "was payable at a time long since expired," and which had been assigned to one George Alexander, who was entitled to receive the money secured thereby; that at the time of making such purchase, it was agreed between plaintiff and defendant, James R. Bradbury, that he (Bradbury) should pay off such mortgage, and should give to plaintiff a title free and clear of all incumbrances: that the conveyance therefor was executed to plaintiff, who paid a portion of the purchase money, and executed a mortgage in favour of the defendant, James R. Bradbury, securing the balance, (£500,) which had been transferred by James R. Bradbury in the latter part of the year 1857, and was then held by the defendant, McDonell.

The bill charged notice to McDonell of the agreement to pay off the mortgage held by Alexander, and claimed that plaintiff had a right to apply the £500 secured by his mortgage to Bradbury, to paying off the first mortgage so held by Alexander; and prayed, amongst other things, an injunction to stay proceedings at law by McDonell against plaintiff to recover the amount of the mortgage to Bradbury.

The defendant, McDonell, answered the bill, denying all notice of any agreement as to the discharge of the mortgage held by Alexander, or any notice with respect to it, other than appeared in the abstract of title furnished to him. The bill was taken *pro confesso* against the defendants, Bradbury.

An affidavit of the plaintiff was filed, reiterating the statements in the bill. The defendant, James R. Bradbury, was examined on behalf of the plaintiff, before a special examiner: his evidence, however, did not vary materially from the facts set out in McDonell's answer. Upon this state of facts, a motion

was made for an injunction to restrain the action at law, on the ground of plaintiff's right to apply the money due upon his mortgage to Bradbury.

Fitzgerald, in support of the application.

If the mortgage given by plaintiff had still been held by Bradbury, a clear right would exist for plaintiff to apply the amount due by him in reduction of the amount due upon the mortgage in the hands of Alexander; the position of the plaintiff is in fact that of surety for the debt due to him, and *Davis* v. *Hawke* (4 Grant, p. 408) is an authority in favour of plaintiff. The same rule must apply as to McDonell, who took the assignment subject to all the equitable rights of plaintiff as such surety. *Jones* v. *Mossop*, 3 Hare 568; *Moore* v. *Jervis*, 2 Col. 60; *DeMattos* v. *Gibson*, 5 Jur. N. S. 347.

The only point admitting of any question is the fact of notice to McDonell, but the notice conveyed by the abstract of title, and which is admitted by his answer, is sufficient for this purpose.

Strong contra. Although James R. Bradbury is bound to pay off the mortgage held by Alexander, still this affords no ground for plaintiff applying his debt in discharge of it. The pleadings and evidence shew that a bond was executed by Bradbury, for the purpose of indemnifying plaintiff against the mortgage of Alexander: this, it was contended, evinced an intention on the part of the plaintiff to rely upon that security, not upon any right of his to apply the amount secured by his own mortgage to discharge that held by Alexander. Besides, a person taking a bond of indemnity cannot refuse to pay his debt, because he has such bond before he has sustained any loss.

Here the most that can be claimed on behalf of plaintiff is a right of set-off, but this not having attached before the transfer of Tully's mortgage to McDonell, he must be treated as holding discharged of it.

Rigney v. *Vanzandt*, 5 Grant, p. 498; *Ex parte* v. *Hippins*, 2 Gl. & J. 98; *Barnet* v. *Sheffield*, 1 D. M. & G. 371; *Clark* v. *Cort*, Cr. & Ph. 154, were amongst other cases also cited by counsel.

ESTEN, V. C.—The material facts of this case, I understand, are these, the defendant, William Bradbury, purchased the lands in question, subject, with other lands, to a mortgage for £500 to one Alexander, which he covenanted to discharge. James Bradbury, another defendant, became entitled in equity to the lands in question, but received no conveyance of them from his father, William Bradbury. He contracts for the sale of them to the plaintiff for £645, of which £145 is paid, and £500 is secured by mortgage; and James Bradbury by bond agrees to discharge the mortgage to Alexander. The conveyance to the plaintiff is made by William Bradbury, as a trustee for James Bradbury, and he enters into covenants for the title limited to his own acts. James Bradbury transfers the mortgage for £500 to the other defendant, McDonell, who commences an action against the plaintiff on the covenant for payment of the mortgage money contained in it, and this suit is thereupon instituted by the plaintiff for an injunction to stay proceedings in that action, and to apply the mortgage held by McDonell to the exoneration of the lands in question from the mortgage of Alexander. The claim is based on several grounds; first, that the estate is a surety, and is entitled to apply its own debt to its exoneration as such surety; second, that both James and William Bradbury, the former by his bond, the latter by his covenant, have agreed to discharge the mortgage of Alexander, and that the plaintiff has a lien on his own purchase money or mortgage for securing all for which he bargained, namely, the estate free from incumbrances, and has therefore a right to apply his mortgage to the discharge of the incumbrance of the previous mortgage. Conceding the existence of these rights in the abstract, for the sake of argument, I think the circumstances of the case furnish an answer to them, inasmuch as they indicate an intention that the two mortgages shall be independent, and that one shall not be held as an indemnity or security against the other, and inasmuch as these rights cannot of course exist in opposition to the express intention. Had it been intended that the plaintiff should have a lien on his purchase money for the discharge of the incumbrance affecting the estate, he would have undertaken to discharge it, and purchased the equity of redemption merely, which would have been the prudent course. He would in this case probably have paid a little more for the estate. Aware of the incumbrance, and intending that it shall be discharged by the vendor, he nevertheless grants a mortgage and covenant, binding himself to pay the balance of the purchase money at stated times, and takes from the vendor a bond to discharge the incumbrance. This agreement indicates a clear intention to my mind that the balance of the purchase money should be paid irrespective of the prior incumbrance, and that no lien should exist upon it for the discharge of that incumbrance.

It is true, that if the mortgage remained in James Bradbury's hands, and the plaintiff had paid, or was required to pay the previous incumbrance, an off-set would be made of one against the other, in order to prevent any inconvenient circuity. But as I understand the law on this point, the right of set-off, when it is mere matter of arrangement, and does not arise from contract express or implied, accrues only when the necessity for making the arrangement occurs, and not before, and if one of the funds has been previously alienated, it does not arise at all.

In the present case, the circumstances, I think, exclude any implied contract that one mortgage should be a security against the other; and as a *bona fide* transfer was made by James Bradbury of the mortgage executed by the plaintiff before any right of set-off accrued, that is, before the necessity for it arose, I think it would be unjust to restrain McDonell from enforcing his legal rights; and therefore I think this application must be refused.

ANDREWS V. MAULSON.

Practice—Breach of injunction—Order to commit.

Where a party commits a breach of an injunction after service of the order upon his solicitor, but before personal service of the injunction upon the party enjoined, the court will commit him for contempt.

In this case an injunction had been granted against the defendant restraining him from collecting rents or otherwise interfering with the estate of the plaintiff. A copy of the order directing the injunction to issue was served on the defendant's solicitor on the 16th September, 1861, but the defendant was not served personally with the injunction until the 30th September, 1861. Between the times of the service of the order and of the injunction, the defendant collected rents belonging to the plaintiff's estate. Evidence having been taken,

Hodgins, for the plaintiff, moved in court for an order *nisi* to commit the defendant for breach of the injunction. He cited Drewry on Injunctions.

ESTEN, V. C., after hearing the cases referred to in Drewry, considered that notice to the solicitor that an injunction had been ordered was sufficient, and that the defendant, having violated the order, was guilty of contempt, and he therefore granted the order *nisi*. No cause having been shown on the return of the order, an attachment was issued against the defendant for breach of the injunction.

COUNTY COURT CASES.

In the County Court of the County of Elgin, before his Honor JUDGE HUGHES

METCALFE V. WIDDIFIELD.

Taverns—Election law—Con. Stat. of Canada, ch. 6, sec. 81—Action for penalties thereunder—Demurrer.

The General Election Law, section 81, enacts that "every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days for polling, *in the same manner as it should be on Sunday during divine service*, and that no spirituous or fermented liquors shall be sold or given during the said period under a penalty of $100 for either offence."

In an action for penalties under this Act for both offences, claiming $100 for each in separate counts,

Held on demurrer that the prohibition is absolute, not restricted by any saving in other statutes.

Also, that a plea to the whole declaration that the liquors were supplied to travellers was bad, and no answer to the second count.

Also, that a plea that there was not when the Act was passed any law of the land requiring taverns or hotels to be closed on Sunday during divine service was bad.

Declaration.—First count. For that the defendant is indebted to the plaintiff in the sum of $200; for that heretofore, to wit,

on the 5th of July, 1861, a poll was opened and held in and for the municipality of the township of Yarmouth, in the county of Elgin, for the election of a member to represent the east riding of the said county in the Legislative Assembly of Canada. And for that the defendant, being keeper of an hotel or tavern wherein spirituous or fermented liquors or drinks are ordinarily sold in the said township of Yarmouth, did neglect to close and keep closed his said hotel or tavern on the said fifth day of July, in the manner directed by the Act, chapter six of the Consolidated Statutes of Canada, intitled "An Act respecting Elections of Members of the Legislature," and contrary to the provisions of the said Act, whereby the defendant forfeited for his said offence one hundred dollars.

Second count.—And for that the defendant, on the said fifth day of July, at his hotel or tavern aforesaid, in the township of Yarmouth aforesaid, did sell or give certain spirituous or fermented liquors or drinks to divers persons in his hotel or tavern aforesaid, contrary to the provisions of the said Act, whereby the defendant forfeited for his said offence the further sum of one hundred dollars.

Pleas.—1. The defendant says that he does not owe the said debt as alleged.

2. That the time when, &c., the liquors sold or given to the said persons was by way of refreshment to travellers lodging at defendant's tavern, but not otherwise.

3. To so much of the plaintiff's declaration as alleges that the said defendant, at the said time when, &c., neglected to close his said hotel or tavern in the manner directed by the Act therein referred to, the defendant says that there was not at the time of passing the said Act, or before the passing thereof, any law of the land requiring taverns or hotels to be closed on Sunday during divine service.

Demurrer to both pleas.

Joinder in demurrer, and notice of exception to the declaration that there is no manner pointed out by law in which hotels or taverns shall be closed during elections, as in said declaration mentioned.

Paul, Plaintiff's Attorney for the demurrer.

Ellis, Defendant's Attorney in support of the pleas.

Hughes, Co. J.—1st. The object of the demurrers in this case is to test the meaning of the 81st section of Con. Stat. of Can., cap. 6. I think that according to the rules of construction of penal statutes, such as this is, there is no difficulty in reaching the intention of the Legislature, and that it is not all obscurely expressed, however strict a construction may be placed upon its wording.

2nd. *The intention* is no doubt to promote complete freedom to every one in the use of his own unbiassed judgment in the exercise of the elective franchise, and to remove from him the baneful influence of intoxicating drinks and the importunities of those who assemble in taverns and drinking places to tempt the unwary in order to make them vote under the influence of intoxication, in a manner they would not do in their sober moments.

3rd. Every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold is to be closed during the two polling days of an election.

4th. I take the words in "*wards or municipalities in which the polls are held*," to mean a ward as applicable to a city or town election and a municipality to apply to a county or riding election.

5th. And I take from the words "*in the same manner as it should be on Sunday during divine service*" this meaning, *i. e.*, by the laws of Upper and Lower as well as of United Canada there is a public recognition of the Christian Sabbath, and protection given to those professing christians who meet for purposes of public worship on the Lord's Day called Sunday, and at other times. I refer to the Statutes of Lower Canada, 7 Geo. 4, cap. 8 (1827); 1 Geo. 4, cap. 2; 4 Geo. 4, cap. 35; 45 Geo. 3, cap. 10 (1805); also to the Statutes of Canada, 14 & 15 Vic., cap. 100, sec. 12; 7 Vic., cap. 14 (1843); 12 Vic., cap. 58, sec. 90; 14 & 15 Vic., cap. 96, sec. 8; 22 Vic., cap. 102, sec. 7; and cap. 54, sec. 282; also of Upper Canada, 8 Vic., cap. 45, sec. 1, 2, 3, &c.; 22 Vic., cap. 104, and others: and although the recognition of legal equality among all religious denominations is now an admitted principle in Colonial Legislation and has been recognised by our Parliament as a fundamental principle of our civil policy and the free exercise and enjoyment of religious profession and worship without discrimination or preference is allowed under proper restrictions to all Her Majesty's subjects, the Christian profession is the religion of the inhabitants and the Christian Sabbath is the day of rest and worship recognized by law. I take those words therefore to point to the necessity of keeping closed every hotel, tavern, &c., during the two days of polling in an election contest with as much strictness and scrupulosity and in the same manner and as it ought to be on a Sunday during divine service.

6th. Supposing the Legislature had not used the words "*on Sunday during divine service*," and suppose this country were to consist of a large majority of those who profess the Roman Catholic system and the words in this Statute were "*in the same manner as it should be during the passing of a public religious procession*," I think there would be no difficulty in saying that the intention of the Legislature was to pay respect to those whose religious profession might lead them to believe and to follow or join in such a procession; so here I think the duty enjoined by the Legislature is to keep taverns closed with as much strictness as a point of obedience to the necessity of insuring purity of election and the mischief that that clause of the Statute was intended to cure, as the deference which the community generally ought to pay to the feelings and views of those who engage in Christian worship on the Sabbath and the requirements of morality and public decency.

7th. I cannot understand that the Legislature, when passing the Election law (Con. Stat. of Can., cap. 6, sec. 81), had any intention to refer or to make allusion to the provisions of 22 Vic., cap. 6, which restrains the sale of intoxicating liquors from Saturday night until Monday morning, because that Act merely applies to Upper and not to Lower Canada, and it surely could not be intended to make the people of Lower Canada understand that they were bound to read a Statute exclusively applicable to this part of the Province in order to make them have proper apprehension of what is enjoined or forbidden by the 81st section of the General Election law—that it stands as an independent enactment like several others purely local in so far as Upper Canada is concerned.

8th. By keeping open an hotel, &c., during the two days of an election, *i. e.*, not closing it in the manner intended by the Legislature, is a penal offence, subjecting the offender to the penalty of $100, and the selling liquors during the same period is another distinct offence subjecting the transgressor of the law to another penalty of $100.

9th. In this view I think the declaration upon the objections raised against its sufficiency is good, and there must be judgment for the plaintiff upon it.

10th. For the reasons before stated, *i. e.*, that the provisions of Statute of U. C., 22 Vic., cap. 6, has no bearing upon the question, I think the second plea is no answer to the plaintiff's action.

11th. And as to the last plea, I think it insufficient, because it neither traverses nor confesses and avoids what is alleged in the declaration, and, in my opinion, it was not at all necessary that the Legislature should pass an Act of Parliament enjoining that a tavern shall be closed on Sunday during divine service in order to give effect to their Statute requiring that taverns shall be kept closed during an election and pointing out that the manner of its being so kept closed should be the same as it should be on a Sunday during divine service.

12th. If the 81st section had expressed its intention in these words, "*in the same manner as by law it is bound to be on Sunday during divine service*," then in the absence of such a law the 81st section would have been inoperative as it is. I think the last plea is no answer and offers no issue, at all events it is no answer to the second count.

Judgment for plaintiff.*

* This judgment has since been affirmed on appeal. (See 21 U. C. Q. B. 247.)

COUNTY COURT CHAMBERS.

In Chambers, before the County Judge of the County of Elgin.

Regina v. Bryers.

Bail—Grounds for admitting criminal prisoners to bail—Probability of the prisoner appearing to take his trial—Arson.

The guilt or innocence of prisoner not the question to decide on application for bail on a criminal charge.

The circumstances of the charge, the nature of punishment and evidence, and probability of prisoner's appearing to take his trial are the important questions to be considered.

Held, when it is shewn prisoner attempted to bribe the constable to allow him to escape, the probability of his appearing to take his trial was too slight for the Judge to order bail. Bail refused, although it was some months before a criminal court competent to try the case would sit.

The charge in this case was for feloniously causing one Florence Stumpff to set fire to prisoner's dwelling house in order that he might recover from the Equitable Insurance Company a large amount assured to the prisoner by that Company in the event of its being destroyed by fire. Stumpff was the only witness to prove the fact examined before the committing Magistrate.

Paul, for prisoner, applied for bail upon copies of the depositions taken before the committing Magistrate and upon affidavits, and cited Taylor on Evidence, 177 and 179; Arch. Crim. Plead., 225, and urged that the only evidence against the prisoner was that of an accomplice and produced affidavits impeaching that witness's character.

Stanton, County Attorney, contra, produced the affidavit of the constable who executed the warrant to apprehend, which set forth that prisoner attempted to bribe him to let prisoner escape by offering him a deed of some land and money.

The alleged arson took place about the time of the Spring Assizes and prisoner was not arrested until they were over.

Hughes, Co. J.—Acting upon the authority of *Regina v. Smith and wife*, 9 Dowl. P. C., 558, which was also acted upon in *Regina v. Gallaher*, by the Irish Court of Queen's Bench, reported in 20 L. T. Reports, page 221, and also upon the authority of *Barronet's Case*, 1 Ell. & Bl. 1, I must refuse to bail the prisoner for the following reasons:—

I conceive that the reason why parties are committed to prison by Magistrates before trial is for the purpose of ensuring or making certain their appearance to take their trial, and the same principle is to be adopted on an application for bailing a person committed to take his trial; and it is not a question as to the guilt or innocence of the prisoner—it is on that account necessary to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy.

In this case the accusation is a very serious one, *i. e.*, procuring and hiring another person to set his house on fire and to burn it in order to recover from an Insurence Company a large sum of money which had been assured to him in the event of its being accidentally burned; the punishment is very considerable, imprisonment in the Penitentiary from two years upwards to the end of life; the evidence is strongly presumptive of guilt, and besides that, the prisoner appears to have endeavoured to purchase his escape from the custody of the constable who arrested him and had him in charge, which does away with any hope that he would, if ordered to be bailed, come forward to take his trial. I think therefore I would not be exercising my discretion properly by granting the order asked for.

Order for bail refused.

ELECTION CASE.

Before Kenneth McKenzie, Esq., Judge of the County Court of the United Counties of Frontenac, Lennox and Addington.

Qualification of voters—Effect of assessment rolls—Admissibility of parol evidence to contradict or vary same.

1. In the case of a municipality divided into wards, where a voter is entitled to vote in the ward in which he resides, he is not entitled to vote in any other ward.
2. In the case of a householder, residence for one month next before the election is an essential to qualification as a voter.
3. Where there was great noise and confusion at the polling place, but no personal violence offered to the voter, the allegation of intimidation failed in the proof.
4. It is necessary that a voter, whether freeholder or householder, should not only be rated as such, but at the time of the election hold the property in respect of which he is rated.
5. Parol evidence cannot be received by a returning officer or judge sitting as a court-house, to contradict or vary the contents of the assessment roll.

A writ of summons, in the nature of a *quo warranto*, was issued upon the fiat of Judge McKenzie, calling upon the defendant to show by what authority he used, enjoyed and exercised the office of municipal councillor for Rideau ward, in the city of Kingston, the relator claiming an interest in the election as a candidate.

The relator complained that six illegal votes had been recorded at the election for the defendant, and that he (relator) had a clear legal majority of three votes over the defendant, and should have been returned elected. The relator claimed the seat for himself.

The relator objected to the vote of one Thomas Campbell, on the ground that he was residing in Victoria ward at the time of the election, and entitled then to vote therein; to the vote of one Wm. McKee, on the ground that he was residing in Frontenac ward at the time of the election, and entitled then to vote therein; to the vote of one John Mills, on the ground that he was not rated for any property in Rideau ward, and that he voted on real property assessed against his father; to the vote of one Jacob Wilson, on the ground that one David Moore falsely personated Wilson at the election, and voted in his name; to the vote of one David Sewell, on the ground of non-residence, he being assessed as a householder; and to the vote of one John Hickey, on the ground that he was, through threats, violence and intimidation, induced to vote for the defendant.

The defendant, in his answer, denied the allegations of the relator generally, and objected to several votes recorded for the relator. The defendant objected to the vote of one John Waters, on the ground that he was not sufficiently assessed; to the votes of one John Redpath and one Benjamin Redpath, on the same ground; to the vote of one William Aubin, on the ground of non-residence. He claimed also the vote of one James Ovens, as having been recorded in a mistake by the returning officer for the relator, whereas the vote was intended for the defendant. Exceptions taken by the defendant to several other votes of the relator were of a clerical character, and unnecessary to be here noticed.

J. O'Reilly for the relator. *J. Agnew* for the defendant.

McKenzie, Co. J.—According to the poll-book returned to me, 118 votes had been polled at the election for the defendant, and 116 votes for the relator, so that the defendant was returned as elected by an apparent majority of two votes over the relator.

I am of opinion that the votes of Thomas Campbell, William McKee, John Mills, David Sewell and Jacob Wilson, were not legal votes, and must be struck out of the poll-book; and that the vote of John Hickey should not be disturbed.

The evidence showed conclusively that Thomas Campbell was residing at the time of the election, and a long time before it, in Victoria ward, and entitled to vote in that ward. William McKee was, at the time of the election, and for a long time before it, residing in Frontenac ward, and entitled to vote in that ward at the time of the election. It is clear that, under the 78th section of the Municipal Institutions Act, Campbell and McKee could not vote in Rideau ward. John Mills had no right whatever to vote. The real property in respect of which he voted, was not his property, or assessed against him. It was the property of his father, and assessed against his father. David Sewell had not been residing in the city of Kingston for one month before the election within the meaning of the act of Parliament; on the contrary, he had been residing in the township of Kingston for several months before the election. One David Moore falsely personated Jacob Wilson at the election, and voted for the defendant as Jacob Wilson. This was an unblushing piece of effrontery, involving a criminal violation of the law. As to the vote of John Hickey, I think it should not be disturbed. It is true that there was great noise and confusion at the polling place when Hickey went up to vote, and violent language passed, but no personal violence was offered to Hickey. I think Hickey, if he had a mind to, might have withheld his vote from the defendant. From the evidence, I am inclined to think that the persuasion of Lenox had more influence over the mind of Hickey than the turbulence of the crowd.

The five illegal votes recorded at the election for the defendant —namely, the votes of Campbell, McKee, Mills, Sewell and Wilson, must be deducted from the 118 votes recorded in his favor in the poll-book. This will reduce the aggregate of legal votes received by the defendant to 113 votes, giving the relator an apparent majority of three votes over the defendant.

It is admitted on all sides that the vote of James Ovens was intended for the defendant, and entered, by a mistake, in the poll-book for the relator. The evidence admits of no other conclusion, consequently the vote of James Ovens must be deducted from the gross votes received by the relator, and added to the 113 legal votes entered for the defendant. This will reduce the number of aggregate votes received by the relator, according to the poll-book, to 115 votes, and increase the number received by the defendant to 114 votes.

I am clearly of opinion, under the law, that William Aubin was not entitled to vote in Rideau ward at the election. He left the city in the spring, in company with a young woman, leaving his wife and family behind him. Before he left, he sold his interest in the premises upon which he voted for $100 to one Elmer, and has been out of the possession of them ever since. It is true that he returned to the city a few weeks before the election, but there was nothing to show that he had resumed possession of the assessed premises, or that any one held the possession of them for him. On the contrary, it was shown that Elmer had the possession of them through his tenant. The statute requires that the voter should be a freeholder or a householder, at the time of the election, within the municipality. It cannot be said on the evidence that William Aubin was the one or the other at the time of the election; it is very clear he was not. Several of the adjudicated cases show that when a person sells or disposes of the premises assessed against him, between the time of the assessment and the election, that he cannot vote on such premises, as he cannot be said in respect of them to be a freeholder or a householder at the time of the election.

The vote of John Waters requires to be considered carefully. The entries in the assessment rolls must be examined in connection with the law. By the 103rd section of the Municipal Institutions Act, it is enacted "that the assessors shall state in their assessment rolls whether the persons therein named are freeholders or householders, or both, and shall in separate columns for this purpose use the initial letters F. and H. to signify the same respectively," and the 23rd section of the assessment law that when land is assessed against the owner and occupant, the assessors shall on the roll add to the name of the owner the word "owner," and to the name of the occupant the word "occupant;" and by the 19th section, the assessors are required "to set down the names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality, who have taxable property therein." The 75th section of the Municipal Institution Act defines who shall be municipal electors as follows:—"The electors of every municipality for which there is an assessment roll shall be the male freeholders thereof, and such of the householders thereof as have been resident therein for one month next before the election, who were severally rated on the last revised assessment roll for real property in the municipality, held in their own rights or that of their wives as proprietors or tenants;" and by the 79th section it is enacted that "in case both the owner and occupant of real property are rated therefor, both shall be deemed rated within this Act;" and by the 80th section, "that when any real property is owned or occupied jointly by two or more persons, and is rated at an amount sufficient, if equally divided among them, to give a qualification to each, then each shall be deemed rated within the act, otherwise none of them shall be deemed so rated;" and by the 97th section it is enacted "that the clerk of the municipality shall deliver to the Returning Officer, who is to preside at the election, a correct copy of so much of the last revised assessment roll for the municipality, ward, &c., as contains the names of all male freeholders and householders rated upon the roll in respect of real property lying therein, with the assessed value of the real property for which every such person is so rated."

On reading over these several enactments carefully, with the adjudicated cases, and in connection with the common sense of the of the thing, I am unable to arrive at any other conclusion than that the right of municipal electors to vote rests upon the last revised assessment roll, and every Returning officer is bound in the reception or rejection of votes by what appears on such roll, and has no right to resort to extrinsic evidence to explain, vary, or contradict what appears on such roll. The law requires great care in preparing those rolls. The assessors make them up under the solemnity of an oath, in the first instance; then the Court of Revision reviews the proceedings of the assessors, and an appeal lies to the County Judge from the Court of Revision. And the statute declares that the roll as finally passed by the Court of Revision and County Judge shall be valid, and binding on all parties concerned. The assessment rolls, it appears, are records of great importance, and should be prepared with great care and intelligence. They fix the basis of taxation, and regulate and limit the right of voting at elections. The roll settles the value of the property assessed, and the character in which a party is assessed, whether as owner, occupant, or jointly with other persons. The returning officer is bound to receive or reject a vote, according to what appears on the roll or the copy sent to him. When a party appears on the roll as an owner, the returning officer cannot receive extrinsic evidence to show that he is an occupant only. Or when two parties appear on the roll as householders the returning officer cannot receive such evidence to show that the one is a freeholder and the other a householder. And that is what the learned counsel for the relator proposed in reference to the vote of John Waters. In a scrutiny of votes the Judge is bound by the same law, the same rules, and the same restrictions as the returning officer at the election. In the assessment roll produced at the hearing of this cause, I find the following entry in respect of John Waters:—"John Waters or Garrett Fitzgerald, with a figure 1 in the column headed Householders yearly value of real property, 42 dollars."—Now if this entry means anything at all, it means that John Waters and Garrett Fitzgerald some way or other are householders in respect of the assessed property. Mr. O'Reily at the hearing, offered parol evidence to show that John Waters was the occupant, and Garret Fitzgerald the owner of the assessed premises. I refused to receive this evidence, and justly so. The returning officer could not receive such evidence at the election, and I could not receive it at the scrutiny, as it would be admitting evidence to explain and contradict a written record made evidence in the matter by Act of Parliament. John Waters could not vote as a householder, as the roll shows that Garret Fitzgerald has as much a right to vote as he has, and I cannot decide which of them has the right to vote, and both could not vote. He cannot vote under the 80th section as a joint occupant with Fitzgerald, as the rate is too low for that purpose, and if he could vote at all on the present assessment roll, it would be under that section. I think that the 78th and 80th section of the Act cut out the right of John Waters to vote on the real property, as rated and assessed on the last revised assessment roll. His vote is an illegal vote, and must be struck out. It would be a waste of time to discuss the fact that a John Waters appears rated on the roll together with June Webster, as it is not the same man; and if he were the same man it would do the good, as the rate is too low.

The names of Benjamin Redpath and John Redpath are entered on the roll in the same manner as the names of John Waters and Garrett Fitzgerald are, and the principles of law which are applicable to the vote of John Waters are applicable to the votes of Benjamin Redpath and John Redpath, consequently their votes must be disallowed.

Upon this view of the case, the votes of William Aubin, John Waters, Benjamin Redpath and John Redpath, four in all, must be deducted from the 115 votes standing in favor of the relator, which will reduce the actual number of legal votes received by him to 111 votes, which being deducted from the 114 legal votes adjudged to the defendant, will give to the defendant a clear legal majority of 3 votes over the relator, consequently the defendant is entitled to hold the office of councilman, to which he has been elected.

As the defendant is entitled to hold the seat, it becomes unnecessary to discuss the question raised at the hearing about the qualification of the relator.

A considerable portion of the difficulties I had to encounter in deciding this case, has been caused by the defective manner in

which the assessment rolls produced had been made up. The assessors seem to have repudiated the plain and intelligent directions of the statutes and have introduced a novel mode of their own, not sanctioned by any statute whatever. To the directions contained in the 163rd section of the Municipal Institutions Act, and in the 18th and 24th sections of the Assessment Act they have paid no regard whatever in the assessment rolls produced before me, at the hearing of this cause. I am, however, bound by law to act on the rolls as they are, and not on rolls as they ought to be.

For the reasons already stated, I am of opinion that the defendant is entitled to hold the office and to judgment on the present writ of summons in the nature of a *quo warranto* issued against him. Therefore I consider and adjudge that the said office of Municipal Councillman for Rideau ward, in the City of Kingston, be allowed and adjudged to him the defendant Thomas Flynn, and that he be dismissed and discharged from the premises charged upon him; and also that he do recover against the said relator his proper costs and charges laid out and expended in defending himself.

Judgment for the defendant with costs.

ENGLISH CASES.

V. C. WOOD'S COURT.

(*From the Law Times.*)

HOLMES ET AL V. THE QUEEN.

Petition of right—Jurisdiction—Lands in a colony—Petition of Right Act 1860, 23 & 24 *Vict. c.* 34.

This court will not entertain a petition of right to adjudicate upon a claim to lands vested in the Crown, situated in one of the colonies; nor will it make a decree *in personam* as against the Sovereign of this country in the character of Trustee here of lands in a British colony.

(*Nov.* 15 *and* 19.)

Demurrer.

This was a demurrer filed by the Crown to a petition of right, presented under the Petition of Right Act 1860, to obtain restoration from the Crown of certain lands within the city of Ottawa, in Upper Canada, taken by the Ordnance Department under the authority of the Rideau Canal Act, and not actually used for the purposes of the canal. It appeared that in 1801 a concession of lands in Upper Canada was made by the Crown to a Mrs. M'Queen. In 1827 the Rideau Canal Act, authorising the construction of a canal for connecting Lake Ontario with the river Ottawa, and containing certain provisions for vesting in the Crown the lands required for the purposes of the canal, was passed by the Upper Canada Parliament. The canal, which was completed in May 1832, passed through the lands conceded to Mrs. M'Queen, but left on both sides of the canal a tract of surplus land, which formed the subject-matter of the present claim. The present petitioners claimed under the late Colonel By, who had purchased in 1832 from the heir-at-law of Mrs. M'Queen all the lands conceded to that lady. In 1843 an Act was passed by the Provincial Parliament of Canada, for vesting in the Ordnance Department the Rideau Canal, and the lands and works belonging to it for the service of the Department. This Act contained a provision (sect. 29), that all lands taken from private owners, under the authority of the Rideau Canal Act, for the uses of the canal, which had not been used for that purpose, should be restored to the parties from whom the same were taken. In 1856 an Act was passed by the Canadian Legislature for vesting the Ordnance estate and property in her Majesty, for the benefit, use and purposes of the provinces. The petitioners, as the persons interested in Colonel By's Canada estate had filed this petition of right, claiming the restoration of so much of the land taken for the use of the Rideau Canal as had not been used for that purpose. To this petition of right the Attorney-General had demurred.

The Solicitor-General (Sir R. Palmer), *Sir H. Cairns, Q. C.* and *Wickens*, for the Crown, in support of the demurrer, contended that a court of equity in England had no jurisdiction to entertain questions of right to lands in a British colony; that the courts of the colony in which the lands were situated had ample jurisdiction to entertain such questions. No case was here raised upon which a court of equity could adjudicate. The Petition of Right Act, 23 & 24 Vict. c. 34, expressly declared that a legal right was given to parties who might claim an interest in lands situated as the present were. They cited *Penn* v. *Lord Baltimore*, 1 Ves. sen. 444; *Clayton* v. *Attorney-General*, 1 C. P. Coop. 97; and referred to Story's Conflict of Laws.

Giffard Q. C., W. W. Cooper and *Hanson*, in support of the petition, contended that the court had ample jurisdiction to make a decree *in personam*, assuming her Majesty to be the trustee dwelling here, in whom the lands in question were vested as trustee. By such decree a conveyance could be directed, and an enumeration of the lands with their respective boundaries obtained. No petition of right could be presented in Canada, where the lands were. The remedy was that pointed out by the Petition of Right Act, 1860; and it was only under that Act that a petition similar to the present could be presented, and justice obtained. Unless the present petition could be entertained, the petitioners would be wholly without a remedy. They cited *Earl Kildare* v. *Eustace*, 1 Vern. 418; *Innes* v. *Mitchell*, 4 Drew. 57 and 151; S. C. on appeal, 2 De G. and Jo. 453; *Cranston* v. *Johnstone*, 3 Ves. 17; *Tullock*, v. *Hardy*, 1 Yo. C. C. C. 115.

THE VICE-CHANCELLOR, after stating the case, said that the demurrer must be allowed, on the broad ground that this court could not take upon itself to adjudicate the claims to land in one of the colonies, and that there was nothing in the Petition of Right Act 1860 which could have the effect of withdrawing land from the jurisdiction of the country in which it was situated, and giving the English courts jurisdiction over it. It had been conceded on behalf of the petitioners that no direct remedy *in rem* could be given by this court as to lands out of the jurisdiction; but it was argued that, according to a series of cases beginning with that cited from Vernon and *Penn* v. *Lord Baltimore*, where the question did not arise so as to involve the action of the court *in rem*, but a decree could be made *in personam*, then that the Court of Chancery had authority to act, and order a conveyance to be made as directed by the colonial legislature in 1843 (according to the allegations in the petition). That really was the main question, but it appeared to him that it must clearly be decided against the petitioners. It was argued that the Crown was a trustee for these petitioners of the land in Canada, and was bound to restore it to them; that if it had been a case between subjects, and the trustees were found to be in this country, those trustees would be bound by the decree of this court, and that the Queen must be taken to be a trustee in respect of these lands present in this country. But this was a singular doctrine, and it would be a great surprise to the various colonies enjoying a separate legislature, if they were to be told that by an Act passed in England, to which they were not consenting parties, the courts of this country were authorized to determine the rights to property in the colonies as against the colonial legislature. It had been contended that the Crown, on the theory of being present everywhere within its dominions, must be taken to be in the position of a trustee present in this country, so as to bring the land in question under the jurisdiction of the English Court of Chancery. But even assuming that a trust existed, that the claim was not merely legal, and that courts of equity could exercise jurisdiction in matters relating to land in a foreign country, still it was necessary that the trustee should be within the jurisdiction to give any operation to this court. The land was unquestionably vested in her Majesty by the Act of 1856, for the benefit of the province, and in that point of view her Majesty was just as much present in Canada as in England. For the purposes of the Act, and the doctrine of this court acting *in personam*, her Majesty could not be taken to be within the jurisdiction of this court in respect of lands situate in Canada, and held by her not in virtue of her prerogative, but under the Act of the colonial legislature. On the highest ground, therefore, that it was not within the scope of the Act of 1860, or intended thereby, to transfer to this country the jurisdiction over lands in the various colonies upon the mere supposition that the Crown was present as a trustee in England, the demurrer must be allowed. This rendered it unnecessary for him (the V. C.) to enter into a consideration of the other arguments urged in support of the demurrer. He considered this ground sufficient to oblige him to allow the demurrer of the Crown, and with costs.

Order accordingly.

UNITED STATES LAW REPORTS.

SUPREME COURT OF PHILADELPHIA.

POTTSDOWN GAS COMPANY v. MURPHY.

Nuisance—Liability of Incorporated Gas Company.

1. A corporation is exempt from consequential damages only where, being clothed with the state right of eminent domain, it takes private property for public use, on making proper compensation, and where such damages are not part of the compensation required
2. A gas company is answerable for consequential damages, such as the corruption of the plaintiffs' ground and well, by the fluids percolating from the works; and is not exempted, as a corporation authorized by statute to carry on the business of making gas, and to purchase in fee simple the real estate necessary therefor.
3. In an action against a gas company for a nuisance, the court defined it as "wantonly, unnecessarily, or oppressively, causing such smells as to annoy the plaintiff below in a special and peculiar degree beyond others, in the immediate vicinity." *Held*, that the definition was not perfect, but, that when taken in connection with the instruction to the jury, "that a certain degree of offensive odor is unavoidably incident to the business, and must be endured by the public," it was as favourable to the defendant as a more perfect one would have been, and was not a cause for reversing the verdict of the jury.

Error to the Common Pleas of Montgomery County.

This was an action on the case brought September 14th, 1858, by John Murphy against the Pottsdown Gas Company.

The defendants were incorporated by the Legislature of the State on the 7th of March, 1856, in the usual form, with authority to supply with gas-light the borough of Pottsdown, and such individuals and corporations as might desire to produce, sell, and distribute gas for the production of artificial light; to make land erect the necessary apparatus for manufacturing and introducing the same; construct the requisite buildings and machinery; purchase and prepare the necessary materials; with the right to enter upon any public street, lane, or highway, for the purpose of laying down, repairing, altering, and inspecting the pipes necessary for conducting said gas, doing as little damage, &c.

Soon after the passage of this act, the company purchased in fee simple such real estate as was necessary for carrying on the business of the corporation, and commenced their works in June, 1856, which were completed on the 16th of September of that year.

The site selected by the company for their main works, lies between the Reading railroad and the Schuylkill river, on the verge of the borough of Pottsdown, convenient to the canal and railroad from which they were to receive their supplies of coal, &c., and is the most available and central point from which to supply the town with gas.

The house of the plaintiff, which is a hotel, is also between the railroad and the river, and near it the gas works were erected, the main tank and gas meter being about sixty feet from plaintiff's line. The soil in that locality is sandy. In sinking the pit for the tank, veins of water were discovered, and after the flooring of the tank had been put in, it leaked in several places. The ammonia well into which the water from the gas-washer is discharged, is lined with rough stone without cement, and has no artificial outlet, the water being allowed to soak into the earth. There were other houses in the neighbourhood of the works. Soon after the works were commenced, to wit, June 18th, 1856, Murphy caused the following notice to be served on the company:

"To the President and Managers of the Pottsdown Gas Company.

"You are hereby notified that I will hold you liable for any damage my property may sustain in consequence of the erection of your works, and the manufacture of gas.

"JOHN MURPHY.

"June 12th, 1856."

And also another notice, served in the same way, on the 8th of December, 1856, of which the following is a copy:

"To the President and Managers of the Pottsdown Gas Company.

"You are hereby notified that on the 18th day of June last past, I gave you lawful notice that I would hold you liable for all damages my property might sustain in consequence of the erection of your works and the manufacture of gas. I now give you due and timely notice that the erection of your works and the manufacture of gas, has injured the water in my well, so that it is wholly unfit for use, and if you do not prevent injuring my water, I will proceed against you by due course of law.

"JOHN MURPHY.

"Pottsdown, December 8th, 1856."

About a year after this he sunk another well, which cost about sixty dollars.

On the 14th of September, 1858, this suit was brought, as above stated.

The declaration contained six counts, laying the cause of the action as a nuisance, to which the defendants pleaded not guilty, with leave, &c.

On the trial, the following agreement between the parties was signed by the counsel, and filed in the cause:

"1859, October 26. It is agreed, that if the plaintiff is entitled to recover at all in this case, and does recover, the jury shall assess the damages on the basis of entire compensation, prospectively, as well as up to the present time, for the entire alleged injury, if any has been suffered for which compensation ought legally to be made, and in consideration thereof, plaintiff releases, remits, and for ever discharges all or any right or rights of action, claim, or demand which he might (independently of this agreement) have in the future, on account of any continuance or maintenance of the alleged injury and nuisance complained of, after and beyond the day of the institution of the present action, unless defendants, by some new erection or material change in the location or construction of their works should inflict some new and substantial injury, or supposed injury on the plaintiff, or to his property, not embraced within the true intent, meaning, and spirit of this agreement.

"This agreement to be filed of record in this case, and to be for ever binding on both parties."

The plaintiff requested the court to charge the jury:

1. Even if the jury believe that the defendants have constructed their works with the usual skill and precaution, they are notwithstanding answerable in damages for any injury which the jury may find has been done to the property of the plaintiff by means of the construction of the works of the defendants, or as a consequence of their use in the manufacture of gas.

The defendants requested the court to charge:

1. If the jury find that the defendants have not been guilty of negligence in the erection and in the carrying on of said works, the plaintiff cannot recover.

2. That the defendants were authorized by law to erect said works, and to have the right to carry them on for the purpose of manufacturing gas for the public, and are not responsible in damages for the ordinary and usual smells that usually proceed from such works, nor are they liable to pay damages for injuring the plaintiff's water, unless done by their negligence.

3. That in no sense can the gas works be considered a nuisance, if conducted and carried on in the usual and customary way that similar works are conducted and carried on.

The Court below (Smyser J.) answered these points as follows:—"The points of plaintiff are correct, subject to the qualifications contained in our answer to defendants' second point." As to the points presented by the defendants, the court said:

"1. We cannot so instruct the jury. The question is not one of negligence or no negligence, but of nuisance or no nuisance. If the defendants have either so constructed, or carried on and conducted their works, or both, as to create an abiding nuisance to the particular injury of plaintiff's property, they are liable in reasonable damages therefor, whether there was negligence or not; subject, however, to the qualifications contained in our answer to the second point.

"2. The business of manufacturing and distributing gas is lawful and beneficial to the public; and the defendants were specially authorized by their charter to engage in it. A certain degree of offensive odour is unavoidably incident to the business, and must

be endured by the public, or the business must stop. We, therefore, say that the law is as stated in the first part of the proposition (that relating to smells), unless the defendants, by something done in the construction, location, or conduct of their works, have wantonly, unnecessarily, or oppressively caused such smells and odours to annoy plaintiff in a special and peculiar manner and degree beyond others in the immediate vicinity; and such annoyance shall, in the opinion of the jury, amount to such a nuisance as is referred to in the answer to the first point.

"The latter branch of this proposition, that relative to the water, is answered by the reply to the first point, to which we refer the jury.

"3. We cannot affirm this proposition. If so carried on and conducted as to create and amount to such a nuisance as we have described, there is an injury for which plaintiff would be entitled to reasonable and proper, which means mere compensatory, damages, no matter whether the works were managed in the usual manner of others or not. This company could not plead the example and practice of others in excuse or justification of a nuisance."

There was a verdict and judgment in favor of the plaintiff for $1400 damages and six cents costs; whereupon the defendant sued out this writ, and assigned for error the following matters, viz.:

1. The court erred in refusing to affirm the first point of the defendants below, and erred in charging that the question was nuisance or no nuisance, when there was no evidence of a nuisance beyond what pertains to all gas works.

2. The court erred in refusing to affirm the defendants' second point.

3. The court erred in refusing to affirm the defendants' third point.

J. H. Hobart and *James Boyd*, with whom was *St. George Tucker Campbell*, for plaintiff in error.—In answer to our point, which raised the question of negligence in erecting and carrying on the works, the court below replied that the case was one which raised the question of nuisance or no nuisance, and refused the instruction prayed for. As there was no evidence in the cause tending to establish a nuisance, except in so far as all gas works are nuisances, *per se*, the question is, whether these works, properly constructed and worked, are *per se* nuisances, and whether the owners are responsible in damages for the consequence arising from the ordinary and usual smells incident to such works. If so, the result will be ruinous to most, if not all the gas companies in the state. We argue, therefore, that under the ruling in *Wheatly* v. *Baugh*, 1 *Casey* 536, the court below should have told the jury that the plaintiff had no cause of action. Analogous cases sustain this view: Am. Railway Cases, vol. 2, p. 292.

This argument meets the second and third assignments of error, because, taking the whole charge together, the jury were told that the company was liable for damages, although guilty of nothing beyond the proper use of the works. The slight qualification as to the manufacturing and distributing of gas being legal and beneficial, did not change the general tenor and effect of the charge.

B. M. Boyer, for defendant in error. The plaintiff below has cause to complain of the charge of the Court below, for by it he was deprived of damages, on account of the noisome smells proceeding from the works, unless he could show that the company "by something done in the construction of their works, had wantonly, unnecessarily, or oppressively caused such smells to annoy the plaintiff in a special and peculiar manner and degree beyond others in the immediate vicinity;" while, with regard to the injury done to the well of plaintiff, the jury were told "that for such an injury, if it amounted to a nuisance, he was entitled to reasonable and proper, which means mere compensatory, damages."

The law is not as is contended for, that a gas company may pollute the air which a man breathes, and the water which he uses, provided it be done skilfully, and from no worse motives than selfishness. The offer to the public of a cheap, safe light, is no proper substitute for pure air and water. The principle *sic utere tuo*, &c., applies to this as to other offensive occupations.

The fact that the defendants are incorporated is no justification or excuse. It is a private corporation, which sells what it manufactures for private profit. It is a public accommodation, but so is the hotel of Mr. Murphy.

The court instructed the jury that the question was not of negligence, but nuisance, and that if the works were constructed, or carried on, or either, so as to create an abiding nuisance, to the particular injury of plaintiff's property, the company were liable to reasonable damages, whether there was negligence or not. This instruction was correct: 3 Bl. Com. c. 13; *Shuter* v. *The City Leg. Int.*, October 15th, 1858; *Greer* v. *The Borough of Reading*, 9 Watts 382; *The Mayor* v. *Randolph*, 4 W. & S. 514, are not like this; but the cases of *Howell* v. *McCoy*, 3 Rawle, 269; *Barclay* v. *The Commonwealth*, 1 Casey, 506; Angell on Watercourses 136; Co. Litt. 200; *Merton* v. *Schofield*, 9 M. & W. 565; *Mason* v. *Chadwick*, 11 A. & El. Rep. 371; *Wright* v. *Williams*, 1 M. & W. 77; *Storey* v. *Hammond*, 4 Ohio Rep. 333; *People* v. *Townsend*, 3 Hill (N. Y. Rep.) 479; *Mayo* v. *Turner*, 1 Muf. (Va. Rep.) 405; *Wood* v. *Sutcliffe*, 16 Jurist 75; 8 E. C. L. & Eq. Rep. 217, are in point, and sustain the view taken by defendant in error.

The opinion of the Court was delivered, at Harrisburg, May 6th, 1861, by

Lowrie, C. J.—The Court was right in saying that this is not a question of negligence, but of nuisance, for so is the declaration. How, then, did they define nuisance? First, of smells, wantonly, unnecessarily, or oppressively causing such smells as to annoy the plaintiff below in a special and peculiar degree beyond others in the immediate vicinity, and to create an abiding nuisance, to the particular injury of the plaintiff's property.

We cannot call this a perfect definition; but, taken in connection with the instruction that "a certain degree of offensive odour is unavoidably incident to the business, and must be endured by the public," it seems to us that it must have been understood by the jury as well and as favourably to the defendants as the most perfect one could have been.

Then, as to the corruption of the plaintiff's ground and well, by the fluids percolating from the defendants' works. This was disposed of in a similar way. But the defendants think that as a corporation, authorized by statute to carry on this business, and to purchase in fee simple such real estate as may be necessary for it, they are not answerable for such consequential damages as are complained of here. We cannot adopt this view. No such exemption is involved in the fact of incorporation, nor in the privilege of buying land. The principle they invoke applies only where an incorporation, clothed with a portion of the state's right of eminent domain, takes private property for public use on making proper compensation, and where such damages are not part of the compensation required.

Judgment affirmed.

Strong, J., dissentiente.

GENERAL CORRESPONDENCE.

Non-payment of Crown Witnesses.

To the Editors of the Law Journal.

Gentlemen,—I have just read your excellent editorial in the February number of the *Law Journal*, about "Payment of Crown Witnesses." Permit me to illustrate your position by an incident in my own experience.

Three or four years ago, I sent a letter containing money to Streetsville. It never came to hand. In two or three weeks I was written to about the money. I replied, giving a particular description of the bills—bank, letters and numbers—which I had kept, according to an invariable custom of mine, in a book for the purpose. A party was arrested on suspicion, and a five-dollar bill corresponding to one in my list found in his trunk. I knew nothing of this for some weeks, till I was served with a subpœna to attend the assizes at Toronto. I had to engage a person at a dollar a day to supply my place in the Division Court office till my return, and start at a few hours' notice. By the good offices of the prosecuting attorney,

the case, which had been put off till my arrival, was brought on the second day of my stay in Toronto, and I got home in the wonderfully short space of four days from the time of leaving Owen Sound. The accused party was found guilty.

Thinking that the County Auditors had a larger discretion than I have since learned they possess, I made application by affidavit for reimbursement of necessary expenses, amounting to sixteen dollars, exclusive of the loss of time. Of course the application was refused.

Now, if I had been careless about sending money, and, instead of keeping a list of the bills, &c., sent at the request of the plaintiffs, had merely enclosed and posted the money in presence of a witness, my evidence would have been of no value, and I would not have been troubled. I could not help looking upon it as a *fine for being correct*. My first impulse was to throw my memoranda of "cash mailed" into the fire, and keep no more such; but I did not, and have since found the memoranda useful on several occasions;—though I still live in the dread of being hauled off some morning to Toronto, London or Ottawa, at an hour's notice, on a similar errand.

I am, &c., WILLIAM W. SMITH,
Clerk 1st D. C., G.

Owen Sound, Feb. 10, 1862.

[The above is one of several letters of the same kind which we have received on the subject to which it refers. We give it as a specimen. The evils arising from non-payment of Crown witnesses are wide-spread. Something ought to be done towards amendment of the law in the matter.—EDS. L. J.]

Fines, Penalties, Forfeitures—How Appropriated.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN—Would you oblige me and my brother magistrates by answering the following questions through your valuable periodical, the *Law Journal*:—

1st. What shall be done with moneys collected in payment of fines or penalties for assault? The Consolidated Statute of Canada, page 960, chap. 91, sec. 39, says that the amount is to be paid to the Treasurer of the Municipality in which the offence was committed. Query: Is it the County or the minor Municipalities within the County?

2nd. On page 1008 C., chap. 98, sec. 3, says, "One moiety is to be paid to the prosecutor, and the other to Her Majesty." Where or to whom shall Her Majesty's moiety be paid?

3rd. Again on page 968, C., chap. 92, sec. 33, in reference to dog stealing, what shall be done with the fine imposed for such offence?

4th. Under chap. 96, sec. 13, page 1003 C., fines imposed for cruelty to animals are to be spent in improvement of roads, &c. Must the money be applied to improving streets and roads, or can it be applied to the general fund of the town out of which the money is taken to improve the streets?

5th. In sections 122 and 123, chap. 99, page 1036 C., concerning the appropriation of fines imposed by a Justice of the Peace. Suppose, for example, six persons are taken up and fined, say two dollars each, for damage to property. The prosecutor, of course, gets two dollars, the amount of the damage. The question is, to whom is the remaining $10 to be paid?

6th. Do sections 77, 78, 79, 80 and 86 of chap. 103, page 1100 of C., concerning summary convictions, apply to both Provinces, or to Lower Canada only?

7th. It is the impression of some Magistrates that according to 124th chapter of U. C., all moneys must be sent to the Clerk of the Peace with the statements of the returns of convictions. Is this so?

A reply to the above questions in the next issue of your valuable journal, and any suggestions you may make, will be much appreciated by magistrates generally in this quarter.

Yours truly, M. C. L.

Galt, Feb. 24, 1862.

[1st. Reading the section without reference to others, we should say that the Municipality meant is the local and not the County Municipality; but upon reference to the old Act, 4 & 5 Vic., cap. 27, sec. 27, and to the present Con. Stat. U. C., cap. 118, we greatly doubt if the Legislature so intended.

2nd. The moiety of Her Majesty is to be paid into some branch of the Bank of Upper Canada to the credit of the Receiver General.

3rd. Where no provision is made for the appropriation of a penalty or forfeiture, one half belongs to the Crown and the other half to the private prosecutor, if any there be, and if none, then the whole to the Crown. (Con. Stat. Can., cap 5, s. 6, sub s. 17.)

4th. Penalties levied under Con. Stat. Can., cap. 96, must be applied exclusively in repairing streets or roads, and ought not to be paid into any general fund applicable to miscellaneous purposes, though including repairs of streets and roads.

5th. The expression "shall be applied in the same manner as other penalties imposed by Justices of the Peace are directed to be applied," is, we think, very unsatisfactory, for the reason that we can find no *general* Act declaring in *what* particular manner penalties imposed by Justices of the Peace are to be applied. So far as Lower Canada is concerned, reference may be made to Con. Stat. Can., cap. 105, s. 77, 78, 79 and 80. And so far as Upper Canada is concerned, we can do more than refer to Con. Stat. Can., cap. 5, s. 6, sub-s. 17.

6th. To Lower Canada only, we think. The original Act, 14 & 15 Vic., cap. 95, was in terms so restricted.

7th. Such impression, so far as Upper Canada is concerned, is erroneous. The convicting Justice is by Con. Stat. U. C., cap. 124, required to make to the Quarter Sessions a return of the convictions and "of the receipt and *application* by him of the moneys received," &c., (sec. 1.) The form of return has a column with this heading, "To whom paid over by such Justice."

The questions put by our correspondent, and the difficulties in the way of answering some of them satisfactorily, convinces us that the many provisions regulating the appropriation of fines, penalties and forfeitures, ought by some general Act to be consolidated so that Justices of the Peace might at a glance, in the absence of a special provision in the

Act creating the offence or providing for its punishment, know to whom to pay the fine, penalty or money forfeited. We are satisfied that the want of such an Act is the cause of serious loss to the Revenue as well as of much embarrassment to Justices of the Peace.—Eds. L. J.]

Menonists—Exemption from municipal duties.

To the Editors of the Law Journal.

Gentlemen,—An answer to the following will much oblige the Township Clerk of Rainham. Are the people called Mononists exempt by law from doing the duty of overseers of highways, or holding the office of school trustees? We have a class of people in this township who refuse to serve, and the Council scarcely know how to proceed in the matter. The question is one of public interest, especially in those townships where the population is of German origin. A.

Selkirk, Feb. 19, 1862.

[Persons bearing certificates from the Society of Quakers Menonists and Tunkers, are exempt from attending militia muster in time of peace, but are not, so far as we can find, exempt from the discharge of duties appertaining to municipal offices.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. Valentine v. Dickson. *May* 7.

Vendor and purchaser—Specific performance—Conflict of evidence—Parties left to their remedy at law—Costs.

In a suit against the heir-at-law of the vendor for specific performance of a contract entered into by his ancestor, the evidence as to the circumstances under which the contract was signed by the vendor being unsatisfactory, the bill was dismissed without costs and the parties left to their remedy at law.

M. R. Boulton v. Pilcher. *May* 8.

Will—Construction—Application of whole income to maintenance of children—Direction to sell on all children attaining twenty-one—Gift of proceeds to children—Survivorship—Vesting.

Bequest of leaseholds to trustees upon trust to pay the rents and profits to the testator's wife for life, and after her death apply them during the minorities of all the children of the testator living at her death for their maintenance, and after the said children shall have attained twenty-one, upon trust to sell such leasehold property, and divide the proceeds equally among all and every the said children, and if but one surviving child then the whole to such child.

Held that all the children who survived the testator took vested interests in the property bequeathed, and that the construction was not varied by the interposition of the life interest to the widow.

V. C. K.

In Re Plaskett's Estate. Bryant v. Kuyvett.

Bond—Consideration—Cohabitation—Illegitimate children.

P. binds himself in a penal sum to pay an annuity of £200 a year to trustees, for the benefit of E. K., a single woman, by whom he has had five children, in consideration of her having ceded to him the custody, education and support of such children. And such bond is conditioned to be void on due payment of the annuity during such time as E. K. shall not require the custody of the children.

Held that such bond was for a valuable consideration, and constituted a specialty debt.

S. C. In Re Ward. Gordon v. Duff.

Will—Construction—Bequest of a sum of long annuities—Specific or demonstrative legacy.

The will of a testatrix, made in 1846, contained the following bequests: "I bequeath to M. the sum of £2000 long annuities, standing in my name in the books of the Governor and Company of the Bank of England. I bequeath to A. the sum of £2000 of the said long annuities, standing in my name," &c. At the date of her will and of her death, the testatrix was possessed of £300 long annuities, and no more, but left personal estate to a considerable amount.

Held that the said legacies were specific and not demonstrative, and that the legatees were not entitled to have the deficiency in their legacies made good out of the testator's general estate.

V. C. K. Mawe v. Heaviside.

Practice—Married woman—Separate receipt—Consent in court.

Where there is a fund in Court to part of which a married woman is entitled, but not for her separate use, the Court will not dispense with her being examined in Court; although it was proposed with the consent of her husband, that the money should be paid to her on her separate estate.

V. C. S. Fowle v. N. G. Assurance Society and others.

Assurance—Guarantee policy—Misrepresentation—Notice—Principal and agent.

R. effected a policy of guarantee, the basis of which was his answer to certain questions. These answers were substantially correct when made; but a practice of checking accounts, &c., to which they referred, was subsequently abandoned.

Held that the policy was not invalidated by his neglecting to give notice of the change.

Endorsed on a life policy effected by the same Society was a memorandum that it was issued in connection with the guarantee policy. The Society transferred its life business to the Assurance Company, who accepted the said life policy.

Held that the Company were liable under the guarantee policy.

No private arrangement between agent and principal as to the peculiar form of a receipt in writing can be binding on a person who has no notice of such arrangement, nor does it constitute any part of the extent or nature of the authority which a person dealing with the agent is bound to know.

V. C. W. Harding v. Wickham.

Arbitration—Jurisdiction.

By an order of the Court of Exchequer, all matters in difference between A. & B., who had each brought an action against the other, were referred to arbitration; the award to be delivered by a certain day to the parties or their personal representatives, in case either of them should die before award made; the arbitrator to proceed *ex parte* if either of the parties should without reasonable excuse fail to attend, with power to enlarge the time for making the award. Within two days of the time fixed for proceeding with the reference, A., one of the parties, died. The arbitrator refused to postpone the reference until the presence of A.'s personal representative could be obtained, and made his award *ex parte*.

To a bill by A.'s personal representatives to set aside the award and all proceedings thereunder—

Demurrer allowed, on the ground that the matter was already before a court of jurisdiction competent to re-consider the matter and correct any error, the bill itself alleging that an application to set aside the award could be sustained in the Court of Exchequer.

COMMON LAW.

Q. B. SCHLIMBERGER V. LISTER. *Nov.* 9.

Demurrer—Equitable replication—Contemporaneous deeds—same parties—one instrument.

Declaration for infringement of a patent.

Plea that the administrator of the patentee granted a license to use the patent to S. & A. who assigned the same to the defendant.

Replication on equitable grounds that the deed of license was contemporaneous with another deed made between the administrator of the patentee of the first part, the plaintiff and others of the second part, and S. & A. of the third part, and by the latter deed it was witnessed that S. & A. should not manufacture or sell machines under the license out of Great Britain and Ireland; and that by another deed between S. & A. of the one part and the defendant of the other part, the defendant covenanted that he would perform all the covenants in the first deed contained to be performed on the part of S. &. A. The replication then alleged breeches of the covenant by the defendant in making and selling machines out of Great Britain and Ireland.

Replication held bad on demurrer

C. P. TODD V. FLIGHT. *Nov.* 20.

Reversioner, action against—Demising premises, knowing them to be in a dangerous condition.

An action lies against a reversioner who has demised his premises with the chimneys in a ruinous condition, and in danger of falling, they being known to be so by him at the time of the demise, and in consequence of their condition falling during the demise and injuring the building of another person.

C. P. SMITH V. VIRTUE ET AL. *Nov.* 24.

Bill of Exchange—Acceptance.

If a bill is accepted conditionally on a bill of lading being given up, and the bill of exchange is not presented for payment, and the bill of lading is not given up on the day on which the bill of exchange falls due, the acceptor is not released from his liability.

C. P.

WILSON V. LANCASTER AND YORKSHIRE RAILWAY COMPANY.

Carriers—Goods not delivered in time—Loss of season—Loss of profits.

The defendants a railway company delivered cloth entrusted to them for conveyance to the plaintiff, the consignee, so long after the time when it was due that the exchangeable value was materially diminished—the judge told the jury to consider what the plaintiff had suffered by "the loss of the season."—the jury gave a verdict for the plaintiff with £60 damages.

Held, that the jury were right in giving substantial damages for the loss in exchangeable value, but that as from the words of the judge "loss of the season" and the circumstances of the case there was ground for supposing that the jury might have included in the amount awarded a sum for the loss of profits, contrary to the rule laid down in *Hadley* v. *Baxendale*, 9 Ex. 341; there must be a new trial unless the plaintiff consented to the damages being reduced.

EX. DURRELL V. EVANS. *April*, 30.

Statute of frauds—Sale of goods—Bought and sold Notes made out by factor of seller.

The factor of a hop merchant negotiated with the defendant for the sale to him of a quantity of hops, the defendant agreed verbally to purchase a certain quantity at an agreed price, and the factor made out a note of the transaction at the time in the form of bought and sold notes, altering the date from the day of the transaction to the day following at the request of the defendant.

In an action for not receiving the hops—*Held*, that there was no memorandum of the contract signed by or on behalf of the defendant to satisfy the statute of frauds.

C. P. CAHILL V. THE L. & H. W. RAILWAY CO. *April*, 26.

Railway Company—Passengers luggage—Merchandise.

If a passenger by railway, without any other contract with the Company than that arising from taking a ticket to travel as one of their passengers, so conducts him as that his conduct amounts to a representation that a package which he brings with him to be carried as part of his personal luggage is only his personal luggage, whereas the package contains merchandise only (the regulations requiring merchandise to be paid for) the Company are not responsible for the loss of such package and its contents. It makes no difference if "glass" be written outside the package.

Per EARLE, C. J.—That where a Company is created by act of parliament with liabilities and duties cast upon it, and privileges and rights granted to the persons dealing with it the party imposing duties on the Company must be taken to know the provisions of the statute although it be a private act.

C. P.

THE MIDLAND RAILWAY CO. APPELLANTS, V. PYE RESPONDENTS.

Feme covert—Order of protection—Right to sue—Retro-activity.

A married women deserted by her husband entered a plaint in the County Court—afterwards and before the hearing she obtained an order of protection.

Held, that the order has not such a retro-active effect as to entitle her to a right to sue in such plaint, which right she had not at the time of the entry of the plaint by reason of her coverture.

B. C. THE EASTERN COUNTIES RAILWAY CO., RESPONDENTS V. WOODARD, APPELLANT.

Railway passenger—Holder of annual ticket liable to penalty for not producing his ticket when required—By-laws—Regulations—Special control—Cumulation Remedy.

A By-law of the E. C. R. Co. provides that each passenger not producing or delivering up his ticket when required shall be subject to a penalty. The appellant whilst travelling on the line, was required by a collector, who knew that the appellant was the holder of an annual ticket, to produce his ticket. He refused, and, upon an information framed upon the by-law was convicted for refusing. Upon a case stated by the justices it appeared that it was printed upon the ticket itself, that it was to be exhibited when required, and that the holder was subjected to the regulations in regard to passengers. The appellant also when he took the ticket agreed in writing to abide by the by-laws of the Company, and to produce the ticket when required, or, in default thereof to pay the ordinary fare.

Held, that the conviction was right; that the appellant was a passenger subject to the by-laws; that the by-laws were regulations within the meaning of the terms upon the ticket; and that as the appellant had absolutely refused to produce his ticket, and had not paid the ordinary fare the penalty under the by-law could be enforced notwithstanding that by his special agreement he had agreed to produce the ticket or, in default, to pay the ordinary fare.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW for February, 1862, London: Butterworths, 7 Fleet Street.

We welcome this number of a valued legal quarterly. The contents are as usual both able and interesting. The *first* is a biographical sketch of Sir John Patterson, for many years an ornament to the English Bench. The sketch, which is written in an easy style, is full of interest. Lawyers are delighted to read of the habits, vicissitudes and successes of those who have attained eminence in the profession. Sir John Patterson was born on 11th February, 1790, and died on 28th June, 1861. He was first appointed to a seat on the Bench on 12th November, 1830. On 19th January, 1852, he resigned that appointment. From that time till the day of

his death he was a member of the Privy Council. The *second* is a paper on international general average, the object of which is to shew the injurious results to commerce from the want of some international system of general average, and at the same time to point out the best means of accomplishing that object. The writer displays much learning in the treatment of his subject. The *third*, headed Ancient Irish Conveyancing, is the substance of a paper read by Mr. J. Huband Smith, M.A., at the meeting of the National Association for the promotion of Social Science held at Dublin in August last. The writer starts with the proposition that a system of jurisprudence of a comprehensive nature existed in Ireland long anterior to the arrival of the Anglo-Norman invaders in the twelfth century. The remainder of his paper is devoted to the proof of that proposition. The *fourth* is a short and curious paper on the rights, disabilities and usages of the Ancient English Peasantry. The *fifth* is a paper on the disbarment of Edwin James by the Benchers of the Inner Temple, and is evidently written with the knowledge if not under the instructions of the Benchers. It gives to the public the facts which rendered necessary that proceeding, and these facts appear to be an ample justification for what was done by the Benchers. The *sixth* is a review of the eighth edition of Sugden on Powers, just issued from the pen of Lord St. Leonards. The *seventh* is an investigation of the several vexed questions which were raised out of the affair of the Trent. The *eighth* is a short paper on the practice of the Divorce Court, in which the writer dwells chiefly on the fact that the wife whose husband commits adultery is without redress, although the most complete redress is afforded to the husband whose wife is unfaithful to marriage vows. The *ninth* is a paper on the Disunion of the United States and the right of Secession. The conclusion at which the author arrives is that "there is much to be said on both sides."

THE EDINBURGH for January, 1862—New York: Leonard, Scott & Co., also received.

Contents: 1. Life and Writings of William Paterson; 2. Sewell's Ordeal of Free Labour; 3. Max Müller on the Science of Language; 4. Felix Mendelssohn's Letters; 6. Wrecks, Life Boats and Light Houses; 7. Barton's City of the Saints; 8. May's Constitutional History of England; 9. The Lady of Garaye; 10. Belligerents and Neutrals.

THE WESTMINSTER for January, 1862—New York: Leonard, Scott & Co., also received.

Contents: 1. Law in and for India; 2. The Dramatic Poetry of Oehlenschläger; 3. The Religious Heresies of the Working Classes; 4. Income Tax Reform; 5. Admiral Sir Charles Napier; 6. On Translating Homer; 7. Popular Education in Russia; 8. The American Belligerents; 9. The late Prince Consort.

BLACKWOOD for February, 1862—New York: Leonard, Scott & Co., is also received.

1. Caxtonians, a series of Essays on Life, Literature and Manners. These essays promise to be well worth reading. They are by the author of "The Caxton Family." The first essay is "On the increased attention to outward nature in the decline of life." 2. The conclusion of Wassail, a Christmas story; 3. Physicians and Quacks; 4. Conclusion of Captain Clutterbuck's Champagne; 5. Chronicles of Carlingford; 6. The Origin of Language—a Song; 7. The Defence of Canada—a long and, at the present time, deeply interesting paper. The writer thinks that a war between England and the United States, since the affair of the Trent, is only deferred, and that if not imminent, is pretty sure to come sooner or later. In order, therefore, that Great Britain may be prepared for the contingency he throws out a number of suggestions for the Defence of Canada. The writer is evidently a military man of experience, and his suggestions well worthy of consideration.

THE ECLECTIC MAGAZINE for March, 1862—New York: W. H. Bidwell, is received.

It opens with a portrait of the King of Prussia. In the next we are promised a portrait of Her Majesty the Queen. The contents of the Letter Press are as usual copious and well selected. 1. The Italian Clergy and the Pope; 2. Elizabeth Barrett Browning; 3. The Poetry of Age; 4. Concerning the World's Opinion; 5. Are the Planets Inhabited? 6. Comets and their Phenomena; 7. The Constable of the Tower; 8. Life and Times of Edmund Burke; 9. Ancient Forests and Modern Fuel; 10. Story of the Winter Light; 11. Discoveries, New and Old; 12. The Struggle in America; 13. The Coronation at Königsberg; 13. Martyrs to Adventure; 15. Possible Future of Russia and Poland; 16. King Frederick William Louis; 17. Passages in the Last War; 18. The Abbot Female Collegiate Institute; 19. The Last of the Condes.

LADY'S BOOK for March—Philadelphia: Louis A. Godey, also received.

This number contains no less than sixty-eight engravings, and nearly all of them illustrative of the proper costume for Spring. The letter press is entertaining and instructive. The Magazine is now so well known to that class of readers for whom it is designed that nothing we can say will enhance its value. We wish the magazine the continued success which the enterprise of its publisher so richly deserves.

LLOYD'S MILITARY MAP AND GAZETTEER OF THE SOUTHERN STATES.

This at the present time will be found a most useful compilation. The Map, unlike many others that are palmed off on the public, is drawn from actual surveys made by Southern surveyors. We believe it to be not only the most reliable but by far the most complete Map of the Southern States now offered for sale. The statistical information furnished on the back of the Map is of great importance. It appears to have been compiled with great care and to be very complete and well condensed. The whole undertaking is entitled to a liberal support from those interested in the struggle that unhappily is still pending in the Southern States.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

JAMES HENDERSON, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted February 8, 1862.)

CORONERS.

BENJAMIN HEATON LEMON, Esquire, M.D., Associate Coroner, County of Lincoln.—(Gazetted February 8, 1862.)

BENJAMIN HEATON LEMON, Esquire, M.D., Associate Coroner, County of Welland.—(Gazetted February 8, 1862.)

JOHN GILCHRIST, Esquire, Associate Coroner, United Counties Huron and Bruce.—(Gazetted February 8, 1862.)

PETER C. DAVIS, Esquire, Associate Coroner, United Counties of Frontenac, Lennox and Addington.—(Gazetted February 22, 1862.)

REVENUE INSPECTORS.

THOMAS WHITE, of Peterborough, Esquire, Revenue Inspector, United Counties of Peterborough and Victoria.—(Gazetted February 8, 1862.)

HENRY GODSON, of the City of Toronto, Esquire, Revenue Inspector, Revenue District No 3, Counties of York and Ontario.—(Gazetted February 8, 1862.)

TO CORRESPONDENTS.

"CLERK 6TH D. C. Co."—"R. R. K."—"SCRUTINEUR."—Under "Division Courts."

"WILLIAM W. SMITH."—"M. C. L."—"A."—Under "General Correspondence."

"X. Y. Z." Your letter accidentally omitted. In answer, we think both first and last days must be excluded.

DIARY FOR APRIL.

1. Tuesday ..... Chan. Examination Term Barrie and Ottawa commences.
5. Saturday ..... Last Day for notice of trial for York and Peel.
6. SUNDAY ..... *5th Sunday in Lent.*
7. Monday ..... County Court and Surr. Ct. Terms beg. Recorder's Ct. sits.
8. Tuesday ..... Chancery Examination Term, Goderich and Cornwall, com.
12. Saturday ..... County Court and Surrogate Court Terms end.
13. SUNDAY ..... *Palm Sunday.*
14. Monday ..... York and Peel Spring Assizes.
17. Thursday ..... Last day for setl. down for Hearing Chancery.
18. Friday ..... *Good Friday.*
20. SUNDAY ..... *Easter Sunday.*
21. Monday ..... Last day for notice of Hearing Chancery.
27. SUNDAY ..... *Low Sunday.*
28. Monday ..... Chancery Hearing Term commences.
30. Wednesday..... Last day for complet. Assessment Rolls. Last day for Non-Residents to give lists of their lands.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

APRIL, 1862.

THE NEW CHANCELLOR.

On 18th March last an extra issued from the office of the *Canada Gazette*, announcing that the Governor General had been pleased to appoint the Honorable Philip Michael Matthew Scott Vankoughnet to be Chancellor of Upper Canada.

Mr. Vankoughnet is a very young man to have attained a position so high and important. He is not yet forty years old. His great talents have given him the start of many of his seniors. He is the descendant of a United Empire Loyalist. His grandfather was a loyalist, and his father, Philip Vankoughnet, who is still living, was for many years a member of the Legislature of Upper Canada before the union of Upper and Lower Canada.

The present Chancellor is a Canadian by birth, having been born at Cornwall on the 26th January, 1823. Dr. Urquhart of that town was his instructor. He early gave promise of the talents which have since made him so distinguished. His parents had intended him to embrace the clerical profession; this was their design, and so continued for several years. He is said at one time not to have been averse to it; but owing to some circumstance or other suddenly changed his intentions. Some say that it was his admiration of a speech delivered in his hearing by the late Mr. Justice Hagerman that caused the change.

He first became a student-at-law in the office of George Jarvis, of Cornwall. He next entered the office of Messrs. Smith & Crooks, in Toronto. He displayed great aptitude for the profession and diligence in the pursuit of it. He was known among the students of his day as "a hard working, clever kind of fellow." His principals trusted much to his judgment, and his subsequent career has proved the correctness of their discernment.

He was called to the bar in February, 1844, when only twenty-one years of age. He wisely decided to practise in the City of Toronto, the seat of law. His first partnership was with the present Mr. Justice Burns. His next was with Mr. Oliver Mowat, who at one time was considered his rival for the Chancellorship, in the event of a lucky throw in the political dice. His diligence after his call to the bar was not so great as when a student. He trusted more to his talents than to his industry. He was successful at Nisi Prius as an advocate. His display of industry "during term" was not equal to that of many of his compeers. He during the later years of his practice made Equity his study, and held many equity briefs. He was the Trinity College lecturer on "Equity Jurisprudence," at the same time that the present Mr. Justice Hagarty lectured on the "Law of Contracts," and Mr. J. Hillyard Cameron on the "Law of Real Property." His lectures were oral, and not remarkable as the fruits of industry; but were at all times interesting and instructive.

He was only twelve years at the bar when, in 1856, he accepted the office of President of the Executive Council, at the solicitation of the present Attorney General for Upper Canada. Since then he has not been in the active practice of his profession; his duties as a minister of the crown engrossed his attention. He was shortly after his acceptance of office elected a member for the Legislative Council division of Rideau, and from that time till his acceptance of the office of Chancellor was the leader of the Government in the Legislative Council. At first he was said as a public man to be a failure. This was a hasty conclusion. No doubt, considering his youth and inexperience in politics, he did not for a little time take a decided and prominent position in debates. He was, however, not long in doing so, and when he did so it was with marked effect. His good humor and acknowledged abilities soon made him fully equal to his conspicuous and important position. During the Macdonald-Cartier Administration he was head of the Bureau of Agriculture, and upon the formation of the Cartier-Macdonald Administration he became Commissioner of Crown Lands; and in the latter office, to the surprise of everybody, accomplished wonders in cleaning that Augean Stable. His ready talents, combined with his knowledge of both law and equity, enabled him to dispose of hundreds of "land cases" which for years had lain dormant on the shelves of the department.

It is to be hoped that the industry of his boyhood will characterise the discharge of the duties appertaining to the high office which he now fills. Noted as the Crown Lands Department was for numbers of undetermined cases, he will find still more in the Court of Chancery. The illness of the late Chancellor long before his resignation, and the vacancy in the office since his resignation, have added much to the work of the Court. The two Vice-Chancellors have been far from idle, but the work to be done was more than enough for any two men, however industrious or however able.

AUDITA QUERELA.

The indulgence shown by the Courts in modern times, by way of motion, has in a great measure superseded the remedy by Audita Querela. Still there are cases in which a resort to that proceeding is necessary. The proceeding is neither obsolete nor difficult. Owing to the fact that it is little used there is not much to be found in the books about it.

We therefore propose to devote some of our space to the consideration of the following:—The nature of the writ—Persons entitled to it—How obtained—From what Court issued—Form of writ—Process thereon and effect thereof—Subsequent proceedings—Damages and costs.

1. *Nature of the writ.* The proceedings of courts of justice are not to be perverted to purposes of injustice. Audita Querela is a proceeding invented to prevent the procedure of courts of justice working injustice. It is in general allowed where a party having a good defence at law has no opportunity of setting it up by the ordinary forms of proceeding in courts of law. Thus it lies for a person who is either in execution or in danger of being so upon a judgment or recognizance, when he has matter to show that the execution if issued ought not to have issued, or if not issued should not issue (2 Wms. Saund. 147, 1.) It is a mode of obtaining relief from a judgment at law just as scire facias is the mode of enforcing such a judgment. It is in the nature of a bill in equity, and yet distinct in that, either by the existence of the remedy or by having unsuccessfully resorted to it, precluded from bringing his original bill in equity for relief (*Williams* v. *Roberts*, 8 Hare, 315).

2. *Persons entitled to it.* The writ is only granted upon the application of a party to the judgment, or a person in privity with a party to the judgment. It will be refused when the applicant is a stranger to the judgment. Thus, where applicant had purchased lands from a judgment debtor after execution issued, under 5 Geo. II. cap. 7, contending that as plaintiff was an alien the execution was improperly issued, the court refused to interfere, leaving applicant to his action of ejectment against the purchaser at sheriff's sale (*Beard* v. *Ketchum*, 8 U. C. Q. B. 523. See also Bac. Abr. Audita Querela.) It is not a remedy to which a plaintiff can resort. It is peculiarly intended for relief of a defendant from the oppression or injustice of a plaintiff (*Aldridge* v. *Butler*, 2 M. & W. 413, per Parke, B.)

3. *How obtained.* The Rule of Court, Trinity Term, 9 Jac. I. is as follows:—"That no writ of audita querela for any cause whatever be allowed, nor bail thereupon taken, unless here in public and open court and by special motion here first made and a rule thereupon entered." This has been held to mean that the writ shall not issue without an order made *in open court* (*Beard* v. *Ketchum*, 8 U. C. Q. B. 533). In England it is now provided that "no writ of audita querela shall be allowed unless by Rule of Court *or order of a Judge*" (Eng. R. 79, H. T. 1853). This rule is not adopted in Upper Canada. The authority of a Judge in Chambers in Upper Canada is under the circumstances very doubtful. At one time it was thought that the writ being ex debito justitiæ might be issued without any application to court or judge. There was, however, no decision to that effect, and it has since been said that the Rule of 9 Jac. I. above mentioned is only declaratory of the common law (*Dearle* v. *Ker*, 7 D. & L. 231).

4. *From what Court issued.* An audita querela may be brought in the same court in which the record upon which it is founded remains, or be made returnable in the same court. Therefore in England it has been held that if a man recovers judgment in the Common Pleas or Queen's Bench, and afterwards by deed releases it and then sues out execution, the defendant may have an audita querela out of the Common Pleas or Queen's Bench where the record is; and yet he may have an audita querela out of Chancery returnable in the Common Pleas or Queen's Bench, "and so it is sometimes judicial and sometimes original" (2 Wms. Saund. 148 f.). But it cannot be issued out of any court returnable in the same court where the record upon which it is founded is not in such court (F. N. B. 105 b.).

5. *Form of writ.* The writ, after stating that the complaint of the defendant having been heard (*audita querela defendentis*), and after setting out the matter of the complaint, enjoins the Court to call the parties before them, and having heard the allegations and proofs to cause justice to be done between them (See forms in 2 Wms. Saund. 148 a. *Porchester* v. *Petrie*, 8 Doug. 261.)

6. *Process thereon and effect thereof.* An audita querela is not a supersedeas of execution (2 Wms. Saund. 148 f.). If the writ be founded on a record, or the party be in cus-

tody, the process upon it when allowed is a scire facias. But if grounded on a matter of fact, or the party be not in custody, the process appears to be a venire facias and on default a distringas ad infinitum (*Langston* v. *Grant*, 1 Salk. 92; *Clerk* v. *Moore*, Ib. 93; Anonymous 92; Anonymous 93). Where execution is actually issued there must be a writ of supersedeas (*Giles* v. *Hutt*, 1 Ex. 59). In the case last mentioned, a writ of audita querela having issued, a motion was made for a writ of supersedeas to the sheriff to stay execution, and also for a writ of venire facias and the Court made the following rule: "upon the motion of the counsel for George Giles, the plaintiff above named, and upon reading the writ of audita querela issued herein, with the allowance thereof endorsed thereon, and the rule made in the case of *Hutt and another* v. *Giles*, whereby execution was stayed for a month on the terms of the defendant undertaking within that time to issue a writ of audita querela, it is ordered that the said George Giles, the plaintiff above named, be at liberty to issue a supersedeas to the sheriff to stay execution, together with a writ of venire facias thereon (1 Ex. 59, note).

7. *Subsequent proceedings.* If the defendant appears upon the scire facias, venire facias, or distringas, the plaintiff declares, in which declaration the whole writ of audita querela is recited in the same manner as in a declaration in scire facias. The declaration ought to comprehend only one gravamen; or at least if it mentions several, it ought to rely upon one only, otherwise it will be double. The plaintiff should show himself aggrieved. The declaration should conclude with the prayer of relief that defendant be discharged, &c. If the defendant confesses the matter alleged the plaintiff has judgment by confession; but if the defendant denies it the parties proceed to issue in fact or in law as the case may be, as in other cases. If the plaintiff be nonsuited, though he may have a new writ of audita querela, he shall have no writ of supersedeas to stay execution (Sellon's Prac. 287).

8. *Damages and Costs.* It has been held that at common law there can neither be damages nor costs—no costs under Statute of Gloucester, because no damages—in a proceeding by audita querela (2 Tidd's Prac. 976, 1132; 2 Sellon's Prac. 256; Burton's Ex. Prac. 299; *Gascoine* v. *Whalley*, 2 Dyer, 193 b.), but under some recent statutes whereby costs are recoverable, independently of the Statute of Gloucester, it may be held that costs are recoverable in this mode of proceeding. It may be mentioned that in a recent case where plaintiff was without the jurisdiction of the court, proceedings were stayed till security for costs was given (*Holmes* v. *Pemberton*, 5 Jur. N. S. 727; S. C. 7 W. R. 160).

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1861.

FOR CERTIFICATES OF FITNESS.

STATUTES AND PLEADINGS AND PRACTICE.—(Equity.)

1. State the statutory alteration in the law of merger.
2. State the statutory alteration concerning *lis pendens*, and the class of cases to which the alteration does not apply.
3. State the various modes by which a plaintiff may bring his cause to hearing.
4. State the classes of cases in which it is proper to move for a decree.
5. Draft that part of an answer setting up the plea of a purchase for valuable consideration without notice.

WILLIAMS ON REAL PROPERTY.

1. State the proceedings upon a common recovery.
2. State the classes of persons not possessing the ordinary rights of alienation of real estates.
3. State the classes of objects in respect of which these rights are restricted.
4. Define a contingent remainder.
5. Define an executory interest.
6. State the difference between a will of lands and a will of personal estate regarding them as documents of title.

STORY'S EQUITY JURISPRUDENCE.

1. State the three great heads of jurisdiction, and shortly define each.
2. State the several divisions of the subject matter which are discussed in the first volume, beginning with "Accident."
3. Define "constructive frauds," and give an example.
4. What are bills *quia timet*? and give an example.
5. Define implied, as contra-distinguished from express, trusts.
6. What is the vendor's lien? State the probable origin and present extent of the doctrine.

ADMISSION FOR ATTORNEY.

BLACKSTONE'S COMMENTARIES—Vol. I.

1. Give the different sources of the law of England.
2. What subject is treated of in the first book of Commentaries? and give briefly the different heads.
3. Mention some of the rights, capacities and incapacities of persons.
4. What are some of the duties of persons in their private relations?
5. What are artificial persons? and how may they be created?

SMITH'S MERCANTILE LAW.

1. When may notice of dishonour to the drawer of a bill be dispensed with?
2. Mention some of the peculiarities of the contract of hiring and service.
3. What are the requisites of a guarantee?
4. In what contracts must a consideration exist and be proved, and in what is it presumed?

5. How far is a pledge by a factor of his principal's goods valid.

6. When is the *transitus* of goods determined ?

STATUTES, PLEADING AND PRACTICE.

1. What are the provisions of the statutes as to warehouse receipts ?

2. What statutory provisions exist as to the registration of different instruments ?

3. When will *replevin* lie ?

4. What circumstances must exist to permit "a defence on equitable grounds" to an action at law ?

5. How is an action of ejectment revived ?

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. Of what estate does escheat arise, and of what not ?

2. How may a lease for a term of years be made valid by estoppel ?

3. What is the doctrine of *cy-près ?* and give an instance.

4. In what respects do powers of alienation unconnected with ownership, differ from alienations in respect of ownership ?

5. Distinguish between a license and a grant.

6. Is a purely incorporal hereditament the subject of tenure ? and give reasons for your answer.

STORY'S EQUITY JURISPRUDENCE.

1. Explain the maxim "*Equitas sequitur legem,*" and state what (if any) exceptions exist thereto.

2. In what cases has equity jurisdiction exclusive of the common law ?

3. Will a court of equity relieve against acts performed under mistaken notions of law ?

4. How far is the maxim "*Caveat emptor,*" applicable in case of specific performance ?

5. Describe tacking, and in what cases may it arise ?

6. What is the remedy by injunction, and when is a receiver granted as ancillary thereto ?

TAYLOR ON EVIDENCE.

1. In what cases may entries in the writing of a deceased person be given in evidence to prove the facts stated in them ?

2. Distinguish between the "admissibility" and the "credibility" of a witness.

3. How may a discovery at law be obtained from the opposite party ?

4. When may parol evidence be gone into, notwithstanding a written agreement exists ?

5. Under what general heads is the law of evidence treated of by Mr. Taylor.

BYLES ON BILLS.

1. Can a corporation be sued in assumpsit on a promissory note ?

2. What considerations are illegal ?

3. Can a bill be endorsed after the death of a payee ? and if so by whom ?

4. How far is the title of the transferee affected by his negligence ?

5. As to what parties is presentment unnecessary so as to charge them ?

6. What are the five principal rules established in the law of England with respect to the conflict of laws, which arise in cases of bill of exchange ?

STATUTES PLEADING AND PRACTICE.

1. When may a defendant obtain relief from a plaintiff without filing a cross-bill ?

2. How is a decree in equity enforced ?

3. What is the object of enrolling a decree, and how is it done ?

4. May a defendant in equity when under examination, at the instance of the opposite party, enter into any facts material to his own defence, or to what extent is his examination on his own behalf limited.

5. In what cases will equity assume jurisdiction without requiring a bill to be filed.

6. In what cases is a judgment creditor who obtains judgment subsequent to the attachment of an absconding debtor's goods entitled to priority over the attaching creditor ?

7. What is the effect of suing the several parties to a bill or note in separate actions ?

8. What is the effect of a verdict for the defendant on a plea of *non cepit* in replevin, and to what extent, if at all, are the sureties in the replevin bond liable in such a case ?

9. From what date is a recovery in ejectment evidence of the plaintiff's title in a subsequent action for mesne profits ?

STEPHENS ON PLEADING.

1. What is the proper form of traversing a deed by a party, or by a stranger respectively, and upon what doctrine does this distinction depend ?

2. What is judgment of respondeat ouster, and to what class of plea does it apply ?

3. What is a departure, and what is the earliest stage of the pleadings in which it can occur ?

4. In what cases is it necessary to allege in pleading that a conveyance was in writing ?

SMITH'S MERCANTILE LAW.

1. Is there any, and if so what distinction between such a delivery as would support an action for goods sold and delivered, where there was a binding contract, and such a one as would satisfy the Statute of Frauds where there had been no previous contract within the statute ?

2. How does the right to stop in transitu differ from a lien ?

3. State some of the grounds on which a surety's liability will be discharged.

ADDITION ON CONTRACTS.

1. Can money deposited with a third party to be applied to an illegal purpose, be recovered at any, and if so what time ?

2. State the rule with regard to proof of consideration in simple contracts, bills and notes, and instruments under seal respectively.

3. What is the effect of a *contract* being partly legal and partly illegal, and of the *consideration* for a contract being partly legal and partly illegal ? Give your reason.

NEW CHANCERY ORDER.

SATURDAY, 22ND FEBRUARY, 1862.

It is ordered that sections 8 and 9 of the 36th of the General Orders of this Court of the third of June, 1853, be and the same are hereby repealed: and it is further ordered, that in future all sales are to be with the approbation of one of the Masters of this Court, who is to report the same to the Court, such report to be in the form hereunder set forth, or as near thereto as circumstances will permit, that is to say:—

"IN CHANCERY."

(*Title of Cause.*)

"Pursuant to the decree (*or order*) of this honourable Court bearing date the —— day of —— and made in this cause, I have under the General Orders of this Court, in the presence of (*or after notice to*) all parties concerned, settled an advertisement and particulars and conditions of sale for the lands mentioned or referred to in the said decree, (*or order,*) and such advertisement having, according to my directions, been published in the (naming the newspaper or newspapers) once in each week for the four weeks immediately preceding the said sale, (*or as the case may be,*) and and bills of the said sale having been also as directed by me published in different parts of the township, (*town or city*) of —— and the adjacent country and villages, (*or as the case may be,*) the said lands were offered for sale by public auction according to my appointment, on the —— day of —— by me, (or by Mr. —— of —— appointed by me for that purpose, auctioneer,) and such sale was conducted in a fair, open and proper manner, when —— of —— was declared the highest bidder for and became the purchaser of the same at the price or sum of £ —— (or when sold in different lots, that A. B. became the purchaser of lot No. 1 at the price or sum of £——, as the case may be): all which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this honourable Court.

Under the printed conditions of sale is to be printed a blank form of contract in these words, or to this effect:—

"I agree to purchase the property (or lot No. ——) mentioned in the annexed particulars, for the sum of £——, and upon the terms mentioned in the above conditions of sale," which is to be signed by the purchaser.

Witness, ——."

This order is to take effect on and after the eighth day of March next.

(Signed) J. C. P. ESTEN, V. C.
J. G. SPRAGGE, V. C.

SELECTIONS.

THE MASON AND SLIDELL CASE.

(*Continued from page* 66.)

We revert, for the last time, to the despatch of the American Minister in the affair of The Trent; the fifth of whose propositions is the only one that remains for examination. The question there raised and the arguments used in support of it, are of such a character, that it is but justice to allow the writer to tell his tale in his own words.

"Only the fifth question remains, namely, did Captain Wilkes exercise the right of capturing the contraband in conformity with the laws of nations? It is just here that the difficulties of the case begin. What is the manner which the law of nations prescibes for disposing of the contraband when you have found and seized it on board of the neutral vessel?

"The answer would be easily found if the question were, what shall you do with the contraband vessel? You must take or send her into a convenient port, and subject her to a judicial prosecution there in admiralty, which will try and decide the questions of belligerency, neutrality, contraband and capture. So, again, you will promptly find the same answer if the question were, what is the manner of proceeding prescribed by the law of nations in regard to the contraband if it be property or things of material or pecuniary value? But the question here concerns the mode of procedure in regard not to the vessel that was carrying the contraband, nor yet to the contraband things which worked the forfeiture of the vessel, but to contraband persons.

"The books of law are dumb; yet the question is as important as it is difficult. First, the belligerent captor has a right to prevent the contraband officer, soldier, sailor, minister, messenger, or carrier from proceeding on his unlawful voyage, and reaching the destined scene of his injurious service. But, on the other hand, the person captured may be innocent—that is, he may not be contraband. He, therefore, has a right to a fair trial of the accusation against him. The neutral State that has taken him under its flag is bound to protect him if he is not contraband, and is therefore entitled to be satisfied upon that important question. The faith of that State is pledged to his safety if innocent, as its justice is pledged to his surrender if he is really contraband. Here are conflicting claims, involving personal liberty, life, honour, and duty. Here are conflicting national claims, involving welfare, safety, honour and empire. They require a tribunal and a trial. The captors and the captured are equals; the neutrals and the belligerent State are equals.

"While the law authorities were found silent, it was suggested at an early day by this Government that you should take the captured persons into a convenient port, and institute judicial proceedings there to try the controversy. But only Courts of Admiralty have jurisdiction in maritime cases, and these Courts have formulas to try only claims to contraband chattels, but none to try claims concerning contraband persons. The Courts can entertain no proceedings, and render no judgment, in favour or against the alleged contraband men. It was replied—All this is true; but you can reach in these courts a decision which will have the moral weight of a judicial one, by a circuitous proceeding. Convey the suspected men, together with the suspected vessel, into port, and try there the question whether the vessel is contraband. You can prove it to be so by proving the suspected men to be contraband, and the Court must then determine the vessel to be contraband. If the men are not contraband, the vessel will escape condemnation. Still, is there no judgment for or against the captured persons? But it was assumed that there would result, from the determination of the Court concerning the vessel, a legal certainty concerning the character of the men. This course of proceeding seemed open to many objections. It elevates the incidental inferior private interests into the proper place of the main paramount public one, and possibly it may make the fortunes, the safety, or the existence of a nation depend on the accident of a merely personal and pecuniary litigation. Moreover, when the judgment of the prize court upon the lawfulness of the capture of the vessels is rendered, it really concludes nothing, and binds neither the belligerent State nor the neutral upon the great question of the disposition to be made of the captured contraband persons. That question is still to be really determined, if at all, by diplomatic arrangement, or by war.

"One may well express his surprise when told that the law of nations has furnished no more reasonable, practical, and perfect mode than this of determining questions of such grave

import between Sovereign Powers. The regret we may feel on the occasion, is, nevertheless, modified by the reflection that the difficulty is not altogether anomalous. Similar and equal deficiencies are found in every system of municipal law, especially in the system which exists in the greater portions of Great Britain and the United States. The title to personal property can hardly ever be resolved by a court without resorting to the fiction that the claimant has lost and the possessor has found it; and the title of real estate is disputed by real litigants under the names of imaginary persons.

"It must be confessed, however, that while all aggrieved nations demand, and all impartial ones concede the need of some form of judicial process in determining the characters of contraband persons, no form but the illogical and circuitous one thus described exists, nor has any other yet been suggested. Practically, therefore, the choice is between that judicial remedy and no judicial remedy whatever. If there be no judicial remedy, the result is, that the question must be determined by the captor himself on the deck of the prize vessel. Very grave objections are against such a course. The captor is armed; the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued, and helpless. The tribunal is irresponsible, while its judgment is carried into instant execution. The captured party is compelled to submit, though bound by no legal, moral, or treaty obligation to acquiesce. Reparation is distant and problematical, and depends at last on the justice, magnanimity, or weakness of the State in whose behalf and by whose authority the capture was made. Out of these disputes reprisals and wars necessarily arise, and these are so frequent and destructive that it may well be doubted whether this form of remedy is not a greater social evil than all that could follow if the belligerent right of search were universally renounced and abolished for ever. But carry the case one step further. What if the State that has made the capture unreasonably refuses to hear the complaint of the neutral, or to redress it? In that case the very act of capture would be an act of war—of war begun without notice, and possibly entirely without provocation. I think all unprejudiced minds will agree, that, imperfect as the existing judicial remedy may be supposed to be, it would be, as a general practice, better to follow it than to adopt the summary one of of leaving the decision with the captor, and relying upon diplomatic debates to review his decision. Practically it is a question of choice between law, with its imperfections and delays, and war, with its evils and desolations. Nor is it ever to be forgotten that neutrality, honestly and justly preserved, is always the harbinger of peace, and is therefore the common interest of nations, which is only saying that it is the interest of humanity itself.

"At the same time it is not to be denied that it may sometimes happen that the judicial remedy will become impossible—as by the shipwreck of the prize vessel, or other circumstances, which excuse the captor from sending or taking her into port for confiscation. In such a case the right of the captor to the custody of the captured persons, and to dispose of them, if they are really contraband, so as to defeat their unlawful purposes, cannot reasonably be denied. What rule shall be applied in such a case? Clearly the captor ought to be required to shew that the failure of the judicial remedy results from circumstances beyond his control, and without his fault. Otherwise he would be allowed to derive advantage from a wrongful act of his own."

Applying these principles to the facts before him, the position of the American Minister is this—that although The Trent was carrying persons, whom, by the law of nations, she was prohibited from carrying; although Captain Wilkes had a right to board and search her for those persons, and, on finding them in her, had a right to capture both them and the vessel; still that he had no right (unless with the concurrence of the authorities of The Trent, which he had not obtained, or was compelled by stress of weather, or being unable to spare a prize crew for her, &c.,) to take those persons out of her; but was bound to take her and her illegal freight into port for condemnation as prize by a judicial tribunal. And that, as he did not do this, but took those persons out of the ship, allowing her to go free on her voyage, the persons so taken were in an unlawful custody, and the Government of the United States was bound to restore them to the country from under the protection of whose flag they had been taken. He restores them accordingly.

The first observation that naturally presents itself to the mind on reading this is, that the American Minister does not profess to rest his case on any known and established rule of international law. The rule which he invokes is, in his own language, "unsettled"—a rule uncertainly established,—one respecting which "the books of law are dumb," &c.; and he admits by implication, if not in express terms, that it is a rule for the establishment of which the United States of America have always contended against other nations. For, in subsequent passages of his despatch he speaks of it as "an old, honoured, and cherished American cause;" "the most cherished principle," "the essential policy" of his Government, &c.

Admitting that whenever there is any doubt or dispute, or wherever it is reasonably practicable to bring the captured vessel into port for adjudication, it is right to do so, we deny the rule laid down by the American Minister as a rule obligatory in all cases, and foresee much mischief if it were adopted in its entirety.

Its first effect would be to tie up most unfairly the hands of belligerents, and confer on neutrals most dangerous powers of evading the law of nations. The American Minister plausibly argues in favour of his theory, "The captor is armed; the neutral is unarmed. The captor is interested, prejudiced, and perhaps violent; the neutral, if truly neutral, is disinterested, subdued, and helpless." How the neutral is "disinterested" we confess we do not see; and with respect to the interest of the captor, his interest in general is to bring the vessel into port, for by taking the goods or persons, and forbearing to capture the ship, he sacrifices a prize.

The American Minister, indeed, admits that certain circumstances might dispense with the rigour of his rule—namely, the consent of the authorities of the captured vessel, stress of weather, inability to furnish a prize crew, etc. But many cases occur in war, where, without any of these excuses, the being compelled to place a prize crew in a captured vessel would be a very great hardship on the captor, for reasons which could not be disclosed to a prize court without the greatest inconvenience and danger. Take this case:—A ship of war, pretty fairly but not over manned, meets, off the enemy's coast, a dozen neutral vessels going directly thither, conveying troops of the enemy. Has she not a right to board them, and take out the illegal freight? Surely such conduct in the neutral vessels is an act of interference in the war, and, at all events, is an evil to remedy which the ordinary process of law would be too slow, and which must be dealt with by instant action—"Silent leges inter arma." Now, the American Minister must say that this course is not open, and that the captor must put a prize crew into each of those vessels, and send them into port for adjudication as prize? To do this would probably require 100 of his crew, and his orders might be to watch a ship of superior force, whom he dared not engage unless with a full crew, and perhaps at a disadvantage even then. Would such instructions be a fit matter to disclose in a prize court? Many similar cases might be put.

Secondly, such a rule would be to the disadvantage of honest neutrals, who, in general, take good care not to carry con-

traband of war, and, if such is smuggled on board their ships, have generally proofs of their own innocence of its presence there sufficient to satisfy any reasonable person. The taking such a vessel into port for adjudication under such circumstances could be productive of nothing but annoyance. To the sham neutral, indeed, the advantage of such a rule is obvious enough.

Thirdly. to the human race in general, war is at all times an evil, and each belligerent nation, as well as every nation which is honestly and truly neutral, has a direct interest in bringing it to a close as soon as possible. But a great obstacle to this would be created if the rules of the law of nations were such as to allow pretended neutrals to drive a flourishing trade between the belligerents, with the power of indirectly aiding either party at convenience or pleasure.

The British Minister, in his reply to the American Minister, on which we commented in our last number, does not dispute the position of the latter which we have been discussing. The English Minister's case did not, indeed, require him to do so; for his position is, that the Trent was not in any way violating the law of nations, so that any seizure of her or her freight was unlawful ab initio.

Such, as appears to us, is the juristical view of the question raised by this affair of the Trent. We have all along purposely refrained from considering the subject in any political or moral view, and now take leave of it.—*Jurist.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal Barrie Post Office.

All other Communications are as hitherto to be "The Editors of the Law Journal, Toronto."

SPLITTING THE PLAINTIFF'S DEMAND.

(*Continued from page 67.*)

The Plaintiff in this case (*Grimbley* v. *Aykroid*) was a grocer, the Defendant a Railway Contractor. The men employed by the latter on the Railway, were paid partly in money, and partly in tickets or orders for goods. Three thousand of these tickets had been given by order of the defendant to the plaintiff who supplied the workmen accordingly, and on settling with them the contractors deducted these orders as so much money.

The defendant having refused to pay the plaintiff these tickets, the latter brought 228 actions upon them in the County Court, each as it would seem on the amount of the supplies to one workman. The question was whether under these circumstances the case came within the provision of the 63rd section (English Act,) against dividing any cause of action for the purpose of bringing two or more suits, or in other words, whether the splitting of a tradesman bill as had been done in this case was a dividing a cause of action within the meaning of the statute. *Pollock, C. B.*, after referring to the older authorities, all of which had been cited and commented on in the course of the argument, and to the judgment of Lord Tenterden in *R.* v. *Sheriff of Herefordshire*, 1 B & Ad. 672, proceeds hus: "The present case however does not proceed upon these authorities, but on the construction of the recent act 9 & 10 Vic., c. 95. The whole question turns upon the meaning of the term "cause of action." This term does not necessarily mean a cause of action on one single entire contract, for there may be one cause of action on several debts contracted at different times; and in by far the greater number of cases a count in *indebitatus* assumpsit, or debt is founded on many distinct contracts, as was pointed out in *Hesketh* v. *Fawcett*, (11 M. & W. 360;) and one count may be considered one cause of action.

To provide that one cause of action on one entire contract should not be divided, would be unnecessary and surplusage; and though an argument that a clause in an act of Parliament if understood in one sense would be operative, —in another inoperative,—is not by any means a conclusive one, because it must be admitted clauses are often introduced *ex abundantia cautelâ*, yet it is of some weight; and the probability is that the Legislature, in enacting that a cause of action shall not be divided, meant a cause of action which but for the enactment would be divisable, and when it is considered to what abuses the narrower construction of the term would lead (which is strongly exemplified in the present case, in which 228 actions have been commenced, and 3000 might have been brought), we think we may safely conclude, that the term "cause of action" ought to be interpreted *one cause of action*, and not to be limited to an action, on one separate contract.

But on the other hand, if the term is to comprise all debts that might be included in one count,—debts for work and labor, goods sold, use and occupation, &c.,—though totally unconnected with each other, which might be included in one *indebitatus* count, would be prevented from being divided under this clause,—and if *indivisible*, and the creditor brought an action for any part he would virtually abandon all the remainder by the operation of the latter part of the 63rd section.

In such a case Mr. Justice *Coleridge* held that a similar clause in the Brighton Court of requests act did not apply, —the demand there being for three distinct things, the price of a horse, rent, and goods sold; but he made a distinction between that case and one where a debtor has a bill running on from day to day (*Neale* v. *Ellis*, 1 Dowl. & L. 163.) In such a case, though each item of goods supplied or work done constituted a separate contract, so that after the stipulated price became due the tradesman, could sue for one item, yet the understanding is undoubtedly, that it shall be united with other items and form an entire demand; and doubtless if after several other items were added to the first, the tradesmen were to bring separate actions for each as for a distinct debt, any superior court would deal with such a proceeding as vexatious.

It appears then that a great inconvenience would follow, if the term "cause of action" were interpreted to mean *cause of action on one separate contract*,—and also if the construction were to be that it was intended to cover all contracts executed, however dissimilar in character, that could be included in one *indebitatus* count which, according to the modern practice may comprise any number of separate unconnected contracts, wherever made, each having ended in a debt before the commencement of the suit. As some extension must be given to the former construction some restriction must be put on the latter; and we think that we ought to hold that the 63rd section does apply (whether to all debts that could be comprised in one description in one count, as for "goods sold," we need not now decide), at all events to the cases of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract but to be continuous, so that one item if not paid shall be united with another and form one entire demand. If that demand exceed £20 it ceases to be within the jurisdiction of the County Courts; and therefore we think that on the facts before us, all the debts claimed fall with that description,—the total greatly exceeding £20,—and consequently they ought not to have been separated into different suits.

ANSWERS TO CORRESPONDENTS.

Most willingly we give publicity to the subjoined letter from Judge Robinson.

It is a radical defect in our Division Court system. This forced benevolence from Clerks and others—this begging from corporations or individuals for aid in supporting Courts of Justice. The public are taxed largely both in Upper and Lower Canada for Court accommodation, but not one shilling is provided for such purposes in the Division Courts.

In County towns the Councils are generally willing enough to make provision—indeed Sarnia appears to stand alone in its dollar economy. But the matter should not be left to whim or caprice, for the general public have as much if not more interest in these tribunals as in others of a higher jurisdiction.

As respects the Division Courts held in County towns the evil complained of might be remedied by a brief enactment striking out of section 2 of the U. C. Act, cap. 127, the words "other than the Division Courts," but this would not accomplish all that is desirable—there should be some general provision touching all the Courts to secure for them, as a matter of right, proper accommodation for their sittings.—Eds. L. J.

To the Editors of the Law Journal.

Gentlemen—May I trouble you by calling your attention to a serious defect in the administration of justice. The County Councils have the right of refusing to let the Division Courts be held in the Court Room of the County. In this County the Clerk of the Division Court held in Sarnia is obliged to pay $1 out of his own pocket every time the Division Court is held in the Court House. Perhaps you would be good enough to take notice of this in your journal. If attention were called to it a remedy might be applied.

Your obedient servant,

Charles Robinson, Co. J.

P. S.—The $1 charged is for cleaning, &c., of the room and goes to the attendant, but should not the public pay this, not a poor Clerk?

Sarnia, 17th March, 1862.

To the Editors of the Law Journal.

Dear Sirs—There are many little amendments very much required to facilitate the better working of the Division Court system, and if the "Clerk's Conventions" had become general and properly continued, much good would have resulted in bringing about a more perfect and uniform system.

There is no doubt but during the present session of the Legislature some amendments will be made to the Division Court Act, and it is highly necessary that when the Act is overhauled that *all* the amendments necessary should be made, and the question is whether our Legislature will be in possession of all the alterations needed.

There are one or two matters I wish to draw your attention to for an explanation, as the *Law Journal* always comes to the rescue of the bewildered, and is the highest court of appeal for Division Court disputants. It would seem, according to the 124th section of the Act, that it is the duty of Clerks to summon a jury for *each* sitting of the Court, whether a jury has been demanded or not. I believe some Clerks always summon a jury for every Court, and the 132nd section of the Act still further confirms that a jury should be summoned for each Court, which says, "If the Judge wishes a jury to try any suit, the Clerk shall instantly return a jury of five persons present." Now, if no jury is summoned to attend the Court, it would appear that such selection is left entirely with the Clerk, a fine opportunity, certainly, for suitors to charge a Clerk with packing a jury. But if fifteen jurors are regularly summoned to attend each sitting of the Court, the process would be regular enough. On the other hand, if jurors are summoned and none required, how is the cost of summoning them to be paid? I don't know of any provision for such expense. Furthermore, it would seem very absurd to summon fifteen jurymen to attend a Court where they were not needed at their own expense.

There is another matter in connection with the jury system that requires altering; that is, in the mode of selecting them. The Act requires them to be selected from a copy of the Collector's Roll, commencing with the first name and going through the whole roll. Now, the Collector's Roll is alphabetically arranged. By this system persons of the same name, families, are sure to be summoned. I had an instance in my Court not long ago where fifteen jurors were summoned, and eleven out of the fifteen were of the same name, and either brothers or cousins, and when the five were sworn, four of the five were of the eleven. One of the suitors looked up at the Court and sarcastically said, "I don't know how I stand with this family." Now, where persons are selected in this way, I should think such circumstances would frequently occur in old-settled portions of the country.

I see by the 51st section of the Act, that if costs are not paid by the plaintiff in the first instance, a power is given to the Judge to order the amount to be levied by execution. How or where is a form of *fi. fa.* to be obtained for such cases?

Yours, &c., Clerk 6th Division Court Co. Norfolk.

[The 122nd section, as our correspondent suggests, is open to question, which ought to be finally settled by enactment; but we do not understand the words "summoned in rotation, beginning with the first," to mean that of necessity the Collector's Roll must be gone through with name for name in the order in which they are entered, for in the next section it says, "and if there be more than one such township or place within the Division beginning with *the Roll*" (not with *the first person* on such roll) "for that within which the Court is held, and then proceeding to that one of *the other Rolls* which contains the greatest number," &c.

The first part of the clause says that the jurors "shall be *taken* from the Collector's Rolls," &c. The after provision is how they are to be "summoned."

We are not aware that there has been a decision by any Judge on this point.

No form of order or execution has been framed by the Board of Judges. Unless applied for at the hearing and in presence of the party liable, we do not think a Judge would make an order absolute without a previous order to show cause. The remedy, therefore, by ordinary summons would be quite as easy a mode of recovering fees.

The 124th section cannot be isolated but must be read in connection with other provisions of the Act; and unless the Clerk's action is required under the 120th section, no jury need be summoned. It would be an intolerable burden to the public to have a jury in attendance at every Court, whether required or not. The jury called at the instance of a party to a suit and the fees for summoning and for attendance, &c., are chargeable only against him.

The 132nd section does not, in our view, show what our correspondent suggests—it says the Clerk shall return a jury "of five *persons present*," not five *from the jury panel*, or five of the jury in attendance at the Court, and is rather an argument the other way.

Disappointed suitors are ready enough to make unfounded charges against officers, but a Clerk who must have a general acquaintance in the neighbourhood will always be able to set such suggestions at defiance by selecting "first class men."—EDS. L. J.]

U. C. REPORTS.

ERROR AND APPEAL.

(*Reported by* ALEXANDER GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*

(Before the Hon. Sir J. B. ROBINSON, Bt., C. J.; the Hon. W. H. DRAPER, Q. B., Chief Jus., C. P.; the Hon. Mr. Vice-Chancellor ESTEN; the Hon. Mr. Justice BURNS; the Hon. Mr. Vice-Chancellor SPRAGGE; the Hon. Mr. Justice RICHARDS) and the Hon. Mr. Justice HAGARTY.)

HALL V. COLDWELL.

Mortgage—Dormant Equities—Statute of Limitations—Infancy.

Held, that the Dormant Equities Act does not apply to cases of actual mortgage—that is, where the proviso for redemption appears on the face of the instrument creating the incumbrance:—such cases are to be dealt with under the 11th clause of the original Chancery Act.

So long as the mortgagor remains in possession of the mortgaged estate, the twenty years limited for him to redeem does not begin to run for so long as he holds possession, he is entitled to pay or tender the mortgage money and interest, and if in the meantime the mortgagee should take proceedings to dispossess him by ejectment, he could, at any time before judgment, stay proceedings by paying the amount due into court, with costs.

In mortgage, as well as other cases, the disability on account of infancy is to be allowed for in the computation of the time allowed by the statute (chap. 88 of the Consolidated Statutes of Upper Canada) for the bringing of actions.

This was an appeal from a judgment of His Honor V. C. ESTEN, overruling the demurrer put in by the defendants.

The bill in the Court below was filed on the 20th October, 1859, by *James Coldwell*, against *Hezekiah J. Hall* and *John Maxwell*, setting forth that one Robert Coldwell, the father of the plaintiff, was, in the year 1835, the owner of lot number 104, in the town of Guelph, containing, by admeasurement, one quarter of an acre, with a valuable house thereon, erected by him: that on or about the 10th day of March, in that year, the said Robert Coldwell mortgaged the said lot and premises to the above-named defendant, John Maxwell, to secure £45, and interest, on the 4th February, 1837: that Robert Coldwell continued in possession of the premises until the time of his death: that sometime in the month of May, 1838, and while he was in possession of the premises, he died intestate, leaving a widow, and the plaintiff, his only son, him surviving: that at the time of the death of Robert Coldwell, plaintiff was an infant, under the age of two years: that plaintiff and his mother continued in possession of the premises for a short time after the death of his father, and until possession thereof was taken by defendant, John Maxwell: that some time in the year 1839, and about a year after the death of plaintiff's father, Maxwell having threatened proceedings at law upon the mortgage, entered into possession of the said lot thereunder, and took the rents and profits thereof, and so continued in possession, and in receipt of the rents and profits, until some time in the year 1842: that Maxwell did, sometime in the year last mentioned, make an assignment of his interest in the lot to the defendant, Hall, subject to the equity of redemption, as appears by the registration of another assignment, dated in the year 1853, reciting and purporting to confirm the said assignment made in the year 1842, which had not been registered, and is stated to have been burnt: that Hall entered into possession of the lot at the time of the assignment of the mortgage to him, in the year 1842, and had so continued in possession, and in receipt of the rents and profits thereof, at the time of filing the bill: that Maxwell and Hall had received from the rents and profits of the lot much more than the mortgage money and the interest thereon, and that the mortgage money and interest were over paid by rents and profits before plaintiff arrived at the age of twenty-one years: that at the time Maxwell entered into possession of the lot, there were good and valuable houses and buildings thereon, which were burnt down while in possession of Hall, that plaintiff is not aware whether the house and premises so burnt down were insured by Hall or not; but if not, your plaintiff submitted that he should have insured the said house and premises, as being a mortgagee in possession: that at the time of the death of his father, the equity of redemption of the mortgaged premises was vested in plaintiff, who was an infant of less than two years of age: and who became of the age of twenty-one years on the 24th day of November, 1857: and prayed the usual redemption decree.

To this bill the defendants demurred, and showed for cause of demurrer that the bill did not contain any matter of equity wherein the Court could ground any decree, or give the plaintiff any relief against the defendants; and for further cause of demurrer, that it appeared by the bill that the statute commonly known as the Statute of Limitations with respect to real property, was an effectual bar to the relief sought by the plaintiff in the suit; and also, that it appeared by the bill, that the equity sought to be thereby enforced, arose before the passing of the act to establish the Court of Chancery in this Province; and that the act passed in the 18th year of the reign of Her Majesty Queen Victoria, intitled "An Act to amend the Law as to Dormant Equities," was therefore also an effectual bar to the relief sought by the plaintiff: wherefore, and also for that, the defendant Maxwell was an unnecessary party to this suit, and for divers other imperfections, &c., the defendants did demur.

Upon argument the demurrer was overruled, with costs.*

From this order the defendants appealed, assigning as reasons of appeal:

1st. Because it appears, upon the face of the bill, that before the filing thereof, more than twenty years had elapsed since Maxwell entered into possession of the lands and premises sought to be redeemed; and the provisions of the twenty-first and other sections of the Consolidated Statutes of Upper Canada, (4th William IV., chap. 1, sec. 36,) intitled "An Act respecting the Limitations of Actions and Suits relating to Real Property," &c., are therefore an effectual bar to any relief being decreed upon the said bill.

2. Because it also appears from the said bill, that the estate of Maxwell in the said lands and premises had become absolute at law before the fourth day of March, 1837; and that therefore the

* See 6 U. C. L. J., 141.

provisions of the eleventh section of the Act of the Parliament of Upper Canada, passed in the seventh year of the reign of His late Majesty King William the Fourth, intitled "An Act to establish a Court of Chancery in this Province, (Consolidated Statutes of Upper Canada, chap. 88, sec. 27,) present a further bar to the relief sought, inasmuch as there are no circumstances therein appearing which would make it reasonable or just for such being decreed, and

3rd. Because it also appears from the said bill, that the claim or interest which the respondent seeks thereby to recover arose before the fourth day of March, 1837, and that therefore the provisions of the statute passed in the eighteenth year of Her present Majesty's reign, intitled "An Act as to Dormant Equities," (Consolidated Statutes of Upper Canada, chap. 12, sects. 59 and 60,) have effectually precluded any disturbance of the title of the appellants, which is valid at law notwithstanding any of the grounds or matters alleged in the bill.

In support of the decision of the Court below, the plaintiff assigned as reasons:

1st. That the Statute of Limitations is no bar to the relief sought by him.

2nd. That the said Court of Chancery, under section 11 of 7th William IV., chapter 2, was fully warranted, by the circumstances of the case, in making the said order.

3rd. That the Act as to Dormant Equities is no bar to the relief sought.

On the appeal coming on to be argued, *A. Crooks*, for the appellant, referred to *Barkworth* v. *Young* (4 Drew. 1 S. C. 3 Jur. N. S. 34), to show that a statutable bar might be relied on by demurrer. Here the right, he contended, had accrued before the 4th March, 1837, default having before then been made, and *Brown* v. *Cole* (14 Sim. 427) shows the right accrues on default being made.

That the Legislature finding the rule introduced by the Chancery Act insufficient, had introduced the 18 Victoria, known as the Dormant Equities Act, and intended to apply to mortgages as well as other cases. (*Attorney General* v. *Grassett*, 8 Gr. 180; *Wragg* v. *Beckitt*, 7 Gr. 222.)

Then the Statute of Limitations bars the plaintiff's right to recover. Twenty years had expired before the filing of the bill, and this plaintiff does not come within any of the exceptions mentioned in the disability clause.

The defendants are also entitled to the protection intended to be given to mortgagees, under the 11th section of the Chancery Act.

R. A. Harrison, and with him *Thos. Hodgins*, for the respondent.

It is not shewn that the 20 years had expired when bill filed; the intendment will be against the defendant, who might have answered and shewn distinctly how this fact was; but admitting that the 20 years had elapsed, then it is contended that it does not operate as a bar to the right sought.

It was not intended by the present Statute of Limitations to make any alteration in respect to disabilities which operated to protect parties rights before the passing of the act: thus, if the person entitled to the equity of redemption were under disability when the mortgagor took possession, the time would not begin to run. The defence intended to be afforded by the 11th clause of the Chancery Act cannot be taken advantage of upon demurrer; but if the Court should be of a different opinion, then it is contended that circumstances appearing upon this bill are wholly insufficient, and that mortgages are not within the provisions of the Dormant Equities Act.

They referred to *Baker* v. *Welton*, 14 Simons, 426; *Cope* v. *Doherty*, 2 De G. & J. 614; *Kearns* v. *The Cordwainers' Company*, 5 Jur. N. S. 1216.

The judgment of the Court was delivered by Sir J. B. ROBINSON, Bart., C. J.

The first half of the special preamble to the statute respecting Dormant Equities, 18 Victoria, chapter 124, forms no part of the clause of the Chancery Act in the Consolidated Statutes, U. C, which contains the provision respecting Dormant Equities (Con. St. U. C., chap. 12, sec. 59). But it forms the 58th clause of that Act, and is sufficiently referred to in the 59th, to enable us to read it in connection with the latter clause. The 58, 59 and 60th clauses give us exactly the provision, I think, in effect, which was embraced in the Dormant Equities Act, while it stood by itself.

My opinion is, that in the case of an actual mortgage, that is, when the condition which relates to redemption is expressed in the deed, the Dormant Equities Act does not apply, but that the Legislature left such cases to be dealt with under the 11th clause of the original Chancery Act.

In that respect I agree with the Vice-Chancellor's judgment. It was obviously intended by the Legislature, I think, to leave the former proviso in regard to mortgages undisturbed, and if so, then we have only to consider how this case stands upon the Statute of Limitations.

The statements in the plaintiff's bill are that the mortgage money was payable on 4th February, 1857, and being unpaid, the estate of the mortgagee became on that day absolute at law; but the mortgagor, Robert Caldwell, was not disturbed in the possession, and continued to live, with his family, upon the premises till he died, which was sometime in the month of May, 1838; he died intestate, leaving a widow and this plaintiff, his only surviving son, the plaintiff being then under two years of age. They remained in possession of the premises till some time in the year 1839, and about a year after the death of the mortgagor, when the mortgagee, Maxwell, entered into possession, and took the rents and profits till some time in the year 1842, in which year he assigned his interest in the lot to the defendant, Hall, subject to the equity of redemption. Hall entered into possession in 1842, on receiving the assignment of the mortgage, and is still in possession.

I think it clear that the statute did not begin to run in the lifetime of the mortgagor, though the estate had become absolute at law, by his failure to pay on the day, for the mortgagor was all the time in possession, and had only to pay or tender the mortgage money; and if the mortgagee had attempted to dispossess him by ejectment, he could, at any time before judgment, have stayed proceedings by paying the amount due into court, with costs. He therefore had never occasion to bring a suit for redemption; and it is clear on the 36th clause of Statute 4, William IV, chap. 1, following what had before been the rule in equity, that the statute in this case did not begin to run till Maxwell took possession, at which time the equity of redemption was in the plaintiff, then an infant.

There is some difficulty in the case, from the want of a precise statement in the bill of the time when Maxwell took possession. If we should take it upon the statement that is made, that he certainly took possession before the 20th October, 1839, then 20 years had elapsed between his taking possession and the filing of this bill. The question is, whether, when the plaintiff has stated that Maxwell took possession about a year after the mortgagor died, which was sometime in May, 1838, he does in effect assert that he took possession before 20th October, 1859?

If we are not at liberty to gather this from the statement, as it is made, then the plaintiff cannot be held to be bound, and the defendant, instead of demurring, should himself have stated at what time he took possession, which he had the best means of knowing.

Assuming that on the principle that all statements ambiguously or doubtfully put in a bill, are to be taken, in the most stringent sense, against the plaintiff, we should hold that about a year from the month of May, in one year, must have expired before 20th Oct., in the next year, then it is contended that still plaintiff in this case is not bound, because of his disability from infancy until three or four years before the commencement of this suit. On the other hand, it is contended, that in the case of mortgagors and their heirs, there is no such exception on account of disability, and that the lapse of years is therefore a conclusive bar. But I think we must hold that in regard to equitable as well as legal interests, and in the case of mortgages as well as in others, the disability, on account of infancy, is to be allowed. We have to consider the 16th, 17th, 28th, 32nd and 36th clauses of the statute of 1854, chapter 1; or rather, taking these provisions as they stand in the existing statute, chapter 88 (Consolidated Statutes of Upper Canada), sections 1, 2, 21, 31, and 46. We have the general rule as regards actions for legal rights, in section 1; namely, that the action must be brought within 20 years next after the time when the right to bring the action accrued. In section 2, we are told

when the action shall be considered to have accrued. Section 21 makes the special provision in regard to mortgages: that a suit to redeem shall not be brought but within 20 years next after the time at which the mortgagee obtained possession of the estate mortgaged, or receipt of the rent or profits, unless when a written acknowledgment of the mortgagor's title, or of his right to redeem, has in the meantime been given. Sec. 31 provides, in effect, that a person claiming any land or rent, in equity, must bring his suit in equity, within the period during which he might have brought an action (at law) to recover, if he had been entitled at law to such estate or interest as he shall claim in equity.

And following all these provisions, comes the 46th section, which enacts, that if at the time at which the right of any person to bring an action to recover any land or rent shall have first accrued, as thereinbefore mentioned, such person shall have been an infant, then such person may, notwithstanding the period of twenty years may have expired, bring his action to recover such land or rent, at any time within ten years next after he shall have ceased to be under such disability.

The 21st clause, which specially relates to mortgages, does not, it is true, contain within it any exception on account of infancy or other disability, but that is because the sole object of that clause was to settle the question at what time the right to sue for redemption shall be taken to begin; that is to say, not from the time of the estate becoming absolute at law, as might without this clause had been contended, but from the time of the mortgagee entering into possession.

QUEEN'S BENCH.

Reported by Christopher Robinson, Esq., *Barrister-at-Law, Reporter to the Court.*

Austin v. Snyder.

Interference with water privilege—Obstruction of race-way—Consol. Stats. U. C. ch. 47, sec. 2.

The first count alleged that the plaintiff was possessed of lands near the river Otonabee, and by reason thereof had a right to the benefit of the water to work his mills on said land, and that the defendant, by throwing slabs, &c., into the stream, had wrongfully obstructed his enjoyment.

The second count stated that a certain race-way had been constructed from a dam on said stream to the said land of the plaintiff, by means whereof so much of the water as was necessary for the purpose of working the plaintiff's mill did and ought to flow through said race-way, but that the defendant wrongfully threw slabs and pieces of timber, &c., into the stream above said race-way, which sank, and prevented the water from flowing in its accustomed manner through said race-way to the plaintiff's land, and so hindered the plaintiff in his enjoyment of the said stream.

It appeared that the plaintiff's land on which the mill stood was not upon the stream, but that between it and the stream, along the race-way, a tract of land intervened belonging to one R., from whom the plaintiff held a lease, giving him a right to use the water. Several other persons owned mills above the plaintiff, who were also sued by him at the same assizes, and it was impossible to ascertain how much, if any, of the obstruction was caused by the defendant, and how much by the others.

Held, that this evidence supported the declaration: that the plaintiff was entitled to recover; and that the uncertainty as to the amount of defendant's liability, formed no ground for disturbing the verdict, which was for $40.

Held, also, that as the injury complained of was caused by acts made wrongful by statute (Consol. Stats. U. C. ch. 47, sec 2), and such as the plaintiff could individually recover, for it was unnecessary to refer to the enactment in the declaration, the action not being for any penalty given by it,

The declaration stated that the plaintiff was possessed of certain lands and premises, with the appurtenances, adjacent and near to the river or stream called the Otonabee, and that by reason thereof the plaintiff then of right ought to have had and enjoyed, and still of right ought to have and enjoy the benefit and advantage of the waters of the said stream, for the purpose of working the mills of the plaintiff, erected and being in and upon the said lands and premises; and that the defendant, by throwing of slabs and pieces of slabs and other timber into the said stream, had wrongfully and injuriously obstructed the plaintiff in his use and enjoyment of the waters of the said stream for the purposes aforesaid.

In a second count the plaintiff stated that he was possessed of certain lands and premises adjacent and near to the stream or river called the river Otonabee, and by reason thereof was entitled to the use and flow of the said stream for the benefit and enjoyment of the said land and premises, with the appurtenances, and for the benefit and enjoyment thereof a certain channel or race-way was constructed from a certain dam on the said stream, made for the purposes of the said channel or race-way, to the said lands and premises of the plaintiff, and by means of the said channel or race-way so much of the water of the said stream as was necessary for the purpose of working the saw-mill of the plaintiff, erected and being in and upon the said lands of the plaintiff, then of right did flow, and still of right ought to flow, in and through the said channel or race-way to the said lands of the plaintiff; but the defendant, intending to injure the plaintiff in the use and enjoyment of the said stream for the purposes aforesaid, and by the means aforesaid, had wrongfully thrown and did wrongfully continue to throw into the said stream, higher up the same, and above the said dam and channel or race-way, slabs, and pieces of slabs and other timber which sank in the said stream, and into the said dam, at or near the mouth or entrance of the said channel or race-way, and by so sinking they obstructed and prevented the waters of the said stream from flowing in its natural and accustomed manner in and through the said channel or race-way to the said lands of the plaintiff; and by these means the defendant wrongfully and injuriously hindered and prevented the plaintiff in his use and enjoyment of the said stream for the purposes aforesaid, &c.

The defendant pleaded, 1st, not guilty.

2. That the plaintiff was not possessed of the lands and tenements as alleged.

3. That the plaintiff was not entitled to the benefit and advantages of the waters of the said stream or river, in manner and form, &c.

4. That the damage complained of was caused by constructing the dam mentioned in the second count in a careless and improper unsafe and unskilful manner, without providing necessary waste-gates to afford a passage for large quantities of slabs, bark, drift-wood, saw-dust and other substances, annually floating down the said river.

Issue was joined on these pleas.

At the trial at Peterborough, before Richards, J., it was proved that there were many mills besides that of this defendant above the plaintiff's dam: that the plaintiff's mills were obstructed in their working by an accumulation of slabs and pieces of slabs at the entrance from the river into his race-way seemed to be clear, and that he had suffered much damage from it, but it was difficult to prove certainly that a part of the injury was occasioned by any slabs thrown into the river at the defendant's mill, and impossible to ascertain for what portion of the injury the defendant could be held responsible. The jury could only endeavour to make from the evidence a probable conjecture. It appeared that the land in question was not actually upon the river, but near it, and that the land between it and the river, through which the race-way ran, belonged to one Rogers, who had executed a lease of the mill, with the appurtenances, and the right to use a certain quantity of water to drive the machinery specified, to the plaintiff and one Vanalstine, and that Vanalstine had assigned to the plaintiff.

The defendant's counsel moved as ground of non suit at the trial, that the plaintiff had failed to prove that he was entitled to the lands in the declaration mentioned, or to such an interest in them as gave him a right to the use of the waters as he alleged, or that he was, either by virtue of his possession of the lands or otherwise, entitled to the use and flow of the waters of the river *for the purposes and in a manner alleged*: (that is, that he had no right, by reason of any thing stated or proved, to have the waters of the river run into and through his race-way, which would be diverting them from the natural course of the stream.)

Leave was reserved to move for a nonsuit on these grounds, and the jury found for the plaintiff and $40 damages.

Read, Q. C., obtained a rule *nisi* for a nonsuit on the leave reserved, or for a new trial on the law and evidence, on the ground that the defendant was entitled by the evidence to a verdict on his second, third, and fourth pleas He cited *Beadsworth* v. *Torkington*, 1 Q. B. 782; *Brunton* v. *Hall*, Ib. 792; *Cawkwell* v. *Russell*, 26, L. J. Ex. 34; *Wood* v. *Waud*, 3 Ex. 748 *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590; *Mills* v. *Dixon*, 4 U. C. C. P. 222; *Tucker Paren*, 7 U. C. C. P. 269; *Mason* v. *Hill*, 5 B. & Ad. 17.

Adam Crooks shewed cause, and cited *Embrey* v. *Owen*, 6 Ex. 369; *Dickinson* v. *The Grand Junction Canal Co.*, 7 Ex. 299; *Whaley* v. *Laing*, 2 H. & N. 476; *Mason* v. *Hill*, 5 B. & Ad. 1;

Miner v. *Gilmour*, 12 Moo. P. C. C. 131; *Lord* v. *The Commissioners for the City of Sidney*, Ib. 484; *Chasemore* v. *Richards*, 5 Jur. N. S. 873; *Addison on Torts*, 10, 63-4; *Rogers* v. *Dickson*, 10 U. C. C. P. 481; *Northam* v. *Hurley*, E. & B. 665, Consol. Stats. U. C., ch. 47, sec. 2, ch. 48.

The facts of the case more fully appear in the judgment.

ROBINSON, C. J., delivered the judgment of the court.

The evidence upon the trial proved we think, that there was a great obstruction to the entry of the water of the river Otonabee into the race-way which led from the mill-pond to the plaintiff's mill occasioned by slabs and parts of slabs thrown into the river at the mills above the race-way, some of them a long distance above. It was proved that the slabs and what are called grindings, which are parts of slabs which have been crushed into pieces before being thrown in, collected in large quantities at the end of the pond above and near to the plaintiff's race-way, and formed into a solid mass, the grindings filling up the interstices among the slabs.

The effect of this was to lessen the quantity of water in that part, to obstruct its passage into the race-way, and to force it on one side away from the race-way, and down the natural channel of the river.

That the plaintiff suffered great damage from the obstruction was proved clearly. His claim was confined to the year 1860.

The difficulty was in making it clear for what portion of the injury the defendant, or any other proprietor of any other mills on the stream higher up the stream, could be justly held liable. Several actions had been brought, and were tried at the same assizes, against other mill owners; each defended on his own ground and was in no manner responsible except for such injury as he had himself occasioned by the slabs that had been thrown in by himself or his workmen at his own mill.

It was impossible to shew clearly what proportion the defendant in each action had contributed to the grievance complained of. They clearly could not have been all made jointly liable, and it could be no reason why one of the wrongdoers should not be held individually liable for such wrong as he had done, because other mill-owners had individually committed similar wrongs.

If an arbitration had been held between the plaintiff and all the parties sued, an arbitrator would attempt to settle in the first place what damage the plaintiff had suffered on the whole, and then he might have endeavour to apportion as he best could upon the evidence what portion of the whole damage each should pay, but this could not be so easily done by different juries disposing of different actions. It may have been attempted, and perhaps it was, to take care that the verdicts in all the cases did not make up together an amount much exceeding the whole damage the plaintiff had proved.

Supposing any difficulty on that head avoided so far as it could be, then there was the difficulty of making out with any tolerable degree of certainty what proportion of slabs had come down from each mill especially when we consider that the grindings as they are called, could not well be traced to have come from one mill more than an other, though when whole slabs happened to be marked, and the mark known, they would afford some material for calculation.

It is to be assumed that the jury did as well as they could in the perplexity of the case, and took care to keep within bounds. We do not see that any good ground has been made out for disturbing the verdict so far as regards the amount of damages, or the sufficiency of the testimony to prove the defendant liable.

And that the defendants could all of them have avoided doing the injury complained of by burning the slabs, or otherwise getting rid of them, cannot be doubted. If they could, and have without necessity done a wrong to the plaintiff by throwing them into the river, and leaving them to go wherever the stream would take them, then they must be liable to make compensation for that wrong, which indeed this defendant does not, we think, dispute.

But he objects that the plaintiff has no right of action, for these reasons, that he his not what is called a riparian proprietor, his land not being adjacent to the river: that his race-way leads from the pond—in other words out of the river, for the pond it seems at that place is a natural basin, that had always been covered with water before any dam was there, though the water in the pond was not so deep: that between his race-way and his mill, which is a considerable distance below the pond, there is a a tract of land of some width belonging to another party, and lying between his race-way and his mills, along the whole course of the race-way; so that what the plaintiff is in fact claiming is a right to divert part of the water of the river, and carry it through this race-way; and what he complains of is, that by the obstruction from the slabs thrown in, the entrance of his race-way or dam is to a great extent closed, and the water thrown off from it into the natural course of the river, to his great injury as owner or tenant of the mills below.

There are two actions, pending in the Court of Common Pleas by this plaintiff, Austin, against the owners of other mills, for wrongfully throwing slabs into the river above, and thereby contributing in part to the very injury that he complains of in this suit. The declaration is the same in these actions as in this against the defendant Snyder, and upon the trial the same objections were taken to the plaintiff's right to recover upon the pleadings and evidence as have been taken in this.

The case of *Northam* v. *Hurley* (1 E. & B. 665) goes far, we think, to support the plaintiff's right to recover on the declaration as it is framed in the present case and in the others, though it is not exactly applicable, because in that case the plaintiff's land, as we read the case, was not upon the same stream as the defendants; but perhaps in substance these cases are not distinguishable from it. It is true, as stated in this declaration, that the plaintiff was possessed of lands and premises *near the river*, and by reason of his possessing those lands he had a right to the advantages of the waters of the stream for the purpose of working his mill, for by his lease from Rogers he had, as it was shewn, a right to the use of the waters, as Rogers had, who owns the land all the way to the river; and under such a state of things the case of *Northam* v. *Hurley* does seem to support the plaintiff's assertion, that by reason of the possession of lands near the river, he has a right to the use of the water, for Rogers could have taken a portion of the water of the river, and led it to his mills below, except as to any person above him who could truly complain of being injured by such diversion.

The Court of Common Pleas, upon the case argued before them, have come to the conclusion that the legal objections, either as to the form of declaration or as to the variance between the evidence and the declaration in regard to the right claimed by the plaintiff, are not entitled to prevail, and we have seen the judgment they are prepared to pronounce in the case.(*a*) We incline to the same opinion, though in going through the many cases cited we have met with *dicta* of the learned judges which it did not appear to us easy to reconcile with the language of the court in *Northram* v. *Hurley*.

It is further to be considered, as applying to all these actions brought by the different plaintiffs, that the injury which the defendants are charged with is shewn to have proceeded from acts prohibited by our statute, Consol. Stats. U. C., ch. 47, sec. 2, namely, throwing slabs and other stuff into a stream; and that the plaintiff, as an individual suffering a private and particular damage from the public wrong, is clearly entitled to sue for such damage. In suing upon that ground we do not consider that he is bound to make reference to the statute, for he is not suing for any specific penalty given by the statute, and we are bound to know that by the public law the act complained of is in itself unlawful; and the plaintiff has set forth, and has shewn, that by reason of his possessing land and a mill near the river he suffers a pecuniary damage from the unlawful act of the defendant.

We do not differ from what we find to be the opinion of the Court of Common Pleas on the questions involved, and indeed it would be very embarrassing to have conflicting opinions in the two courts in actions by the same plaintiff depending on precisely similar facts.

In our opinion the defendant's rule should be discharged.

Rule discharged.(*b*)

(*a*) The cases referred to are *Austin* v. *Sharp* and *Austin* v. *Dickson*, not yet reported.

(*b*) There was another action brought by the same plaintiff against another defendant, Hughson, the declaration being the same as in this case. The jury there found also for the plaintiff, and $200 damages, and a rule *nisi* obtained by *Eccles*, Q.C., for a nonsuit or new trial, was discharged for the reasons above given.

THE QUEEN V. ROBLIN.

Marriage of minors—Consent of parent or guardian—26 Geo. II., ch. 33.

It is illegal in this country, as it was in England before the 26 Geo. II., ch. 33, to marry by license, where either of the parties is under twenty-one, without consent of parents or guardians; and the want of consent is a breach of the bond given on obtaining such license, conditioned that there is no lawful cause or impediment to hinder the marriage.

Semble, however, that the eleventh clause of the statute is not in force in this country, and that such a marriage therefore is not void.

(T. T., 25 Vic.)

Scire Facias, on a bond to the Crown, given by defendants Jehiel D. Roblin and Samuel Huff, junior. *Plea*, never indebted. The plaintiff took issue on the plea, and suggested the following breach:

"And hereupon the said plaintiff suggests and gives the court here to understand and be informed, that the said bond in the said writ of *scire facias* mentioned was and is subject to a certain condition thereunder written, whereby, after reciting that whereas a license of marriage had that day been obtained for the purpose of joining together in holy matrimony John H. Stephen, of Napanee, in the counties of Lennox and Addington, gentleman, and Mary Ann Foote, of the same place, spinster, the condition was declared to be such that if it shall appear that there is no affinity, consanguinity, pre-contract, or any other lawful cause or impediment to hinder the said John H. Stevenson and Mary Ann Foote being joined together in holy matrimony, then the said obligation shall be null and void, otherwise to remain in full force and virtue. Nevertheless, for assigning breaches of the said condition of the said bond, the said plaintiff in fact saith that there was lawful cause and impediment to hinder the said John H. Stevenson and Mary Ann Foote from being joined together in holy matrimony, in this, that the said John H. Stevenson was under the age of twenty-one years, and was not a widower, and that John Stevenson, father of the said John H. Stephenson, then living, did not give his consent to his son being so married, contrary to the form and effect of the said writing obligatory, and of the said condition thereof."

The cause came on for trial at Kingston, before Richards, J. The defendant admitted the truth of the allegation in the suggestion mentioned, when a verdict was entered for the plaintiff, and damages assessed on the breaches at one shilling, subject to the opinion of the court whether on the case the plaintiff was entitled to recover.

A. Kirkpatrick and *Prince* for the Crown. *Richards, Q.C.*, contra.

26 Geo. II. ch. 33 (Imperial act); 14 Geo. III. ch. 83; 33 Geo. III. ch. 5; 38 Geo. III. ch. 4; 59 Geo. III. ch. 15; 2 Geo. IV. ch. 11; 11 Geo. IV. ch. 86; *Regina* v. *Secker*, 14 U. C. Q. B. 604, were cited on the argument.

ROBINSON, C. J., delivered the judgment of the court.

We assume from the case stated that John H. Stevenson was above the age of fourteen years and under twenty-one at the time he was married, and that it is unnecessary to the determination of the case to refer to the state of the law as it regards the marriage of a boy under fourteen years of age, or a girl under twelve. Both parties we assume were above that age when by law they would be deemed capable of giving their own consent.

Then as to the legal effect of Stevenson being under the age of twenty-one years. In the case of the *The King* v. *The Inhabitants of Hodnett*, (1 T. R. 99,) Lord Mansfield was required to give judgment in a case in which the point to be determined was the effect upon the legality of a marriage of the fact that the girl, who was illegitimate, was under twenty-one at the time of her marriage, and that there was no consent of parent or guardian. His lordship having to consider the effect of the statute 26 Geo. II. ch. 33, upon the question before the court, entered into this explanation. He said that before that statute clandestine marriages, which it was the object of that act more effectually to prevent, "were so far to be sure *practicable* that the courts would not void the contract, but still they were contrary to law." "The law of England," he said, "executed by ecclesiastical courts, prohibited it, and made it unlawful to marry any person in private; so that no clergyman of reputation dared to marry any person without license or banns. If they married with license, there was an oath that the parties were of age; or if under age, that they had the consent of parents or guardians. If by banns, it was no objection to the marriage that the parties were under age. All other marriages were illegal; but not being vacated," (that is, not being void,) "the practice still continued. Therefore this act was passed in order to prevent these illegal practices, and" (as he afterwards added,) "only made that less practicable *which was before illegal*."

When parties are married by banns, if either of them should be under age, the publication of the banns in the open manner required gives parents and guardians timely notice of the intended marriage, and an opportunity of forbidding it, and if they make no effort to prevent it their consent may reasonably be assumed.

When the marriage is by license, this opportunity of interposing is not afforded, and therefore before granting the license it is right to exact some security that the parties are of age, by which we mean of the full age of twenty-one years.

The law of England, we see, did require it before the 26 Geo. II. ch. 33, was passed, and nothing has been enacted in the province, to dispense with that precaution.

Then as to the English Marriage Act, 26 Geo. II. ch. 33, that part of it which made the marriage by license of a minor without the consent of parents or guardians absolutely void, has been repealed in England by the statute 3 Geo. IV. ch. 75; but that repealing act has no force in Canada, being passed since our constitution was given to us.

It is clear that the 26 Geo. II. ch. 33, had not in itself any binding force in this country, not merely because some of its provisions are in the nature of things inapplicable to us, and incapable of being carried out, for that might not prevent other parts of the same act from being in force to which there might be no such objection, but because by the 18th clause of that statute it is expressly provided that nothing in the act contained shall extend "to any marriages solemnised beyond the seas." It is very clear that it was not intended to be in force in the colonies.

But when by our statute 32 Geo. III. ch. 1, the provincial legislature adopted the law of England as the rule of decision in these words, "that in all matters of controversy *relative to property and civil rights*, resort shall be had to the laws of England as the rule for the decision of the same," they adopted to the extent mentioned not merely the common law of England, but also the statute law, with the exceptions specified in the act, and with other exceptions, though not specified, of such laws as are clearly not applicable to the state of things existing in the colony, of which various examples might be cited.

We consider that our adoption by 32 Geo. III. ch. 1, of the law of England, to the extent and with the exceptions just mentioned, included the law generally which related to marriage. The statute 26 Geo. II. ch. 33, being in force in England when our statute 32 Geo. III. ch. 1, was passed, was adopted as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time "*relating to civil rights*:" that is, to the civil rights which an inhabitant of Upper Canada may claim as a husband and wife, or as lawful issue of a marriage alleged to have been solemnised in Upper Canada.

The legislature of Upper Canada have so regarded this matter, as appears by the statute 38 Geo. III. ch. 5, sections 1, 3, and 6, 38 Geo. III. ch. 4, sec. 4, and 11 Geo. IV. ch. 86, in which they have recognised the English Marriage Act, in effect, though not in express terms, as having the force of law here in a general sense, and controlling the manner in which marriage is to be solemnised. We find nothing in the ordinances of the Governor and council of the province of Quebec, nor any thing in the British statutes 14 Geo. III. ch. 83, or 31 Geo. III. ch. 31, or in any other British statute passed between the 26 Geo. II. ch. 33, and the time of our adopting the law of England, which can affect us in this matter, nor any thing in any British or imperial act passed since, which either extends to the colonies generally or to Canada in particular.

The royal instructions to the governors of Canada we know have given to them authority to issue marriage licenses, and such authority has been recognised by the legislature in the statutes we have referred to, and in others.

From what we have stated, then, we draw this inference—that by the law of England, as it stood before the 26 Geo. II. ch. 33,

as well as after, it was unlawful for any person to solemnise marriage otherwise than after publication of banns, between parties both or either of whom were under the age of twenty-one years, without the consent of parents or guardians. It was so far illegal that it was prohibited by law, although before 26 Geo. II. ch. 33, the marriage would not on that account have been absolutely void. Long before the 26 Geo. II., the canons required that no license should be granted to marry without publication of banns, but upon good caution and security taken, and the security was to contain among other conditions, this, that the parties to be married (if under age) had obtained the consent of their parents, (if they be living,) or otherwise of their parents or governors.—(Burn's Ecclesiastical Law, vol. ii., title, "Marriage.") And this law of England has been no further changed by the 26 Geo. II., than by making the marriage void which shall be solemnised without such consent.

Whether the 11th section of the act containing that provision was ever part of the law of this province, by virtue of our adoption of the law of England, may fairly be questioned. If it ever was it must be so still, as we have already mentioned, because the English statute repealing it is of too modern a date to be binding upon us by virtue of our statute 32 Geo. III. ch. 1, and it has no relation to the colonies; but it would be difficult to satisfy ourselves, we think, that it ever has been in force in Upper Canada, on account of the impossibility of applying the 12th clause to the condition of things here. We could not therefore have the enactment respecting the consent of parents in its integrity, and as it would work great hardship to have the 11th clause in force without the 12th or any other provision as a substitute for it, we shall, perhaps, if we find it necessary in any case to determine the point, find it right to determine that neither of these clauses could be taken to form part of our law of marriage under our own adoption of the law of England by 32 Geo. III. ch. 1.

But whether we should hold that the 11th section of the 26 Geo. II. is in force here or that it is not, it is still true that the law of England, which we adopted, makes it illegal to solemnise a marriage of a minor by *license* without the consent of parent or guardian. Whatever authority we have for dispensing with publication of banns, by obtaining a license, must be taken, we think, to be accompanied with the direction respecting the consent of parents or guardians in case of minority.

The fact, therefore, of either of the parties being under age, and there being no consent of the parent, would be, in the words of the condition of this bond as set out in the record, "a lawful cause to hinder the marriage" of the persons mentioned in it, because it made it against law to marry them without such consent, whether the marriage would or would not be in this province absolutely void, as it would have been in England under the 26 Geo. II., while no part of it had been repealed.

The clergyman or minister who was requested to solemnise the marriage without publication of banns, and by virtue of the license, would rightly desire to avoid infringing the law, and to that end would rely on the security on which he would assume the license must have been obtained; and the public officer to whom the Governor has, with the sanction of the Queen and of the legislature, committed the duty of issuing marriage licenses, must equally desire to avoid giving a license to do what the law prohibits.

This shews that, whether the marriage for want of the consent of the parent would be void or not, there was, nevertheless, a legal sanction for taking such a bond as in this case is sued on.

Then it is admitted that what is suggested in the record as a breach of the condition is true, and the only question, besides what we have been considering, is whether the objection of want of consent of parents is within the condition of this bond, which makes no mention of that requisite in particular terms, but does require that there shall be "no affinity, consanguinity, precontract, *or other lawful cause or impediment to hinder the marriage.*"

We think the want of consent of the father of the minor, under the circumstances stated, was, as we have already stated, a lawful cause to hinder the marriage, for if the fact had been known we must assume that the license would not have been issued, as it ought not to have been by law, and so the marriage by license would not or should not have taken place, though if the license had issued and the marriage had taken place, it would not have been void.

In our opinion the postea should go to the plaintiff.

Judgment for the Crown.

THE QUEEN V. PLUNKETT.

Highway—Trespass Road—Grant—User—Rector's Power to dedicate.

For a period of nearly 50 years, there have been travelled roads through the Humber Plains, in the township of Etobicoke. These roads were not laid out by any public authority; but, in the absence of regular allowances, were used by the public at pleasure. They at times varied in their course, and were irregular in their direction. On 31st March, 1835, 700 acres, "with allowances for roads, as left by the survey of Deputy Surveyor Hawkins, and all other roads, now travelled," were granted to trustees for Christ's Church, Mimico, and subsequently by them transferred to the Rector. One such road crossed lot No. 1, in 4th range of Etobicoke, leased by the Rector to defendant. When the regular allowances were opened, he obstructed it.

Held 1. That the road had not, before the issue of letters patent, assumed the character of a legal highway; for that no right by dedication could be held to have been gained by the public passing over, while the fee was in the Crown.

Held 2. That nothing in the patent contained, made it a highway, but reserved to the public the easement which before the public had enjoyed.

Held 3. That the easement was the right to use the travelled roads, so long as the regular allowances were unopened, but not longer.

Held 4. That the permission of the Rector, for the time being, or his tenants would not bind his successors, owners in fee, so as to make a dedication against them.

Defendant was indicted at the last quarter sessions for York and Peel for a misdemeanor in obstructing an alleged highway in the township of Etobicoke.

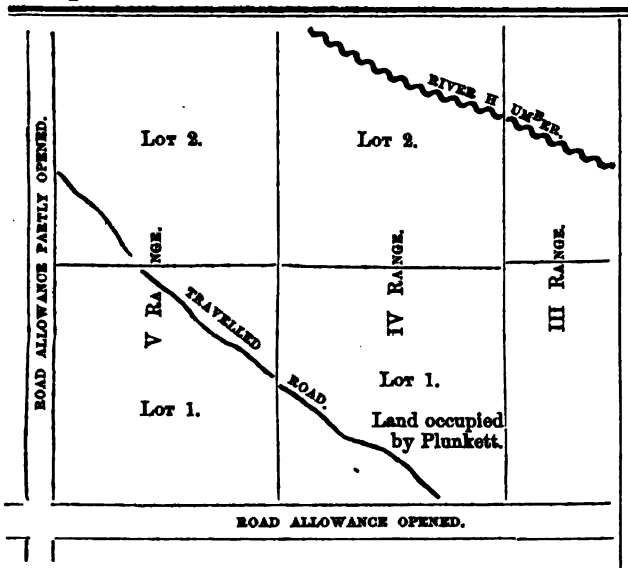
There were two counts in the indictment. The first charged the obstruction to be a ditch cut by the defendant across the alleged highway; and the second, a fence erected by him across the same alleged highway.

The highway was described in each count, as being "a certain road running through, over, and along lot number one in the fourth range of the township of Etobicoke, as surveyed by deputy surveyor Hawkins."

The defendant pleaded not guilty.

It appeared in evidence that for a period much exceeding twenty years there had been travelled roads in different directions through what is known as the Humber Plains, in the township of Etobicoke: that on the 31st March, 1835, the Crown, for the purpose of endowing the Church of England, at Mimico, called "Christ's Church," in the township of Etobicoke, issued letters patent, granting unto the Rev. Dr. Phillips, John William Gamble, and Thomas Fisher, (with a provision for the apportionment of new trustees, in the event of decease of any of the three,) 700 acres of land in Etobicoke, including lot number one, in the fourth range: all described by metes and bounds, "with allowances for roads, as left by the survey of the said deputy surveyor Hawkins, and all other roads now travelled;" to hold in trust for the endowment of Christ's Church, in the township of Etobicoke: Provided that whenever the Governor General should erect a parsonage at the Mimico, and present to such parsonage an incumbent, the trustees should, by deed, convey the 700 acres to the incumbent: that a parsonage was subsequently erected at Mimico, and Dr. Phillips appointed incumbent: that on 3rd April, 1835, William Gamble having been appointed a trustee in the place of the Rev. Dr. Phillips, he, and the remaining trustees, conveyed the 700 acres to the Rev. Dr. Phillips: that on the 15th January, 1845, the Rev. Dr. Phillips demised lot one, in the fourth range of Etobicoke, to Herod Noble, for the term of 21 years: that on the 15th November, 1851, Herod Noble assigned his interest in the lease to Richard Harrison: that the Rev. H. C. Cooper, having succeeded the Rev. Dr. Phillips, as incumbent, Richard Harrison surrendered the lease to him; and, on the 16th November, 1851, obtained a new one from him, for the further term of 21 years: that defendant Plunkett, at the time of the alleged obstruction, was in possession of lot number one, in the fourth range of Etobicoke, under Richard Harrison.

The road crossed defendant's land in the manner indicated in the sketch subjoined.



It was proved that at the time Plunkett took possession of the lot, the public were accustomed to cross by the travelled road. Several witnesses swore that it had been travelled from 20 to 50 years. It was sometimes a little varied in its course, but never materially where it crossed defendant's land. Mr. William Gamble swore, that, as pathmaster, he had directed statute labour to be performed on the road, besides expending money of his own, in improving it. The obstructions were clearly proved. It was also proved that the rector had made application to the township council to have the road closed up; but, for some reason or other, the council refused the application.

The rector (Rev. H. C. Cooper,) was called as a witness for the defence. He swore that he only allowed the old road to be used, as being a temporary road necessary for the use of the public until the regular allowances for road were opened and made good; and that his application to the council was made in the hope of peace, and not as an acknowledgment on his part that the public had any legal right to use the road as a highway.

The evidence shewed that the allowance for road to the south of Plunkett's land was opened through, and that the allowance to the west was opened so far north as to enable the public to travel to the city of Toronto without crossing Plunkett's lot; but it was sworn that the regular allowances were much longer than, and not so good to travel as the old travelled road.

It also appeared that a great part of the old travelled road had been closed up by the action of the council and otherwise; and that nothing had been done, except by Plunkett himself, to close up or obstruct that portion of it which crossed his lot.

It was objected on the part of the defence, as matter of law, that there was no proof of a highway over defendant's land, either by user or grant: that the public had only the right to cross defendant's lot so long as the regular allowances were unopened: that when these allowances were opened up, that right ceased: that there was no evidence of dedication, either by the trustees or rector, for in law they had no power to dedicate: that the letters patent did not make that a highway which was not one before, but only reserved to the public the easement which the public before then enjoyed: that, strictly speaking, the roads then travelled, had been, by the terms of the patent, conveyed to the trustees, and subsequently to the rector.

The court noted the objections, intimating its intention of reserving them for the consideration of one or other of the superior courts of common law. The jury, subject to the objections, rendered a verdict of guilty.'

During last term the chairman of the court of sessions, stated a case for the opinion of this court, and the same was set down and argued.

M. C. Cameron for the prosecution.

R. A. Harrison for defendant.

ROBINSON, C. J.—It was intended, as I apprehend, that the court should give their opinion for or against the defendant, according as it appeared to them that the road obstructed, had or had not *the character of a highway*, at the time the defendant obstructed it; for there was clear proof of the obstruction.

We must have some regard to what has been the usual course of things in this country, for that bears materially on the question of intention to dedicate.

When the country was but thinly settled, land like the Humber plains, lay for a long time uncultivated and uninclosed. Being less productive than the hard-timbered land, it was in a manner neglected, and it being convenient to traverse a sandy plain of that kind in all directions people took the liberty of crossing where they pleased, sometimes to save distance by a cross road, and at other places to avoid any obstruction, even trifling, which made the proper public allowance less easy or agreeable to pass over.

It has been always well understood in such cases, that whenever the public allowances should be opened, and made fit for use, they would be adopted, according to the evident intention, and the "trespass roads," as they were commonly called, would be abandoned. According to the evidence, this has been done in other places near this defendant's property, and why should the case of the defendant be an exception?

I am clear that it would be contrary to reason to look upon what took place here as a perpetual dedication of the road. The public had not been permitted to use it on that understanding, but only till the proper allowances were opened, when, if not before, the proprietor or tenant of the land had a right, so far as any question of dedication is concerned, to inclose and enjoy it as he did his other property.

We see this done every where, and without contesting the right of the proprietor so to act. It would be very inconvenient and unjust, if, because the public had been from good nature allowed to go across a corner of a man's uninclosed land to save distance, the right to resume exclusive possession of it should be denied, when the public stand no longer in need of the indulgence.

The 313th section of the municipal act does provide that all roads on which statute labor *hath been usually performed*, shall be deemed public highways, unless when such roads have been already altered, or may be altered according to law. What Mr. Gamble stated in this case, did not amount to proof that statute labor had been *usually* performed on the road in question, but came very far short of it, and it appears to me besides, that as that road was only a temporary substitute for the proper allowance, which ran along the side of the lot, this road may, within the spirit of that clause, be fairly said to have been altered when the public allowance was opened, for which it had for mere convenience been substituted.

It is difficult to assign a clear meaning to the words in the patent, dated in 1835, to the Rev. Dr. Phillips and others, "with allowances for roads, as left by the survey of the said deputy surveyor Hawkins, *and all other roads now travelled.*"

At that time no doubt this trespass road was travelled, as others on the lots near it were, which have since been abandoned. According to the grammatical construction of the section, these roads would go with the land to the grantee, as they might do, and yet the easement continue.

Whether there was such an easement is the question which these words in the grant cannot, I think, affect.

In my opinion this road cannot properly be considered to have been a legal highway, so as to prevent its being inclosed by the owner of the lot when the public allowance, which had been laid out by the government in the original survey of the mill reserve was opened.

The reserving of the road from the patent, if the words used made it an exception, would not have the effect of rendering it a public highway within the 313th clause, as "an allowance made by a crown surveyor," nor under any other of the words used in that clause. No right by dedication can be held to have been gained by the public passing over while the fee was yet in the crown; and the permission of the rectors for the time being, or their tenants, would not bind their successors owners of the fee.

BURNS J., concurred.

COMMON PLEAS.

Reported by R. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*

DEMPSEY v. CARSON.

Replevin—Lien—Tender—Accord and satisfaction—When the property in a chattel passes on an agreement for a sale.

A. having taken a likeness for B., agrees to take in payment therefor $20 in cash and a cognovit for $70, payable at a future date. After receipt of the $20 and tender of the cognovit, and refusal of the defendants to deliver the picture, the plaintiff brings replevin.

Held, that the agreement for payment as above was a waiver of the right of lien, but did not amount to an accord and satisfaction.

(T. T., 25 Vic.)

Declaration against defendants that they unjustly detained from plaintiff two coloured photographic likenesses of John and Sarah Dempsey, value $20.

2nd plea.—That defendants are photographers; that before alleged detention plaintiff employed them to make two coloured likenesses of John and Sarah Dempsey for reasonable reward; defendants in pursuance of such employment did make the said likenesses and caused them to be coloured, and found the necessary material therefor; which are the likenesses in the declaration mentioned, and the reasonable reward therefor payable to plaintiff amounted to $25, whereof plaintiff had notice, but would not pay the same, which is still due defendants; wherefore they did not deliver said goods to plaintiff, but detained the same for a lien and security for the price thereof, until, &c., as they lawfully might.

Replication to 2nd plea.—Plaintiff says, after said likenesses were made, coloured, and ready for delivery, to wit, on the 26th of February, 1861, it was mutually agreed between plaintiff and defendants, that plaintiff should sign and execute a cognovit to be taken in the first division court of the united counties, in a cause wherein the defendants were plaintiffs, and the now plaintiff was defendant, for the purpose of paying and satisfying the sum of $70, payable on the 1st of April then next, and that plaintiff should pay defendants $20, parcel of the said sum on the 1st of March, 1861; and it was further agreed that the execution of the said confession and payment of the said sum should be accepted by the defendants in satisfaction and discharge of their claim against plaintiff for making the said likenesses, and in consideration thereof it was agreed that the defendant should deliver to plaintiff the said likenesses on, to wit, the 1st of March. aforesaid, and plaintiff says in pursuance of the agreement and in part performance thereof, he did on the 26th of February, aforesaid, make and execute and deliver to defendants the said cognovit, and the same was accepted by them in part performance of the said agreement; and in further part performance of the said agreement, plaintiff on the said 1st of March, 1861, tendered and offered to defendants the sum of $20, which they refused to accept, and although requested so to do, refused to deliver to plaintiff said likenesses. To this replication defendants demurred. Judgment was given in the county court on the demurrer for the defendants. From this judgment the plaintiff appealed. The case was set down for argument during Trinity Term last.

Blevins, for plaintiff, referred to *Renald* v. *Walker*, 8 U. C. C. P., 87; *Wyatt* v. *Bank of Toronto*, 8 U. C. C. P., 104; *Smith* v. *Hobson*, 16 U. C. Q. B., 368; *Bunny* v. *Poyntz*, 4 B. & A., 568; *O'Roarke* v. *Lee*, 18 U. C. Q. B., 600; *Lake* v. *Biggar*, 11 U. C. Q. B., 170; *Simon* v. *Loyd*, 2 C. M. and R., 187; Ib. 5 Ty. 701.

R. A. Harrison, contra, referred to *Brown* v. *Jones*, 17 U. C. Q. B. 50; *Herdman* v. *Bellhouse*, 9 M. & W., 506; Addison on Contracts, 238; *Bloxam* v. *Saunders*, 7 D. & R., 396.

DRAPER, C. J.—The definition of the word lien is enough to shew that the property in question does not belong to the defendants; for lien may be defined to be a right in one man to retain and hold something in his possession which belongs to another, until certain demands of him, the holder, have been satisfied and discharged. It is neither a *jus in re.* nor *jus ad rem.*, and it may be waived by any act or agreement between the parties by which the right is given up. The defendants resist this action on the ground that they have a right to retain goods made by them for the plaintiff until they are paid for the making. The plaintiff asserts an agreement, partly performed on his part and accepted by the defendants, as a waiver of the lien. The defendants admit the facts, but set up in objection to their sustaining the conclusion of waiver, which the plaintiff deduces from those facts; 1st. That the replication sets up an accord without satisfaction. 2nd. That the premises in the replication could not in law be a satisfaction, though they had been agreed to and actually accepted as such.

The first two objections only present the same question in a different shape, and both confound the right of lien with a distinct thing, namely, accord and satisfaction. An innkeeper has a lien on the goods of his guest, but he has no right to detain such goods if he had previously agreed to give credit for the entertainment. The previous agreement prevents the lien ever attaching, though the debt incurred under it has neither been paid nor any accord and satisfaction of it; and such, I apprehend, would be the case if the goods still remained in the innkeeper's hands after the time the credit had expired, (see *Jones* v. *Thurlow*, 8 Mod. 172). And so, if a special agreement be afterwards made for payment and a security taken for the debt, which is payable at a distant day, the lien, though it had attached, is gone, (*Hewison* v. *Guthrie*, 2 Bing. N. C. 759, per Tindal, C. J.; *Cowell* v. *Simpson*, 16 Ves. 275).

The present case shews a lien existing, a new agreement waiving a present right of payment, an acceptance of a security in part performance of that agreement, and a tender of performance of the residue of that agreement. This is, I think, a clear waiver of the lien, though no accord and satisfaction of the original debt.

I think, therefore, the appellant is right, and that judgment should be given in the court below in his favour on the demurrer.

RICHARDS, J.—A good deal of discussion took place on the argument as to the time when the property passed to the buyer on a sale of chattels, and it may be as well to refer to some of the authorities. In *Dixon* v. *Yates*, 5 B. & A., at page 340, Parke J. observes:

"I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. * * * Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chatel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract." In addition to this, however, where payment is to be made at once, the vendor has a lien on the chattel for the unpaid purchase money.

In Brown on the Common Law, at page 408, it is stated:

"When two parties intend an immediate sale of some specific chattel, and have definitively agreed upon its price, if the vendee thereupon tenders such price in payment, it is clear that the vendor will be bound, and that delivery of the chattel will not be necessary in order to pass the property therein to the vendee." *Dixon* v. *Yates* is referred to as authority for this proposition, as also Noy. Max. 88, and Sheppard's Touchstone 225, which latter is quoted as follows:

"If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he presently tender me my money, and I refuse it, he may take the horse or have an action of detinue." "Again, if I offer money for a thing in a market or fair, and the seller agrees to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another, or when I have bought it we agree that he shall keep it until I can go home to my house to fetch the money, in both these cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards to another, and upon the payment or tender and refusal of the money agreed upon, I may take or recover the thing."

The present Mr. Justice Blackburn, in his very able work on the contract of sale, beginning at page 170, has a chapter under the following head:

"The effect of a bargain and sale is to transfer the property in the goods without any delivery; in this respect English law differs from the civil law." He then quotes at great length from Pothier, and reviews the English authorities, and fully sustains the doctrine just quoted at the head of the chapter.

Taking the facts of this case as stated in the pleadings, it would appear that at the time the bargain was made, the articles were not in *case*, so that could not be said to be a sale of *a specific* chattel, but the subsequent agreement set up in the replication, and which is averred to have been partly performed, seems to me, taken in connection with the fact that the defendants allege that they retained the articles replevied for their lien, to shew beyond all reasonable doubt that what took place was equivalent to a sale on the terms mentioned in the replication, or to waiving the lien on those terms. The acceptance of the cognovit in part performance of the agreement would seem to set at rest any question that might arise on the Statute of Frauds, and the lien was gone by the tender of the balance of twenty dollars as agreed upon.—*Martindale* v. *Smith*, 1 Q. B. 389.

The defendant's error has arisen from not sufficiently distinguishing between a plea of accord and satisfaction set up as an answer to a claim for a pre-existing debt acknowledged to be due, and a tender of what was agreed to be paid as the purchase of a chattel, the property in which had passed to the purchaser by the bargain, and the possession of which the seller could only rightfully retain until he received what was agreed to be paid for it; and readiness and willingness to deliver what was so agreed to be paid, and a refusal to accept on the part of the seller is sufficient, especially when accompanied by a tender, to destroy the lien which the seller had for his unpaid purchase money.

I therefore think the defence fails, and that the appeal should be allowed, and that judgment should be given for the plaintiff on the demurrer to the replication.

Per cur.—Appeal allowed.

Parker v. McDonald.

Covenant against acts of covenantor—Costs.

A, having mortgaged a lot of land to B., subsequently sold it to C., giving covenants against his own acts. B. subsequently foreclosed his mortgage, making C. a party to the suit, who employed a solicitor and incurred costs to the amount of £10 9s. 10d., which he claimed in an action he afterwards brought against A. for breach of his covenant.

Held, that the costs were incurred by the voluntary act of C., and were not a necessary consequence arising from a breach of the covenant, and were not recoverable against A.

(T. T., 25 Vic.)

Declaration for breach of a covenant contained in a deed dated the 21st January, 1857. The covenant was, notwithstanding any thing by defendant done, &c., the defendant had in himself good right, full power, and absolute authority to convey lot 33, in range number one, as shewn on a plan of twenty-six acres, part of lot 25, south side of Bleam's road, in the township of Wilmot, with the appurtenances, to the plaintiff, and that defendant had not at any time theretofore done, committed, &c., any act, deed, matter or thing whatsoever, whereby the said lands were or might be affected or encumbered.

Breach—that defendant, before the making, &c., had mortgaged the said lands with other lands to J. V. L. in fee to secure payment of a large sum of money, which mortgage was in full force at the time of making the said covenant, and afterwards proceedings were taken in the Court of Chancery and the equity of redemption was foreclosed, and the title of the said J. V. L. became absolute in equity as well as at law, whereby plaintiff lost the land and his improvements thereon, and was put to expense in defending the Chancery suit.

Pleas.—*Non est factum.* 2nd, that the lands were not at the time of the sale thereof by defendant to plaintiff encumbered. Issue.

At the trial in April last at Toronto, before the Chief Justice of Upper Canada, the deed declared on was proved, and also the mortgage as stated, executed by defendant before the covenant was entered into. It was also proved that this mortgage had been foreclosed. The plaintiff was, with others, served with the bill. He consulted a solicitor, but put in no answer. The solicitor, however, attended for him in the master's office until the final order, accounts were taken of payments on the mortgage in order to see what sum was due by defendant, and the plaintiff's solicitor attended while these accounts were taken. His bill against plaintiff for these services was £10 9s. 10d. The jury, under the direction of the learned Chief Justice, gave the plaintiff a verdict for the amount of his purchase money paid, and interest, and reserved leave for him to move to add the costs incurred by plaintiff in the Chancery suit.

In Easter Term, *R. A. Harrison* obtained a rule *nisi* accordingly to which, in the following term,

M. C. Cameron shewed cause. He cited *Hodges* v. *Litchfield*, 1 Bing. N. C. 492; *Porr* v. *Davis*. 4 L. T. N. S. 399.

Harrison, contra, referred to *Clark* v. *Robertson*, 8 U. C. Q. B. 370; *Plumer* v. *Simonton*, 16 U. C. Q. B. 220; *Stubbs* v. *Martindale*, 7 U. C. C. P. 52; *Rex* v. *Dewhurst*, 5 B. & Ad. 406.

Draper, C. J.—*Collen* v. *Wright*, 8 E. & B. 647, comes nearer this case than any which I have seen. But there the court only held the costs of a suit in Chancery, in which the plaintiff had endeavoured to enforce the contract entered into by the defendant in the name of a third party who had not authorized him, to be recoverable, because they were a natural and direct consequence of the defendant's (implied) contract with the plaintiff, that he had such authority. Here the plaintiff, though made a party to the suit to foreclose, was not subjected to any costs of the mortgagee, the plaintiff in that suit, nor did he appear to or incur any costs in defending it; whether his position gave him any right to redeem is unimportant for the purposes of this inquiry. His solicitor told him he had no defence, but nevertheless attended the taking the accounts in the master's office for the protection of the plaintiff's interests. These costs claimed by the plaintiff, are those charged by this solicitor for those attendances. They certainly cannot strictly be deemed costs of the foreclosure suit; they do not appear to me to be the natural and direct consequence of the defendant's breach of covenant. They must, I think, be looked upon as incurred voluntarily by the plaintiff, and not as a damage unavoidably incurred. I think, therefore, the rule should be discharged with costs.

Per cur.—Rule discharged.

Corporation of Essex v. Park.

Treasurer of corporation—Separation of Counties—Sureties—Bond.

A treasurer having been duly appointed for these counties, (while united,) upon the separation of one from the other two counties.

Held, that a new appointment was not necessary. Consol. Stat. U. C., ch. 54, sec. 159. 174. 51.

An action being brought by a corporation against the sureties of their treasurer, the defendants contended that because money which had been collected by the treasurer and fraudulently charged as paid by him, was not demanded by the parties (the government) entitled thereto, they were not responsible therefor.

Held, that the liability of the treasurer was between the municipality and himself, he having received the money as their officer, and his responsibility was not altered by the government not demanding the money.

(T. T., 25 Vic.)

This case was referrd back to the arbitrators by rule of court, on the 29th of September, 1860, who took further proceedings in the matter, and in Hilary Term last, *Albert Prince* obtained a rule *nisi*, to set aside the award on the following grounds:

1. The want of any valid appointment of George Bullock as treasurer for the periods during which the defendant was his surety.

2. That as to the bond of 1850, there was no sufficient execution therof by the defendant, but a conditional or qualified signature; that there was no defalcation while this bond was in force; that neither bond is sufficient in law to support the action; that the resolutions of the county council shew these bonds were not accepted nor intended to be the securities required by the statute.

3. The defalcations alleged are in funds which the plaintiffs are not entitled to recover against the defendant.

4. The auditing and allowing of the treasurer's accounts by the auditors and finance committee of the council preclude the plaintiffs' recovery for defaults prior thereto.

5. The arbitrator has not sufficiently complied with the rule referring back the award in finding the facts required by the court.

6. The arbitrator has improperly refused to inform the defendant of the items of defalcation alleged so as to enable him to answer the same.

7. The evidence on which the award is founded is insufficient to charge the defendant as is shewn by the arbitrator's answer to the question concerning the same.

8. The awarding costs of reference and award to be paid by defendant is an excess of authority.

The following additional objection was raised. Misconduct of the arbitrator in receiving illegal evidence of, and awarding on, matters in respect of which the evidence shewed there would be no legal claim against the sureties.

In Easter Term *Connor, Q. C.*, shewed cause. *M. C. Cameron* with him.

The defendant's counsel gave up the second objection, and stated they should not support the fourth, though, with a view to possible proceedings in equity, they would not formally abandon it.

Draper, C. J.—The defendant's first bond was given to the municipal corporation of Essex, Kent, and Lambton, and bore date 30th January, 1850. It recited that George Bullock, as treasurer, for Essex, Kent, and Lambton, had been called upon to give security, and was conditioned that he should faithfully perform all duties as treasurer, should receive and safely keep all moneys belonging to the counties, should pay all such sums as he should be directed by the order of the municipal corporation, should obey all by-laws, and as often as lawfully required should render just accounts for all moneys which should come to his hands as such treasurer, and should not suffer any misapplication or embezzlement of such moneys.

The defendant's second bond was dated the 30th January, 1851, and was given to the municipal corporations of Essex and Lambton, with a corresponding recital and a similar condition.

It was insisted there was no proof that Bullock had ever been appointed treasurer of Essex and Lambton after the county of Kent was set off as a separate county. There certainly was no proof to the contrary, and the recital to the second bond stated expressly that Bullock "as treasurer of the said united counties of Essex and Lambton has been required by the municipal corporation of the united counties of Essex and Lambton to give security for the faithful performance of the duties of his office, and more especially for the due accounting for and paying over all moneys which may come into his hands by virtue of his office." This recital is sufficient evidence both of his appointment, and that the municipal corporation had required him to give security. Besides the appointment of treasurer to these united counties being clearly shewn, I do not see that a new appointment was necessary. (*Vide* Consol. Stat. U. C., ch. 54, sec. 169, 174, & 51.

Then as to the two items brought under our notice, the lunatic asylum tax for 1852, stated by the arbitrators to amount to £115 8s. 8d., and second, moneys received for sales of land in Essex and not credited to the plaintiffs for the Baby property.

As to the first, the contention on the part of the defendant, I understand to be, that inasmuch as the government are not claiming anything to be due from the plaintiffs, on account of the lunatic asylum tax, they (the plaintiffs) can have no claim on the defendant as surety for the county treasurer for it. The arbitrator states that he allowed £115 8s. 8d. charged in Mr. Bullock's books as paid to the government on account of such tax when it was not paid; that this sum was received by him as appeared by his books, and was not accounted for, except falsely. It may be true that the government have no claim on the plaintiffs for the money, but if the treasurer received it, he received it as the officer of the plaintiffs, and is accountable to them for it: but it was objected on the part of the defendant that the evidence on which the arbitrator founded his conclusion was illegal; that the entries in the books were not proof against the surety; that the mere verbal statements and explanations of Bullock were insufficient, and that he was not sworn.

There is no direct negative as to the question whether Bullock was sworn. An affidavit filed for the defendant states that the deponent did not see him sworn. The arbitrator states that he does not remember whether he was sworn or not. On the other hand the plaintiffs' solicitor swears that he was present when Bullock was produced as a witness before the arbitrator, and "saw him duly sworn before giving his evidence herein," and further, the arbitrator in an affidavit states, "that the statements of Mr. Bullock referred to in an affidavit filed on the other side, relative to Bullock giving evidence, was received by me with the consent of *Mr. Prince*, counsel for the defendant, as an admission by the defendant of the matters in such statements contained." I think this ought to be conclusive, and that as to this item, the third objection is not sustained.

It is different as to the other, as to which the arbitrator makes the following statement of facts. That in and before the year 1849, one J. B. Baby was treasurer to the plaintiffs, and was a defaulter, and that certain real estate of his in the county of Essex was sold in 1853, to liquidate the amount of the defalcation. That one John Sloan, the then warden, became purchaser for £588 6s. 11d.

That by a resolution of the municipal corporation of Essex and Lambton, Bullock was permitted to become the purchaser of said property by paying the purchase money aforesaid; and thereupon a deed was executed by Sloan to Bullock, and that it was not shewn to the arbitrator that this purchase money had ever been paid.

Taking this in the strongest point of view, it would not establish that Bullock was indebted to the plaintiffs in the purchase money of this lot of land, but that debt was due from him as an individual and not as a treasurer. To make it a debt due by him in the lattter capacity, it must be shewn that the money of his own was so appropriated as to become the plaintiffs, and even then a question might arise whether it would be such a debt as the surety is responsible for; but the facts stated, I have no doubt, do not shew that in this transaction any money came to the hands of Bullock as treasurer, and for the debt due by him on a purchase of land for his own use and benefit, the defendant, as surety in either of these bonds, is not liable.

The defendant's counsel waived supporting the fourth objection, and it is therefore unnecessary to consider it.

As to the fifth objection, I have referred to the new matter submitted to us by the arbitrator. I do not find anything omitted which it is now shewn either upon affidavit or during the argument should have been included. The synopsis of defalcation shews each several amounts in default, in each year separately, and the funds to which the moneys in default belonged.

The sixth objection is not now sustained in fact. No reference is made to it in the affidavits filed on this application.

The seventh objection is involved in the remarks made upon the third, and requires no further observation.

The eighth appears to be founded in mistake. The arbitrator, according to the copy of the award put in, does not award the payment of costs at all, but he assessed the costs of the award at £33 15s. 7d., not making any order as to their payment.

As to the last objection, it seems to me involved in the question as to the Baby estate chiefly, if not entirely. Upon this point at least it is unnecessary to say more. Upon the question of the Lunatic Asylum tax, the remarks made as to the evidence of Mr. Bullock, whether sworn (as the most direct evidence shews he was) or giving statements by way of explanation of the alleged defalcations, or of the meaning of entries, or accounting for the absence of entries in his books, explain the grounds upon which I think it cannot properly be said there was illegal evidence admitted to establish this part of the claim.

It follows from this conclusion, that the award that the verdict should be entered for £701 15s. 7d. is wrong, for there was no legal evidence to charge the surety with the sum of £586 6s. 11d. Though the principal owed that sum to the plaintiffs, it was not for anything that is shewn as treasurer, but in his individual capacity.

Unless, therefore, the plaintiff will consent to reduce the verdict to £115 8s. 8d., the amount of the lunatic asylum tax, the rule for setting aside the award must be made absolute.

Per cur.—Rule absolute.

CHANCERY.

Reported by Richard Shelling, Esquire, Student-at-Law.

Bank of Montreal v. Thompson.

Registered judgment—Execution against lands—Relation to date of registry.

1. *Held*, that a registered judgment binds the lands of the debtor at law from the time of registration, so that the Sheriff can deliver execution of them into the hands of whomsoever they may afterwards pass.

2. *Doe d. Dougall* v. *Fanning*, 8 U. C. Q. B. 166, and *Doe d. Dempsey* v. *Boulton*, 9 U. C. Q. B. 532, affirmed.
3. The dictum of BURNS, J., in *Thirkell* v. *Paterson*, 18 U. C. Q. B. 75, to the contrary doubted.

The facts appear in the judgment of his Honor V. C. ESTEN, before whom the cause was heard.

Edward Blake for the plaintiffs.

William Proudfoot for defendant.

ESTEN, V. C.—The facts of this case are these: one Shaw made a mortgage to Francis Gore Stanton, and then a mortgage of the same lands to one Gillespie, who transferred this mortgage to the plaintiffs. The defendant purchased the same lands, or rather all Shaw's interest in them, at Sheriff's sale, and afterwards acquired the first mentioned mortgage, and the present suit has been instituted against him by the second mortgagee for redemption or foreclosure, the bill insisting that by purchasing the equity of redemption of the lands he became liable to discharge both mortgages, and that having acquired the first mortgage and obtained an assignment of it, he cannot raise it as a shield against the second mortgage.

The answer states that the first mortgage was made to Stanton, as a trustee, to secure divers judgments which it mentioned; that one of these judgments was obtained by the defendant, Thompson, but in trust for one Powell; that he obtained an assignment of another of such judgments likewise in trust for Powell; that he held these judgments in this way at the time that he purchased the lands from the Sheriff; that after such purchase he acquired the beneficial interest in all the judgments secured by the first mortgage, including the judgments which he held in trust for Powell; that he then obtained an assignment of the mortgage from Stanton; that Benner, one of the judgment creditors, whose judgment the first mortgage was intended to secure, repudiated the trust and proceeded on his judgment, and having issued execution against the lands of Shaw, caused the lands in question to be offered for sale, when they were purchased by the defendant.

It is remarkable that the bill does not state the date of the registration of any of the instruments which it mentions, and that the answer, while it states the fact and date of the registration of all the judgments, nowhere states the date of registration of the mortgage to Stanton, and it ends by insisting that this mortgage must be deemed to be subsisting, that the defendant, Thompson, is entitled to the benefit of it, and that he is entitled to a decree of redemption or foreclosure against the plaintiffs as second mortgagees.

It is quite manifest, I think, that the defendant, Thompson, intended to represent himself as the purchaser of the equity of redemption. Had he intended to rely on his title as a purchaser under a judgment registered before the registration of the first mortgage, he would have been careful to state when the mortgage was registered, and he would not have insisted upon the priority of that mortgage over the plaintiffs, such construction being useless when both mortgages had become extinct through the purchase of the mortgage while under a prior registered judgment.

At the hearing, however, the deeds are produced and shew by the Registrar's endorsement upon them that they were registered. Some evidence is also offered of the registration of the judgments, or at all events of Benner's judgment, and from this evidence it appears that this judgment was registered before either of the mortgages.

I do not know now whether it appears otherwise than by the answer that any writ had been delivered to the Sheriff for execution on Benner's judgment, or that the sale in question was effected under such a writ. Supposing it to appear that the sale was effected under a writ upon a judgment registered before the registration of the mortgages, and supposing that fact to be material and to confer a paramount title, I think the Court cannot ignore it merely because the defendant has misapprehended his rights and has supposed himself to stand in a lower position than he really occupies. Suppose, for instance, the answer of a defendant to state a first mortgage with power of sale—then a second mortgage, then a third mortgage, and that the first mortgagee had exercised his power of sale and the defendant had purchased the estate under it and had afterwards acquired the second mortgage, and to insist that this mortgage was subsisting and prior to the third mortgage, the Court would consider that the defendant had acted foolishly and had wholly misapprehended his rights, but could not ignore the fact that the purchase under the power of sale contained in the first mortgage had then in fact extinguished the second and third mortgages and conferred on the defendant a title paramount to both.

The facts being stated and proved, the Court must recognise their legal effect, however much it may be misapprehended by the defendant himself. If the proof of the material facts is defective, I think the defendant ought to be at liberty to supply what is requisite on proper terms as to costs.

This leads me to the consideration of the question which has been raised and argued with much ability on both sides, namely, whether, after the passing of the 9th Vic., chap. 34, and before the passing of the 24th Vic., chap. 41, the Sheriff's deed conveyed the estate that the debtor had at the time of the registration of the judgment under which the sale was effected, or the estate that the debtor had at the time of delivering to the Sheriff for execution the writ under which the sale was performed.

Four cases were cited on this point—*Doe d. Dougall* v. *Fanning*, 8 U. C. Q. B. 166; *Doe d. Dempsey* v. *Boulton*, 9 U. C. Q. B. 532; *Thirkell* v. *Paterson*, 18 U. C. Q. B. 75; *Wales* v. *Bullock*, 10 U. C. C. P. 155.

In the case of *Doe d. Dougall* v. *Fanning* and *Doe d. Dempsey* v. *Boulton*, the precise point arose and was decided. In both these cases judgments were registered, the deeds were executed to purchasers by the debtor, then the writ was delivered to the Sheriff and he proceeded to a sale under the judgments, and in both cases it was decided by the Court of Queen's Bench that the Sheriff's deed prevailed over the deeds to the purchasers, on the principle that under the 9th Vic., chap. 34, the Sheriff's deed conveyed all the estate that the debtor had at the time of registration of the judgments, and that that Act applied to the writ of *fi. fa.* against lands introduced by the 5th Geo. II., and then in use, and did not reintroduce the writ of elegit which the 5th Geo. II. is considered to have abolished, which question was expressly raised and decided in the case of *Doe d. Dempsey* v. *Boulton*. In the case of *Thirkell* v. *Paterson* this point did not arise at all. The only question there was whether a deed was void against a prior judgment registered before it, and it was decided that it was not, because the eighth clause of the 13th & 14th Vic., chap. 63, related only to subsequent judgments; the question whether the Sheriff's deed related to the date of registration or of the delivery of the writ did not arise, because both the registration and delivery of the writ were subsequent to the deed. Mr. Justice Burns, however, expressed his view generally of the operation of the several clauses of the Act relating to this point. His opinion was that the registration of the judgment created only an equitable charge, and that the Sheriff's deed did not relate to the registration so as to avoid mesne conveyances, but only to the delivery of the writ, although the purchaser would hold subject to the equitable charge. The case of *Wales* v. *Bullock* was considered to resemble the case of *Thirkell* v. *Paterson*, although it differed from it in the material circumstance of the registration of the judgment being prior to the deed, and upon the question of the relation of the Sheriff's deed the Court follows the opinion expressed by Mr. Justice Burns in the case of *Thirkell* v. *Paterson*. The point decided in *Thirkell* v. *Paterson* did not arise in *Wales* v. *Bullock*, but the question which it really presented had been expressly decided in the case of *Doe d. Dougall* v. *Fanning*, and *Doe d. Dempsey* v. *Boulton*, which were not cited, while the opinion of Mr. Justice Burns, which however much it might be entitled to weight, was in this respect extra-judicial, was followed as the rule.

Under these circumstances I should consider it my duty to follow the decision in the cases of *Doe d. Dougall* v. *Fanning* and *Doe d. Dempsey* v. *Boulton*, even if my opinion did not agree with it, which, however, it does to the fullest extent. The 13th section of the 9th Vic., chap. 34, is combined in the Con. Stat. with the second section of 13 & 14 Vic., chap. 63. This juxta-position lends some countenance to the construction that registration creates a mere charge in equity. But the 13th section of the 9th Vic, chap. 34, created no equitable charge when it first became part of the law of the land. The equitable charge was created

for the first time by the second section of the 13th & 14th Vic., chap. 63, four or five years afterwards. Between the 9th Vic., chap. 34, and the 13th & 14th Vic., chap. 63, the equitable charge did not exist—what, during this interval, was the operation of the 13th section of the 9th Vic., chap. 34? Doubtless it was as decided in the cases of *Doe d. Dougall* v. *Fanning*, and *Doe d. Dempsey* v. *Boulton*, to cause the judgments to attach upon the lands from the time of registration so as to render it liable to execution into whatever hands it might afterwards come. No other meaning can be attached to the third clause. When it was first enacted it created no equitable charge whatever; it authorised the Sheriff to offer for sale the estate belonging to the debtor at the date of registration, and that was its only operation. The law continued in this state until the passing of the 13th & 14th Vic., chap. 63, which created this equitable charge for the first time. It did not, however, vary the operation of the 9th Vic., chap. 34; the remedy it gave was cumulative, and it likewise subjected to the payment of debts various interests which were not before liable to execution. The 13th section of the 9th Vic., chap. 34, enacted that registered judgments should bind lands in this Province in the same manner as docketed judgments bind lands in England. Now the precise effect of a docketed judgment was to bind the lands into whatsoever hands they might afterwards pass so that the Sheriff could deliver execution of them as if the intermediate conveyances and incumbrances did not exist. The same effect must have resulted from registration of judgments in this Province. It is said that no such intention can be collected from the provision of the 9th Vic., chap. 34. But it appears to me, with great deference, that no other intention can be attributed to the Legislature than what I have mentioned. It appears to have been considered that such a construction would be attended with great inconvenience. But what greater inconvenience exists, in case of a judgment, than in case of a mortgage with power of sale? Such a mortgage may remain dormant for years, during which the property may pass through twenty hands, and the power of sale may be exercised and all the intermediate conveyances defeated, some of which may be Sheriff's deeds. If a judgment be registered it is notice to all the world; any one purchasing the estate affected by it will see it paid off out of his purchase money or require the estate to be released from it, and if he neglect these ordinary precautions he must blame his own folly. I have no doubt that while the practice of registering judgments continued, a registered judgment bound the lands at law from the time of registration, so that the Sheriff could deliver execution of them into the hands of whomsoever they might afterwards pass.

In deciding this I follow the cases *Doe d. Dougall* v. *Fanning*, *Doe d. Dempsey* v. *Boulton*, both, because I think they were rightly decided, and because I am satisfied that the Court of Common Pleas would have followed them in the case of *Wales* v. *Bullock* had they been cited. The opinion of Mr. Justice Burns, expressed in the case of *Thirkell* v. *Paterson*, although entitled to the greatest respect, being only an exposition of his views on the general operation of the Acts, was unnecessary to the decision of that case.

Supposing it to appear, therefore, in the present case, that the Sheriff's sale was under Benner's judgment, and that this judgment was registered before either of the mortgages, I think the defendant acquired a title paramount to them both. It is true that he thought he was purchasing the estate subject to both the mortgages, and he paid, it is said, only twenty shillings for it, but he intended doubtless to purchase whatever he could get, which he thought, however, was only so much. The Sheriff could sell neither more nor less than the estate that Shaw had at the time of the registration of Benner's judgment, and Thompson could purchase nothing more nor less. The sale is not impeached and must operate according to its legal effect so long as it is suffered to stand. Whether it can be maintained is another question, which it would be premature and out of the place at present to discuss.

The learned counsel for the plaintiffs asked leave, if my judgment should be against him, to amend the bill for the purpose of impugning the sale. But such a bill would be substantially a new bill, and I think the proper course is to dismiss the present bill without costs, in consequence of the uncertain state of the authorities, and without prejudice to any other suit which the plaintiffs may be advised to institute.

I do not think that the defendant, at the time that he purchased from the Sheriff, was a mortgagee so as to be within the protection of the clause of the Act. This provision is a very singular one and not to be extended beyond the letter. It seems to contemplate a purchase by a mortgagee from himself, and that although he may purchase the equity of redemption at a Sheriff's sale, and pay so much less for the estate in consequence of the existence of the mortgages, and must be deemed therefore as undertaking to discharge them both, he may hold the second mortgage at arm's length. I certainly would not extend this power to a person who was not a mortgagee at the time, but became so afterwards, and this was the case, I think, with the defendant, Thompson. The protection must at any rate be confined to all judgments belonging to Powell, and of them he was a mere trustee.

I think the objections to the registration ought not to prevail, but that Thompson is bound by the submission in his answer, and that the decree should be for redemption.

Decree for redemption.

PRACTICE COURT.

Reported by Robt. A. Harrison, Esq., Barrister-at-Law.

In the matter of the Arbitration between Amos A. Wright et al., and the Corporation of the County of Grey.

Clause of reference—Power to revoke—When allowed.

On an application by a party to be allowed to revoke a submission to arbitration, the discretion of the court to which the application is made ought to be exercised in the most sparing and cautious manner.

The court in this case, considering the balance of conveniences and inconveniences to the parties, the unsatisfactory language used in the contract between the parties, the uncertainty as to what was intended by the clause of reference, the ample powers with which the Courts and Judges are armed for the purposes of compulsory references, allowed the clause of reference to be revoked.

March 3, 1862.

On the 13th January, 1860, Messrs. Wright & Co. entered into a contract with the Corporation of the County of Grey, for the purpose of gravelling and improving certain roads in the county. The contract recites a by-law of the Corporation, passed on the 28th January, 1859, authorising the raising, by way of loan, the sum of £50,000, to be expended upon the roads mentioned in it. Messrs. Wright & Co. tendered to do the work for $200,010, payable in debentures of the Corporation, which tender the Corporation accepted. The work was to be done according to certain plans and specifications attached to the contract; one half of the work to be finished in one year, and the other half in two years from the date of the contract; payments were to be made monthly, by delivering debentures of the Corporation, according to the work done from time to time, to be estimated and certified by the Chief Engineer of the county.

The contract contains this clause: "And it is also agreed between the parties hereto, that no extras shall be allowed for, unless by the order of the Chief Engineer of the parties of the second part, or some of his assistants, and the ordering of any extras shall in no way invalidate the covenants contained herein, but the said extras shall be deemed to be included in said covenants; and should the parties of the second part see fit to make any alteration in or addition to the said works, including the extra works, they may do so, upon giving to the parties of the first part written instructions for the purpose, signed by their Chief Engineer; but it is understood, that should the work be lessened in some place or particular, that the parties of the first part shall be allowed, under the said Engineer's directions, to do work elsewhere, or in some other particular, so that including extras, the amount of the work to be done shall amount to the said sum of $200,010; and it is understood, that the estimates for extra work shall be returned monthly."

The contract contains this further clause: "And also, that the parties of the second part shall pay to the parties of the first part, for the extra works that may be ordered, according to the schedule of prices hereunto annexed; and that the parties of the first part shall allow to the parties of the second part for any deductions

that may be made in the work, by order of the said Chief Engineer, of the parties of the second part, or otherwise, according to the schedule of prices hereto annexed; but the parties of the first part shall not be entitled to receive any payment for extras until the works in respect of which they shall be made shall have been certified by said Engineer, and the amount of extras in excess of deductions only shall by allowed; and it is understood, that the Engineer shall estimate for extras and deductions, and certify the same monthly, as previously provided, for his estimating and certifying for the work under the contract.

The contract further contains this provision: "And to prevent all disputes during the progress of the works, it is hereby agreed that the Chief Engineer of the parties of the second part shall, in all cases, determine the amount or quantity of the several kinds of work which are to be paid for under this contract, and the amount of compensation to be paid therefor. But if any differences shall arise between the parties of the first and second parts, during the progress of the works, or after the completion of the contract, then after the said completion, the same shall be referred to the award of Walter Shanley, whose award shall be final."

The contract then concludes with this provision: "And it is hereby agreed, that all extra work ordered to be done by the Engineer, or his assistant, in excess of the work hereinbefore referred to, shall be paid by the parties of the second part to the parties of the first part, notwithstanding anything to the contrary contained in this agreement."

It appeared that in 1860, some of the members of the Corporation had heard that the contractors were making the expense of the work much greater than the sum appropriated, and the committee of the County Council, appointed for the purpose, instructed the Engineer that he was to guard against the total cost of the work exceeding the $200,010 debentures.

In the month of January, 1861, the County Engineer notified the contractors that the intention of the Corporation was to stop the works when the cost of the work reached the sum of $200,010.

On the 1st February, 1861, the County Council passed a by-law that their Warden be authorised to notify the contractors that the County Council intended that the whole work should not, including extras, exceed the contract price, $200,010, and that when that amount of work should be done, the Council would consider the contract at an end.

This by-law was communicated to the contractors, on the 25th March, 1861, and a long correspondence took place between the contractors and the Warden of the County, on the subject of the construction of the contract, and about the amount of work done up to that time. The contractors claimed they had done work exceeding the $200,010, and the County Engineer says that the work done up to the 5th April, 1861, was $177,000, or thereabouts.

The County Engineer swore that he continued on making monthly estimates of work done up to September, 1861, and that upon the 17th of that month, the work done by the contractors reached the contract price $200,010. Up to this period, the contractors had not rendered any account demanding any particular sum for excess, but merely stated they had done work largely in excess of the contract.

On the 18th September, the contractors notified the Warden that they considered, under the former notice they had received, that they were to discontinue the completion of the contract, and they desired to be informed what course the Council intended to pursue.

On the 27th September, the committee met, and a communication was made to the contractors, asking them to furnish an account of their demands, if they considered that work had been done to the amount of the contract, and to state what further sum would be required to finish the contract after the expenditure of the $200,010. In reply, the contractors state, that they cannot give an account of what work they had done, as it would take two months to make a final measurement.

On the 9th October, the contractors gave the Council an approximate estimate of what would be required, in order to finish the work contracted for, making it $20,520. On the same day, the County Council resolved to abide by the notice which had been given to the contractors on the 25th March previous, and that resolution was communicated to the contractors.

More correspondence took place between the parties, which it is not necessary to allude to.

On the 12th December, 1861, a Judge's *fiat* was obtained, that the submission stated in the paragraph above quoted from the contract, beginning with the words—"if any difference," &c., should be made a Rule of the Court of Queen's Bench, and the same was accordingly made a rule of court on the same day.

On 18th December the arbitrator, pursuant to appointment, attended at the Rossin House in the city of Toronto. Mr. Osler, a barrister, appeared for the County of Grey and Mr. Robert A. Harrison appeared as counsel for the contractors. Nothing was done at this meeting. The arbitrator, at the request of Mr. Osler, adjourned till 31st December.

On 31st December the arbitrator again attended the Rossin House according to appointment. Messrs. M. C. Cameron and Harrison appeared as counsel for the contractors, and Mr. Osler again appeared for the County. The Warden of the County was also present. A great number of witnesses were in attendance on the part of the contractors. Mr. Harrison opened the case for the contractors, and was about to call his witnesses when Mr. Osler begged for delay in order that particulars of the claim advanced by the contractors might be furnished, and thereupon engineers for both parties meet if possible in order to narrow the ground of dispute. The contractors objected to the adjournment and urged that they had many witnesses in attendance at great expense. The Warden offered to pay the expenses of these witnesses. Attention was then directed to the fact that the submission was silent as to the costs of the reference. The contractors desired to have the costs abide the event, but the Warden and Mr. Osler desired to have them in the discretion of the arbitrator. The contractors at length yielded, and the following agreement was indorsed on the Rule making the submission a Rule of Court:—

"It is agreed between the parties in the within Rule that the costs of the reference arbitration and award shall be in the discretion of the arbitrator, and that this agreement be embodied as part of the submission.

"Toronto, 31st December, 1861.

(Signed) "ROBERT A. HARRISON,
(for contractors.)

(Signed) "F. OSLER,
(for County)."

When this agreement was signed, all costs being in the discretion of the arbitrator, the expenses of witnesses in attendance were not exacted.

On 1st January, 1862, the arbitrator ordered the contractors to furnish a statement of their claim to the County, and adjourned the reference till 22nd of same month.

On 22nd January the arbitrator attended the third time, and a great many witnesses were in attendance on the part of the contractors. Mr. Stephen Richards and Mr. John Creasor, junior, appeared as counsel for the County, and Messrs. M. C. Cameron and R. A. Harrison again appeared as counsel for the contractors. The Warden was also present. Mr. Richards repudiated the authority of the Warden and Mr. Osler as to what had been done by them at the previous meeting. He raised a number of objections against the arbitrator proceeding, contending among other things that the contract contained no actual reference but only an agreement to refer, and that there were no matters in difference between the parties. Notwithstanding the arbitrator proceeded with the examination of a witness whose examination lasted several days. Mr. Richards and Mr. Creasor were present all the time under protest, but cross-examined the witness at great length.

On 28th January the County Council met and passed resolutions repudiating what had been done by the Warden and Mr. Osler, and authorizing the Warden to resist the claim of the contractors.

The contractors, in their written demand furnished on 4th January, pursuant to the order of the arbitrator, claimed from the Corporation that they were entitled to the sum of $409,064 61c., crediting the Corporation with $70,084 71c., as received in debentures on account of the contract and debentures received, as on account of extra work $125,925 29c. Some other credits were given, and they claimed a balance over and above everything, as due from the Corporation, $191,556, 61c.

Among other claims there were the following:—

1. An item of $600 for travelling expenses, incurred in going to Quebec to have defect in debentures removed by Act of Parliament. 2. Eleven per cent discount on $125,925 29c. debentures, sold to pay for account of extra work done, which was to have been paid in cash, amount $13,851 88c. 3. One year's interest taken from $200,000 of debentures due 1st January, 1860, contrary to contract, amount $6000. 4. Various sums of interest claimed upon the coupons detached from the debentures. 5. Twenty-five per cent damages for loss of interest, for loss and damage of the work being hindered, loss in providing funds to carry on the work, and various other matters, amounting to $31,481 82c.

S. Richards, Q. C., obtained a rule, calling upon Amos Wright and others, to shew cause why the Corporation of the County of Grey should not have permission to revoke the reference or submission contained in the agreement or articles of agreement, dated the 18th January, 1860, made between the said Wright and others, of the first part, and the Corporation of said County, of the second part, and which submission was ordered by a Judge in Chambers to be made a Rule of the Court of Queen's Bench; and why the Corporation should not have leave to revoke the power and authority of Walter Shanly, as arbitrator, under said reference, submission and rule of court, on the ground that there are several important legal questions arising and existing between the parties, which should be decided by one of the superior courts of common law, or upon the ground that the alleged submission does not amount to a reference, but at most, is only an agreement to refer, and that no differences had arisen within the meaning of the alleged reference to be referred to Mr. Shanly. Other grounds were mentioned in the rule not necessary to be mentioned here.

M. C. Cameron and *R. A. Harrison* showed cause. The application is one to the discretion of the Court, and that discretion should in every case where invoked be used in the most sparing and cautious manner. (*Scott* v. *Van Sandau*, Q. B. 192.) A very strong case must be made out to warrant the exercise of such a discretion—nothing short of misconduct on the part of the arbitrator. (*Faucett* v. *Eastern Counties R. Co.*, 2 Ex. 344; *James* v. *Attwood*, 7 Scott, 841; *In Re Woodcraft*, 9 Dowl. P. C., 538; *Pape* v. *Duncannon*, 9 Sim. 177; *Wilson* v. *Morrell*, 15 C. B., 720.) The mere apprehension that questions of law will arise with which the arbitrator, a layman, may not be competent to decide according to strict law is not of itself a sufficient ground for the application. (*Fuller* v. *Fenwick*, 3 C. B., 705.) No case has gone that length. That is a matter for consideration at the time of making the reference, and the reference here is an integral part of the contract. Now that the work is done the parties who are benefited by that work should not be allowed to alter the contract to the prejudice of the other parties. It is contended, however, that there is no actual reference but only an agreement to refer. The language imports a present reference of future differences, if any, that may arise. It is a prospective reference and one which is usual in building and other contracts. (*Livingston* v. *Ralli*, 5 El. & B., 132; Russ, 2 Ed., 726.) As such it has been made a Rule of Court. If not a reference, application should be made to set aside the Rule of Court, not to revoke the reference which is now a Rule of Court. Besides here the County by their acts have treated the clause as an actual reference. Their counsel appeared on two occasions at least and submitted to the arbitration. He adopted the Rule of Court and was a party to its amendment in regard to costs. The County cannot now be allowed to say he acted without authority. If he exceeded his authority and they in consequence are damnified, he is responsible. (*Flavielll* v. *Eastern Counties R. Co.*, 2 Ex., 344; *Chambers* v. *Mason*, 5 C. B. N. S., 59) To allow the reference to be revoked after what has taken place would be to enable the County to commit a fraud on the contractors. If the arbitrator exceed his authority the remedy will be an application to set aside his award. The Court has no right to anticipate in such a matter to the prejudice of either party.

S. Richards, Q. C., supported the Rule, and adverting to the facts of the case at great length citing *Scott* v. *The Corporation of Peterborough*, 19 U. C. Q. B., 469.

BURNS, J.—I do not think there is shewn any acquiescence on the part of the Corporation, since the submission has been made a rule of court, which precludes them from asking the interference of this court to relieve them from the reference, if there be sufficient reason for so doing in other respects. The Corporation has been hurried on by the steps taken by the other side; of course such steps were open to them, and no fault is to be found with their setting the law in motion, with as much celerity as possible; but then, when we see that on the other hand the Corporation were acting in some measure in the dark, for no demand was furnished to them until the arbitrator directed that it should be done. I must not hold them to be assenting to the acts of the other side.

We must go back to the contract to define the position of the parties, and collect from that whether the discretion now asked in this application should be granted. I fully agree in the force of what is said by Lord Denman, in *Scott* v. *Van Sandau*, 1 Q. B., 102, "that the discretion of the court to which this appeal is made, ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses and interminable delays." In all probability, in any action to be brought upon the contract in question, a reference will most likely be ordered, but then that would take place under all the safeguards as to legal questions which the court would cast around the parties. And if the case is to go to a reference, there can be no doubt that the gentleman named in this contract is most competent to decide such matters, and the court, upon whom the responsibility would rest of referring it, could not do better than refer the matter to Mr. Shanly. The Corporation do not object to a reference to him of any matters connected with the work done or the manner of doing it, or of any damages which the contractors may legally claim; but what is objected to is, that a reference of everything to him of all questions, legal or equitable, should be indiscriminately made, as it stands as now referred.

When I carefully read the whole contract, I am rather inclined to adopt Mr. Richards' argument, that it amounts to an agreement to refer, in the event of certain things occurring, rather than an actual reference. The parties have selected the few words embodied in the rule, and have considered those the submission, and so they asked for an *ex parte* rule of court making it a reference. We see, however, what precedes that sentence is, that to prevent all disputes during the progress of the works, it was agreed that the Chief Engineer of the County should, in all cases, determine the amount or quantity of the several kinds of work, and the amount of compensation to be paid therefor. Then what follows looks very like this: if there should, during the progress of the work, be a dispute about what the Engineer should determine, either during the progress of the work, or after the completion thereof, of any of those matters of which he is made the judge, then that such matters should be referred to Mr. Shanly to determine, and his decision should be final. If the reference to Mr. Shanly is to be construed in this limited sense, then it is clear that matters had not progressed the length which were necessary in order to invoke his authority to determine them. It is not necessary for me to construe the agreement between the parties, and if I did, then the contractors would undoubtedly be much dissatisfied with that view.

The contractors, on the other hand, have given the widest interpretation possible to the last sentence, and have treated the agreement to refer to Mr. Shanly, as including every possible thing which might arise upon the contract, legal as well as equitable. The question therefore is, whether that is right and that it was so intended to be; for if so, then undoubtedly the court would carry it out, and would act wisely in so doing. I cannot bring my mind to that conclusion, however; I still see in the way the previous agreement, that the Chief Engineer was the person who should determine the amount and quantity of the several kinds of work, and the amount of compensation to be paid therefor. The parties surely never intended to forego that agreement, but yet the contractors have not in any way embodied that in their reference to Mr. Shanly.

The construction put on the agreement to refer to Mr. Shanly by the contractors is inconsistent with the previous agreement

that the amount and quantity of the work and the compensation should be determined by the County Engineer, unless the contractors concede that Mr. Shanly should be governed in respect of that matter as a court and jury should in the first instance. But if they concede that point in so far as affects the question of amount and quantity of the work, there still remains the other question in dispute between the parties. On the one hand the contractors contend that they were bound to finish and complete the roads named in the contract by a certain time, and that they have a right to do this no matter at what cost nor how far the expense may exceed the contract price, and a large sum is claimed by way of damages for stoppage of the work because the Corporation does not assent to this proposition. On the other hand the Corporation contend that the contractors knew that only a certain sum had been appropriated by the rate payers of the county—that the contractors had entered into a contract to do the work for that amount, and that the same should not be exceeded by extras or otherwise, and that whenever the expenditure exceeded that amount there was no authority to go beyond it without a new agreement with the contractors and a reference to the rate payers of the county to sanction a further expenditure of money upon the roads.

The question is whether such a matter as that comes fairly within the meaning of the contract. Supposing I adopt the construction put upon it by the contractors, that is, that the words "if any differences shall arise between the parties of the first and second parts during the progress of the works," open up all and every question which might possibly arise between the parties as the subject of reference to Mr. Shanly, the work has not been completed, consequently there is no question of that kind arising after the completion of the contract. No doubt all parties at the time of entering into the contract contemplated the finishing of the work by the contractors, or if they failed to do it, then by the Corporation themselves doing it and charging the expense to the contractors, for that is provided for by the contract. Nothing whatever is said about what shall be done in the event of the Corporation stopping the work or preventing the contractors from finishing it.

I am not called upon in this application to determine the question definitely between the parties, and I should be sorry it would be understood I have said anything having that tendency. All I am asked to do is to place the parties in such a position that the various questions may be argued and disposed of by the court. In answer to that it is said that the Corporation will not be precluded from bringing up the questions they desire to do on an application to set aside the award for excess of jurisdiction on the part of the arbitrator. It is very true that some of the points desired to be raised and as suggested by myself might be so raised and tested. But then, again, if the arbitrator proceeded and the Corporation made the best defence they could, they might be met with the objection of acquiescence on their part to the proceedings. And if they protested and did not appear, and relied upon the objections to the award, they might be met with the observation, why was not an application made of the nature of the one I am now disposing of.

When I consider the balance of conveniences and inconveniences to both parties, the unsatisfactory language used in the contract, for it is not a well-drawn contract by any means, as to what the parties intended should be referred to Mr. Shanly, and what his powers should be under such a very meagre expression as this, *if any differences shall arise*, and further, when I consider the ample powers the Courts and Judges are now armed with for compulsorily referring matters, I think I shall do justice to both sides by freeing them from this present reference to Mr. Shanly. If the present reference were proceeded with I foresee a long course of litigation, at great expense to the parties. Should an award be made and afterwards set aside, then all that had been done would be futile and the parties be just where they were.

I would suggest that both sides should agree upon a case to be submitted to the Court for its opinion upon any legal question, with power to the Court to remit all questions of compensation to Mr. Shanly.

In the meantime, however, I must grant the Corporation permission to revoke the submission to Mr. Shanly, and so much of the rule as asks for that will be absolute.

All that remains is, upon what terms that should be granted. It does not appear to me that the Corporation should pay the costs of making the submission a rule of Court, for that was done *ex parte*, nor of expenses incurred by or before the arbitrator, for if a rule or summons had been asked for, calling upon the Corporation to shew cause why the submission, as the contractors construe it, should not be made a rule of Court, I am convinced that no Court or Judge would have made such a doubtful agreement as that contained in the contract, with the materials now before me, a rule of Court, and therefor whatever expenses have been incurred by or before the arbitrator the parties causing it must take the risk of. Then, with regard to the expense of this application. I have before me a contract containing a clause about referring matters to arbitration of a doubtful character as to what powers the arbitrator should have under it. In order to get rid of it the Corporation have to come to the Court to ask the Court to interfere and enable them to do so. The other side oppose the application, and I suppose they are entitled to the costs of the opposition.

The rule which has been obtained will therefore be made absolute so far as permitting the Corporation to revoke the submission to Mr. Shanly upon payment by the Corporation of the costs of the rule.

For our Rule absolute.

COMMON LAW CHAMBERS.

Reported by Robt. A. Harrison, Esq., *Barrister-at-Law.*

Samuel Clark, Judgment Creditor, v. Andrew M. Clark, Judgment Debtor; John D. Ham and John Stevenson, Garnishees.

Consol. Stat. U. C., cap. 22 sec. 236, et seq.—Order to attach debt—Payment by garnishee before order to pay how far a discharge—Setting aside attaching order.

A garnishee is not discharged by payment of the money to the judgment creditor merely upon the attaching order without an order to pay.

But if the garnishee, upon being served with the summons to pay, forthwith pay the money into court, he is free from further responsibility.

Where it was made to appear that the debt sought to be attached was *bona fide* assigned before the issue of the garnishee order, the order was, on the joint application of the judgment debtor and his assignee, set aside.

(Chambers, 11th January, 1862.)

A summons was obtained on the application of the judgment debtor and one Shibley, calling on the judgment creditor and the garnishees to shew cause why an attaching order of the 18th October, 1861, should not be set aside, on the ground that the debt sought to be attached had been assigned by the judgment debtor to Sibley before the issue of that order; and why all proceedings subsequent to the said order should not be set aside on the same ground, and on the ground that no notice of the attaching order was given to the judgment debtor; and why the judgment creditor should not pay the costs of the application.

A summons had been issued calling on the judgment debtor and the garnishees to attend and shew cause why the garnishees should not pay the debt due by them to the judgment debtor to the judgment creditor. This summons was not shown to have been served on the judgment debtor. It was issued on 11th November, 1861, returnable on 16th November, 1861; and apparently no order was ever made upon it. No entry of any further proceeding could be found.

The original writ of summons was issued in this cause in July, 1860, and served on 20th September of same year. On 12th November, 1860, the plaintiff recovered judgment for £239 9s. 7d., and a writ of *fi. fa.* issued against the defendants' goods, which was returned *nulla bona*.

By the affidavits of the judgment debtor, Andrew M. Clark, and T. Shibley, it appeared that a bill in Chancery was filed about ten years ago by A. M. Clark against the garnishees, to which they put in no answer; and the court ordered that the deputy master at Kingston should take an account of what was due from the garnishees to A. M. Clark; that the deputy master reported, and the garnishees appealed, and the appeal was dismissed with costs;

that A. M. Clark was largely indebted to Shibley ($848), and Shibley demanded security, whereupon A. M. Clark, on 26th September, 1860, executed an assignment of the money due, as reported by the deputy master in Chancery, from the garnishees to the judgment debtor.

Both A. M. Clark and Shibley swore that the assignment was made in good faith, and for the purpose of securing the debt so justly due to him.

A. M. Clark swore that he had no notice of the application for "a garnishee order in this matter."*

In reply it was sworn that the clerk for the solicitor in the Chancery suit obtained a copy of the attaching order on the day it was granted, and expressed his apprehension lest, in consequence of that order, the solicitor should lose his costs.

The garnishees made affidavits shewing that on 28th September, 1861, a decree in Chancery was made by which they were declared to be indebted to A. M. Clark in £239 14s. 2d., to be paid to him on 1st November, 1861; that they were served with the attaching order, and about 18th November last with the summons to pay over; that before the 14th November last they had no notice or knowledge of the assignment to Shibley; and Stevenson swore that having no cause to shew against this summons, he, after consulting his legal advisers, on 14th November, 1861, paid to the judgment creditor £254 5s., in full satisfaction of the judgment against A. M. Clark, and that he made this payment fearing that if he did not an execution would be issued against him.

DRAPER, C. J.—The attaching order under the 288th section of Con. Stat. U. C., cap. 22, does not, according to *Holmes* v. *Tutton* (5 El. & B. 65), do more than render the judgment creditor a creditor having a security for his debt, and does not give the judgment creditor any lien.

This case, however, arose between the judgment creditor and the assignees of the judgment debtor, who had become bankrupt after the granting of the order.

In *Turner* v. *Jones* (1 H. & N. 878) there is a strong intimation that the garnishee is not discharged by payment of the money to the judgment creditor, merely upon the attaching order, without an order to pay.†

The statute (sec. 297 of our act) enacts that payment by, or execution levied upon, the garnishee *under any proceeding as aforesaid* shall be a valid discharge to them as against the judgment debtor to the amount paid or levied, although the proceeding should be afterwards set aside or the judgment be reversed. But the words "under any proceeding as aforesaid" obviously refer to the preceding enactment (sec. 290), if the garnishee does not forthwith *pay into court* the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor; or if he does not appear upon summons, then the judge may order execution to issue.

The very first part of this section points out to the garnishee his proper course—namely, to pay the money into court, which being done, he is free from further responsibility; but these words in no way point to a payment to the judgment creditor without further order.

In *Cooper* v. *Brayn* (3 H. & N. 972) the garnishee, after a a summons had been issued on him to shew cause why he should not pay (but which was erroneously intitled, and no order consequently made thereon) paid the debt to the official assignee of the judgment creditor, who had become insolvent, and the payment was protected.

The case of *Hirsch* v. *Coates* (18 C. B. 757) sufficiently establishes that an attaching order has no effect or operation upon debts of which the judgment debtor has divested himself by assignment.

Upon these facts, and upon these authorities, I should have no hesitation in deciding that the garnishee was wrong in paying the money to the judgment creditor without an order; and that upon proof of an assignment of the debt (*bona fide* of course) no such order would be made.

* Meaning probably the attaching order.

† See also *McGinnes* v. *The Corporation of Yorkville*, 21 U. C. Q. B. 163.—EDS. L.J.

The only remaining question is, whether I should thereupon grant an order setting aside the attaching order of 18th October, 1861.

On the best consideration I can give the matter, I have determined to grant such order. It never could have been meant by the Legislature that a judgment creditor should, by attaching a debt which is an *ex parte* proceeding, tie the hands of others who assert a right to that same debt, indefinitely, until he pleases by asking for an order to pay it to himself, afford an opportunity of trying who has the better title to it. And yet such might be the consequences, as service of the attaching order binds the debt in the garnishee's hands. I think the case of *Wintle* v. *Williams* (3 H. & N. 288) affords a solution of the difficulty. The judgment creditor must, as Chief Baron Pollock says, "go on or retire, and pay the costs." Here he issues a summons, and as he has got the money, he has allowed it to lapse not serving it on the judgment debtor, and though serving it on the garnishee, not proceeding with it. He offers no statement on affidavit contradicting the assignment or impeaching its validity. He rather leaves to the garnishee the task of supporting the payment made by them; and unless the judgment debtor and his assignee take this course they will have to take proceedings in equity, and I suppose would be met by the answer that the debt is attached in law if they applied to enforce the decree.

I think, therefore, I should make the order.

Order accordingly.

WILLIAMSON v. WILLIAMSON.

Pleas—wrongly intitled—not nullities.

One of the Christian names of one of the parties to a cause was omitted in the style of cause placed at the head of pleas filed in the cause, and plaintiff signed judgment treating the pleas as a nullity. The judgment was set aside.

(March 11, 1862.)

On 14th December, 1861, Jane Eliza Williamson demanded dower of James Williamson, the tenant of a part of lot 12 in block 40, in Sir Allan Napier Macnab's survey in the city of Hamilton.

On 23rd January, 1862, a declaration with notice to plead was served according to Con. Stat. U. C., cap. 28. In the declaration and demand of plea, demandant was described as Jane Eliza Williamson.

On 8th February, 1862, pleas were filed and served by John Barr, attorney for tenant. These pleas were intitled "Jane (omitting Eliza) Williamson, demandant, and James Williamson, tenant." They were three in number, 1 *ne unques accouple*; 2—*ne unques seizie*; and 3—no demand of dower one month before action.

The attorney for defendant treated these pleas as a nullity, signed judgment in default of a plea, and served the attorney for the tenant with notice of assessment.

R. A. Harrison obtained a summons calling upon demandant to shew cause why the interlocutory judgment and all subsequent proceedings should not be set aside with costs upon the ground that pleas had been filed and served before the signing of such judgment.

J. Dunne shewed cause, contending that the pleas not being properly intitled in the cause were nullities, and that being pleaded without leave, defendant was at all events entitled to sign judgment.

R. A. Harrison submitted—That the pleas were not nullities by reason of the omission simply of one Christian name of demandant in the style of the cause, demandant's attorney knowing full well what was intended; and that the pleas were directed to separate material traversable allegations contained in the declaration, and did not therefore require leave of a judge before pleading same.

RICHARDS, J., referring to *Dale qui tam* v. *Beer*, 7 East 333; Anon 7 D. & R., 511; Chit. Arch. 8 Edin., 266, made the summons absolute without costs.*

* See also *Averill et al* v. *Cameron*, 3 O. S. 176.—EDS. L. J.

COUNTY COURT CASES.

In the County Court of the United Counties of Frontenac, Lennox and Addington, before his Honor Judge McKenzie.

Donnelly v. Fletcher.

Certificate for costs—when granted—discretion.

Where plaintiff in good faith brings his action in a County Court, and had fair and reasonable grounds for supposing that he would recover a larger amount of damage than he could recover in the Division Court, although the jury award him damages within the jurisdiction of the Division Court, the case is a proper one for the exercise of the Judge's discretion in granting a certificate for County Court costs. (March 15, 1862.)

At the last sittings of the Court this case was tried, and a verdict rendered in favor of the plaintiff for $25 damages.

Upon the evidence produced on the part of the plaintiff, he made out a strong case for larger damages than he could have recovered in the Division Court.

The defendant produced evidence to show that the plaintiff conducted himself in the defendant's house at Napanee, which was a tavern, with much impropriety.

Draper moved for a certificate for County Court costs under section 328 of C. L. P. A. *O'Reilly* opposed the granting of the certificate, the amount of verdict being within the jurisdiction of the Division Court.

Mackenzie, Co. J.—According to the Plaintiff's evidence, if the jury had given him £25 damages, instead of $25, they would have done only right. The defendant's witnesses proved facts in mitigation of damages. But it is clear the jury did not believe all they said or they would have given a verdict for the defendant on the second plea. I think the witnesses for the plaintiff were more reliable than those for the defendant.

The question for me to decide is whether "the cause was a fit one to be withdrawn from the Division Court and brought in the County Court."

I find, in a very excellent article, written on certificate for full costs, in the 7th volume of the *Upper Canada Law Journal*, page 221, the following sensible remarks: "Some persons, relying upon English cases, which are not always applicable, suppose that the amount of the verdict is conclusive, so as to prevent the giving of a certificate. There can be no greater mistake. So, to read our enactment would be to make it absurd and inconsistent. If a plaintiff in good faith and on probable grounds seeks to recover an amount beyond that which the jury award him, he has a right to the exercise in his favor of the discretionary power vested in the judge. The object of the enactment is not to inflict injustice, but to punish wilful contravention. Wherever it appears to the satisfaction of the judge, that the plaintiff did sincerely urge, and upon reasonable grounds, a claim for debt or damages greater than could be recovered in the inferior court, although the jury may have given the verdict for a sum within the jurisdiction of the inferior court as to amount, it is usual for the judge to certify. Where there is no precise computation to be formed on the evidence, and where the evidence would have warranted a verdict beyond the mark as well as below, it would be hard indeed, that the plaintiff should be compelled, at the risk of losing his costs, to relinquish a large portion, of what he may fairly claim, lest the jury, preferring the testimony of one witness to another, or forming an arbitrary estimate of their own, may bring the verdict within the lower jurisdiction. The Legislative power never intended to work such hardship. So to construe the act is to convert a remedial measure into one of oppression."

Although the above observations from a very useful journal, cannot carry with them the weight of judicial authority, still in my judgment they are to the point, and they certainly convey my own idea as to the manner in which the discretionary power given to the judge should be exercised in reference to the granting of certificates for full costs.

In the present case I think the evidence well warranted the jury in giving three times the amount of damages which they have given. The defendant is an innkeeper. He was under the influence of liquor at the time of the outrage complained of. The outrage was committed in his own house. His own house was a tavern. The plaintiff was almost helpless by reason of liquor. The weapon he used was a murderous one, and the language he uttered manifested a great disregard for consequences.

I think from the evidence that the plaintiff had brought his action in this court in good faith, and that he had fair and reasonable grounds for supposing that he would recover a larger amount of damages than he could recover in the Division Court, although the jury have awarded him a smaller amount.

The statute directs that the judge who presides at the trial shall decide the question of certificate of costs in open court immediately after the verdict has been recorded. From this I conclude that the judge shall decide upon the evidence, and what shall pass before him at the trial, whether the cause be a fit one to be withdrawn from the Division Court or not.

I think, from the evidence, and what passed before me at the trial, that I am bound to exercise the discretionary power vested in the judge in favor of the certificate for County Court costs, as the plaintiff, in my opinion, had brought his action in this Court in good faith, and had reasonable and probable grounds for claiming a larger amount of damages than he could recover in the Division Court.

Certificate granted.

Patterson v. Snook.

Certificate for Costs—Difficult questions of Law.

In cases within the competence of the Division Court, if one of the judges of the Superior Courts would grant a writ of certiorari by reason of anticipating the determination of a difficult question of law to remove the cause if commenced in a Division Court, it is proper for the Judge of the County Court to certify for County Court costs. (March 18, 1862.)

This was an action on the Common Counts for money paid, lent and received. Pleas—never indebted, payment, and set-off. Verdict for the plaintiff, $77.80.

The action was brought for money received by the defendant as attorney for the plaintiff. The set-off was composed of, among other things, two bills of costs. One of the bills of costs was for the conducting of a suit in the Queen's Bench for plaintiff's wife, before she married the plaintiff.

Sir Henry Smith moved for a certificate for County Court costs. *Mr. Snook* opposed the granting of the certificate, contending the suit was a fit one to be brought in the Division Court.

Mackenzie, Co. J.—The case of *Donnelly* v. *Fletcher*, just decided, explains the principle upon which a certificate for full costs should be granted when the action is instituted in this court in good faith, a plaintiff having reasonable and probable grounds for claiming a larger amount of damages than he could recover in the Division Court.

The case of *Hyland* v. *Warren*, decided by me two years ago, and reported in the 6th volume of the U. C. L. J., at page 116, decides that the jurisdiction of the Division Court is restricted to $40 in actions brought to recover purely and simply uncertain, unliquidated damages, depending on matters of opinion whether the cause of action arose out of tort or breach of agreement.

The present case presents another point not noticed in those cases, namely, the right of bringing a suit, in amount within the jurisdiction of the Division Court, in the County Court, when, in all probability, a difficult question of law will arise at the trial.

By the 61st section of the Division Courts Act, it is enacted: "In case the debt or damages claimed in any suit brought in a Division Court amounts to forty dollars or upwards, and in case it appears to any of the judges of the Superior Courts of common law that the case is a fit one to be tried in the Superior Courts, and in case any judge thereof grants leave for that purpose, such suit may, by writ of certiorari, be removed from the Division Court into either of the Superior Courts, upon such terms as the judge thinks fit."

In the case of *Nugent* v. *Chambers*, 8 U. C. L. J., 108, Mr. Justice Burns ordered the writ to issue on the ground that a difficult question of law might arise at the trial in reference to the liability of a husband for necessaries furnished to his wife. In the case of the *Cataraqui Cemetery Company* v. *Burrowes*, 8 U. C. L. J., 47, Mr. Justice McLean ordered the writ to issue because it was alleged that, in all probability difficult questions of law would arise on the trial as to the powers conferred by the act of incorporation. In the the case of *Ridley* v. *Tullock*, 8 U.C.L.J., 14, Mr. Justice Hagarty ordered the writ on the ground that, in

all likelihood, questions of law as to the application of the statute of limitations would arise on the trial. And in a number of other cases the judges of the Superior Courts had ordered cases to be removed from the Division Courts to the Superior Courts on the ground of a probability of difficulty or grave questions of law arising at the trial.

The word "fit" is used in the 61st section of the Division Courts Act; also in the 328th section of the C. L. P. A.

Now it appears to be in accordance with law and common sense, that the principles laid down by the judges in granting a certiorari to remove a suit from the Division Court should be applied by the County Judge, in the granting of certificates of County Court costs. I am inclined to think that as a general rule in cases within the competence of the Division Court in which one of the judges of the Superior Courts would grant a writ of certiorari by reason of anticipating a difficult question of law to remove the cause that the County Court Judge, if such suit were brought before him in the County Court, should grant a certificate.

When a plaintiff anticipates a difficult question of law in a cause within the competence of the Division Court is it not more consistent with justice and good sense, that he should bring his suit in the more speedy and cheaper jurisdiction of the County Court, than to leave it to the defendant to remove it to the Superior Court, where he will be subject to delay and enormous expenses? By instituting such suits in the County Court, either of the parties has an appeal to the Superior Courts from the decision of the County Court, which is a more speedy and cheaper course than to resort to the writ of certiorari.

In the present case a very difficult question of law has arisen as to the application of certain sections of the Act respecting separate rights of property of married women to the claim set up by the defendant in one of his bills of costs; and also upon the relation of attorney and client, and the duty of an attorney in conducting suits. I think upon this ground alone that I should grant the certificate for County Court costs. Moreover the plaintiff had to prove a claim over 100 dollars, though it had been reduced by a contested set-off. Certificate accordingly.

In the County Court of the County of Wentworth, before his Honor James Ross.

WILLIAMSON v. DUNNE.

C. L. P. Act, s. 112—Action on a note and common counts—Several pleas without leave.

To a declaration containing a count on a promissory note and the common counts defendant pleaded—1. A plea denying consideration for the making of the note. 2. Payment. 3. Set-off.

Held, properly pleaded without leave.

On the 9th day of October last declaration was filed in this case.

First count on a promissory note.

Second, common counts.

Defendant filed and served pleas as follows:—

1. James Dunne, the defendant, in person says that he never received any consideration from the plaintiff for the promissory note in his declaration mentioned, and that the said promissory note was made by the defendant at the request and for the accommodation of the plaintiff.

2. And for a second plea the defendant says that before action he satisfied and discharged the plaintiff's claim by payment.

3. Set-off and claiming a balance recoverable by defendant.

The plaintiff signed judgment as for want of a plea, thereby treating defendant's pleas as a nullity, the same having been pleaded without leave of the Judge.

Defendant took out and served on plaintiff a summons to shew cause why the judgment so signed should not be set aside with costs, on the ground that the same had been improperly signed, pleas having been duly filed and served in time by defendant to plaintiff's declaration.

On the return of the summons it was argued on the part of the plaintiff that the pleas so pleaded should not have been pleaded together without leave of the Court or Judge, inasmuch as the first plea could not be taken as a plea in denial, but as a special plea in confession and avoidance of the note declared on, especially as the other pleas pleaded were to the whole declaration and not confined to any particular count in the declaration; therefore judgment was rightly signed.

Defendant, in support of his summons, argued that the matters alleged in the first plea, must when taken together, be considered as a denial of the note, and if a denial only, the pleas pleaded together were proper pleas and allowed by and under one statute.

LOGIE, Co. J., after taking time to consider his judgment, decided that the first plea, when taken and considered as a whole, must be looked upon as a denial of the note, and consequently, under section 112 of Common Law Procedure Act, such a plea was properly pleaded with the other pleas of payment and set-off without leave, and accordingly made an order setting aside the plaintiff's judgment and all subsequent proceedings with costs.

GENERAL CORRESPONDENCE.

Township Councils—Roads and Bridges—Expenditure of Township Moneys.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN—Wishing to ascertain the legality of apportioning the Municipal Funds to various Wards or Divisions, allowing each councillor to give his order on the Treasurer, will you please answer the following questions in the *Law Journal* for April, 1862:—

1st. Is it legal to appropriate money to wards or to divisions in a township not divided into wards—for instance, to ward or division No. 1, $400; ward or division No. 2, $400, &c., &c., without defining the manner in which it has to be laid out, leaving it in the power of the councillor of such ward or division to spend as he thinks best for the improvement of roads and bridges in his ward?

2nd. Is it legal or proper for the councillor or person superintending to receive jobs as duly performed and give his order on the Treasurer for payment thereof?

3rd. Should not all accounts be submitted to the Council for their approval, and all orders on the Treasurer signed by the Reeve or Head of the Corporation?

The practice of appropriating money in such a way is very common, (some go even further, handing the money to the councillor on its appropriation, he producing receipts therefor at the end of the year from parties purporting to have done work to the amount on roads and bridges) appointing one of the members to lay out the money as he sees fit. This, we think, is wrong, as it gives too much power to one man, who may lay out the greater portion of the moneys appropriated in one year for his own personal benefit or that of his friends.

I am, Gentlemen, yours respectfully, W.

[1st. It is the duty of Township Council to repair roads and bridges. The law enables the Council to raise money and to expend it for that purpose. No direction is given as to the mode in which it shall be expended. That is left to the discretion of the Councils. The mode suggested by our correspondent is the one in common use. We cannot say that it is positively illegal, but this we may say that it is pregnant with mischief.

2nd. This depends entirely upon the action of the Council. If the Council in its wisdom authorise such a mode of procedure there can be no legal objection to it. If not the best mode, the remedy rests with the Council to adopt a better one

3rd. This also rests with the Council. There is nothing in the Municipal Institutions Act to say that all accounts shall be submitted to the Council for approval before payment, but there is nothing in the Act to prevent the Council declaring that the same shall be done. It is usual, however, in Municipalities where there is much to be done to leave the decision of such matters to committees. This is especially the case in cities. There is not so much reason for it in the case of Township Councils.

We heartily condemn the practice to which our correspondent alludes. It is the nursery of much of the jobbing which disgraces our Municipal system.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. AUSTEN v. MARTIN. *April 24, May 22.*

Will—Trust for sale of freehold—Disclaimer by trustee—Sale and conveyance by the heir at law—Power to give receipts—Vendor and purchaser—Specific performance—Title—Costs.

A testator, at his death, was entitled to certain freehold property, subject to a mortgage thereof in fee. By his will he devised all his real estate to a trustee on trust to sell, and hold the proceeds upon certain trusts. After his death, the devisee in trust disclaimed the trusts, and the heir at law of the testator (who was also his personal representative), with the concurrence of the mortgagee, sold the property, free from the mortgage, and in exercise of the trust for sale contained in the will, and, in his double character of real and legal representative, joined with the mortgagee in conveying the same to the purchaser.

Held, that the whole of the legal and beneficial interest in the property sold passed to the purchaser by the conveyance of the heir at law and mortgagee, and that he, on reselling the property, could shew a good title without the necessity of a new trustee of the will being appointed to confirm the previous sale.

In a purchaser's suit for specific performance the court, at the request of both parties, and on an assurance that the only question in dispute was one of title, which the court was asked to decide, made a declaration that the defendant could shew a good title without directing a reference as to title on the settlement of the conveyance, at Chambers.

V. C. S. *May 28.*

THE MARCHIONESS OF LONDONDERRY v. BAKER.

Pleading—Res judicata—Sufficiency of plea.

Plaintiff filed a bill, to which a demurrer was allowed, with leave to amend; no amendment was made, and the bill stood dismissed. Subsequently she filed a bill in another court in the same matter, and praying the same relief, but allegations of actual fraud. Defendant pleaded that this bill was for the same matter as the former was for. *Held* that the plea was bad, for not averring that the allegations in support of the matter were the same as in the former bill.

V. C. W. HARE v. WESTROPP. *June 10.*

Will—Construction—Absolute gift.

Testator, after directing payment of his debts and legacies, gave to his wife all the property, whatsoever and wheresoever he possessed, at his death. This gift was followed by a gift of all his residuary estate whatsoever and wheresoever, real and personal, whether in possession, reversion, remainder, or expectancy, in trust, to permit his wife to have the use and enjoyment during her life, and after her death amongst the children absolutely.

Held, that the will was not void for uncertainty, and that the wife took for life with remainder to her children.

M. R. HOLLAND v. ARNOLD. *April 16, 30. May 2.*

Will—Construction—"Surviving" read "other."

The word "surviving" in a will read "other" upon a consideration of the whole scope of the will.

L. J. FORD v. TENNANT. *June 1.*

Practice—Plea for want of parties—Personal equity—Judgment creditors—Solicitor and client.

In a suit by the representative of a client against his solicitor to obtain the benefit of a purchase by the solicitor of a charge on the client's estate, it is not necessary to make the judgment creditors of the client parties.

V. C. S. WILKINS v. HOLD. *May 8.*

Trustee—Breach of trust—Indemnity clause.

A testatrix, by her will, declared that each trustee should be answerable only from losses arising from his own defaults, and not for involuntary acts, or for the acts or defaults of his co-trustees or co-trustee, and particularly that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any money for the general purposes of the will, or for any definite purpose authorized by the will, should not be obliged to see to the due application thereof, nor be rendered responsible by express notice of misapplication of the monies; but this clause should not restrict the right of any trustee to require an account from his co-trustee, or to make him replace monies misapplied Two trustees entrusted the trust fund to a third for investment, and he immediately misapplied it.

Held that the two were not liable to make good the fund.

L. J. *April 27, 29. May 7.*

CLAYTON v. CLARKE.

Practice—Infant—Administrator—Next friend—Costs.

Where a bill is filed by an infant against his trustees and guardians, and a decree is made for the usual accounts, the court will not at the same time direct an inquiry whether any and what benefit has accrued to the infant from the institution of the suit.

It is a *prima facie* benefit to an infant to be made a ward of court, and to have his property secured and duly administered.

The court will take into consideration the motives which actuated the next friend in instituting the suit, and if it appears that the next friend had other motives than the benefit of the infant, the court will deprive him of his costs.

V. C. S. RE PEEL'S WILL. *June 20.*

Will—Substitutional gift—Period of vesting.

On a gift to such of several legatees as should be living at the death of a tenant for life, "and the issue of such of them as should be then dead leaving issue," *Held*, that on the death of one of the original legatees, his share vested absolutely in his issue, though they did not survive the tenant for life.

V. C. K. AYLWIN v. WITTY. *June 11.*

Principal and surety—Policy of insurance—Covenant to pay premiums—Lien—Surety.

D. and P. join in a covenant in a mortgage deed (as sureties) to pay the premiums on life policies, forming part of the securities, and by a contemporaneous interest, to which they are not parties, the equity of redemption is assigned in trust for the benefit of the creditors of the mortgagor. D., who signs the trust deed as a creditor, being called upon to pay the premium on one policy, applies to B. to do so for him, and assigns to B. the policy; and B covenants to pay future premiums. The mortgage is paid off, B. pays the premiums, and the policy is sold by the trustee of the creditor's deed, under a power contained in it. A creditor's suit being instituted; on the question whether D. and P. are entitled

as against the other creditors to a lien upon the produce of the policy, *Held*, that as between D. and B., and B. and the creditors, such creditors are not entitled to take the money without making payment in satisfaction of the premiums paid by B.

L. C. & L. L. J. *March* 16, 20. *May* 7.

MARRIOTT v. THE ANCHOR REVERSIONARY CO.

Mortgage of ship—Duties and liabilities of mortgagee in possession—Postponement of sale—Right of using mortgaged property.

A mortgagee in possession of a ship is not chargeable, if, in the prudent exercise of a fair discretion, he abstains from selling her; but if a sale cannot reasonably be effected, though he is entitled to employ the ship at the risk of the mortgagor in the ordinary course of business, and in such a manner as a prudent man would use her if she were his own property, yet, if he employs her imprudently, or in a trading speculation, he is chargeable with the value of the ship at the time when he took possession of her. (*Dissentients* on this point, TURNER, L. J., who considered that the mortgagee should only be charged with what the vessel ought to have earned if she had been chartered in the ordinary course, and with any damage which she had sustained beyond ordinary wear and tear.)

M. R. THOMPSON v. THOMPSON. *June* 7.

Will—Construction "surviving"—Period of survivorship—Death of tenant for life.

Bequest of leasehold property (described in the will as copy hold) in trust for the testator's wife for life, and at her death to be disposed of for the benefit of his surviving children, share and share alike.

Held, that the period of survivorship must be referred to the death of the tenant for life.

V. C. K. NICHOLSON v. NICHOLSON. *May* 29.

Joint Stock Company—Bonus—Capital and income.

In the deed of settlement of an insurance company there is a provision that before a dividend shall be declared a reserve fund shall be set apart of not less than £2 per cent. of the annual interest of the sum advanced, to be appropriated as a sinking fund until the whole capital is raised as a permanent fund. The funds are accumulated, although no reserve fund is actually set apart, and bonuses are triennially divided. The company then amalgamates with another company, and the shareholders have the option of receiving £5 per share on paid up capital, or having an allotment of the shares and also of receiving a share of the surplus assets. N., a married woman, is entitled to the income of ten shares, which are settled on herself for life, with remainder to her children, and has received the bonuses. On the amalgamation taking place the trustees of N.'s settlement receive the £50, and the share of N. of the surplus claiming such surplus as capital, whereas N. claims it as income, and files a Bill for a declaration to that effect.

Held, that the share of the surplus assets is capital, and subject to the trusts of the settlement.

M. R. *April* 25, 26—*May* 25.

HANNAH v. HODSON.

Vendor and purchaser—Conveyance of reversionary interests—Legal estate outstanding—Bill to complete the conveyance—Fairness—Onus probandi—Pleading—Impeachment of deed by answer—Cross bill.

The father and mother of a family induced their children to join with them in conveying to a purchaser certain property which was held under a will in trust for the parents for life successively, remainder to the children equally. The children received none of the consideration money, although it was expressed to be paid to them as well as their parents. The trustee of the will objected to the transaction, and refused to convey the legal estate to the purchaser. A Bill filed after the death of the surviving tenant for life against the trustee and the children for a conveyance of the legal estate was dismissed.

Where a father and son join in conveying for value property settled on the father for life, remainder to the son in fee, it is necessary, to support the conveyance, that everything should be straightforward, also that it should be complete, and not rest *in fieri*, and the burden of proof of fairness lies on the party afterwards seeking to have it completed.

Where a party to a deed comes to the Court to have a deed and the transaction it represents completed, the deed may be impeached by the answer of the defendants, and a cross bill to set it aside is not necessary.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

THE HONORABLE SIR JOHN BEVERLY ROBINSON, Baronet, C. B., late Chief Justice of Upper Canada, to be the presiding Judge of the Court of Error and Appeal for Upper Canada, according to the statute 24 Vic. cap. 36.—(Gazetted March 15, 1862.)

THE HONORABLE ARCHIBALD McLEAN, one of Her Majesty's Justices of the Court of Queen's Bench in Upper Canada, to be the Chief Justice of Upper Canada, in the room and stead of the Honorable Sir John Beverly Robinson, C.B. resigned.—(Gazetted March 15, 1862.)

THE HONORABLE PHILIP MICHAEL MATHEW SCOTT VANKOUGHNET, Q. C., to be Chancellor of Upper Canada, in the room and stead of the Honorable William Hume Blake, resigned.—(Gazetted March 19, 1862.)

THE HONORABLE JOHN HAWKINS HAGARTY, one of the Judges of Her Majesty's Court of Common Pleas in Upper Canada, to be one of the Judges of Her Majesty's Court of Queen's Bench for Upper Canada, in the room and stead of the Honorable Archibald McLean, appointed Chief Justice of Upper Canada.—(Gazetted March 19, 1862.)

THE HONORABLE JOSEPH CURRAN MORRISON, Solicitor General for Upper Canada, to be one of the Judges of Her Majesty's Court of Common Pleas for Upper Canada, in the room and stead of the Honorable John Hawkins Hagarty, appointed a Judge of Her Majesty's Court of Queen's Bench in Upper Canada. (Gazetted March 19, 1862.)

SOLICITOR GENERAL.

THE HONORABLE JAMES PATTON, to be Solicitor General for Upper Canada, in the room and stead of the Honorable Joseph C. Morrison, resigned.—(Gazetted March 29, 1862.)

QUEEN'S COUNSEL.

THE HONORABLE JAMES PATTON, to be one of Her Majesty's Counsel learned in the Law in Upper Canada.—(Gazetted March 29, 1862.)

NOTARIES PUBLIC.

HENRY IRSKINE IRVINE, of the city of Hamilton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

ALFRED FISHER, of Farnia, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 15, 1862.)

WILLIAM JOHNSON, of Colborne, Esquire, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

THOMAS McNAUGHTON, of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

THOMAS DOUGLAS LEDYARD, of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

GEORGE MORPHY, of Toronto, Esquire, Barrister-at-law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

JOHN KEITH GALBRAITH, of Bowmanville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

WILLIAM DANIELL, of London, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

GEORGE JAMES WELLER, of Lindsay, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 15, 1862.)

FEATHERSTONE OSLER, of the city of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 22, 1862.)

CORONERS.

WILLIAM JOHN KLOPHELL, Esquire, Associate Coroner, County Brant.—(Gazetted March 14, 1862.)

WILLIAM JOHN KLOPHELL, Esquire, Associate Coroner Town of Brantford. (Gazetted March 15, 1862.)

GEORGE R. WELDON, Esquire, Associate Coroner, County of Hastings.—(Gazetted March 22, 1862.)

REGISTRARS.

DAVID S. SHOEMAKER, Esquire, to be Registrar of the North Riding of the County of Waterloo.—(Gazetted March 15, 1862.)

WARD HAMILTON BOWLBY, Esquire, to be Registrar of the South Riding of Waterloo.—(Gazetted March 15, 1862.)

TO CORRESPONDENTS.

"CHARLES ROBINSON, Co. J."—"CLERK 6TH DIVISION COURT, Co. NORFOLK"—Under "Division Courts."

"W."—Under "General Correspondence."

DIARY FOR MAY.

1. Thursday ..... Last day for notice to County of apportionment of Grammar School monies.
3. Saturday ..... Articles, &c., to be left with Secretary of Law Society.
4. SUNDAY ..... *2nd Sunday after Easter.*
10. Saturday ..... Chancery Hearing Term ends.
13. SUNDAY ..... *3rd Sunday after Easter.*
14. Wednesday ..... Last day for service of Writ County Court.
18. SUNDAY ..... *4th Sunday after Easter.*
19. Monday ..... EASTER TERM begins.
23. Friday ..... Paper Day, Q. B.
24. Saturday ..... Queen's Birthday. Paper Day, C. P. Declare for Co. Court.
25. SUNDAY ..... *Rogation.*
26. Monday ..... Paper Day, Q. B.
27. Tuesday ..... Paper Day, C. P.
28. Wednesday ..... Paper Day, Q. B.
29. Thursday ..... Paper Day. C. P.
31. Saturday ..... EASTER TERM ends. Last day for Court of Revision finally to revise Ass't Roll, and for Co. Court to revise Tp. Roll.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

MAY, 1862.

PROCEDURE AT NISI PRIUS.

In the trial of every cause by jury there are functions appertaining to judge, counsel and jury, which functions are quite independent of each other, but the proper discharge of which are essential to the due administration of justice.

In common parlance, the jurors are the judges of the fact as the judge is of the law. Each counsel advocates the right of his client to a verdict on the law and facts, under the direction of the judge.

There are two sides to every cause brought before a jury. One must prevail. It is for the jury, taking the law from the judge, to decide between the parties and a true verdict give according to the evidence.

It is the duty of the judge to decide all questions as to the admissibility of evidence, to instruct the jury in the rules of law by which the evidence admitted is to be weighed, and generally to explain the principles of law governing the questions at issue.

The trial is as it were a legal combat—the counsel the combatants, the judge the moderator, and the jury the arbiters upon whose decision rests the result of the conflict.

In order to the economy of time and the decent administration of justice, law givers have found it necessary to make regulations for the conduct of counsel in their addresses to the jury.

It is as necessary that one party should begin as that the other should end. There is often a struggle for the right to begin, where it carries with it the right to reply. The "last word" with the jury by many is looked upon as an object of importance.

It is provided by the Common Law Procedure Act that the addresses of counsel to the jury shall be regulated as follows:—"The party who begins is allowed (in the event of his opponent *not* announcing, at the close of the case of the party who begins, his intention to adduce evidence) to address the jury a second time, at the close of such case, for the purpose of summing up the evidence; and the party on the other side is allowed to open the case and also to sum up the evidence if any, and the right of reply shall be the same as at present." Con. Stat. U. C. cap. 22, s. 209.

It will be observed that this enactment in no respect alters the previously existing law as to the right to begin and right to reply. It merely provides for intermediate speeches under a given state of circumstances.

First, let us consider what was the law as to right to begin and right to reply before the Common Law Procedure Act; and then, secondly, let us consider the meaning of the clause of the Common Law Procedure Act which we have quoted.

The issue or question to be tried is eliminated by pleadings. That issue has an affirmative and a negative. It is in general the duty of the party who affirms to make out his case. The burden of proof rests upon him. One test is this—what would be the consequence if no evidence were offered at all? If in such case the verdict ought to be given for one party, it is manifest that something must be done by the other to prevent that consequence. He who must give the evidence to prevent that result is the party to begin (per Alderson, B., in *Geach* v. *Ingall*, 14 M.&W. 100). Another test is to consider—what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the right to begin lies on whichever party would fail if this step were taken (per Alderson, B., in *Millis* v. *Barber*, 1 M. & W. 427).

To the rule as just stated there are a few exceptions, as in actions for libel, slander, and injuries to the person, in which cases plaintiff has the right to begin though the affirmative of the issue be on the defendant (per Parke, B., in *Cannam et al.* v. *Farnier*, 3 Ex. 698). We cannot at present enter into any examination of the exceptions. We must content ourselves with referring to Taylor on Evidence, 2 Edn. p. 319.

It is the practice of skilled counsel, conscious of a right to reply when beginning or opening a case, to confine themselves to a brief statement of the facts, and then to call the witnesses in proof of the facts stated. A party is not bound by an inadvertent statement made by counsel in opening a case, where such statement is promptly retracted. (*Jannette* v. *Great Western Railway Co.*, 4 U.C.C.P. 483.)

The party who begins, where there is evidence called for the defence, has the right to reply on the whole case. This is the general reply. It is for this that counsel so often contend and to this that success is so often attributed. Of course much depends upon the counsel who has this advantage, whether or not he make a good use of it. It is for him to use and not to abuse his privilege. Where counsel in a general reply abuses his privilege, he is certain to be followed by remarks from the presiding judge of a counteracting tendency. It is much wiser for counsel having the general reply to keep within the bounds of discretion. An opposite course is worse than no reply at all. It renders it necessary for the presiding judge to argue against him and appear to assume the functions of an advocate rather than those of a judge. The influence of the judge, whose position makes him impartial, is in such a case all powerful.

So much for the right to begin and right to reply. Now for the intermediate speeches. Each party has under certain circumstances a right to sum up evidence. Counsel for the party who begins has that right in the event of his opponent *not* announcing his intention to adduce evidence. Where counsel did not announce his intention to adduce evidence, in consequence of which the counsel who began summed up his evidence, the court refused to allow his opponent to change his mind and adduce evidence. (*Darby* v. *Ouseley*, 2 Jur. N. S. 497.) Where plaintiff's counsel opened the case and called his witnesses, and then, without requiring defendant's counsel to announce whether he intended or not to call witnesses, allowed him to address the jury, and at the conclusion of his speech announced that he did not intend to call witnesses, plaintiff's counsel was held to be too late to claim the reply. (*Gibson* v. *The Toronto Roads Company*, 8 U.C. L J. 11.)

The intermediate speech on either side is only allowed for the purpose of summing up evidence, that is, evidence proper for the jury. It is for the presiding judge to determine whether or not there is evidence to go to the jury. If he rule that there is no such evidence, there is no right to sum up that which does not exist. An address to the jury in a case where there is no evidence could only have the effect of inciting the jury to take the matter into their own hands and to decide in opposition to the ruling of the judge. It would be in fact allowing an appeal from the judge to the jury in a matter which is within the jurisdiction of the judge alone. No doubt there may be a discussion as to whether or not there is evidence to go to the jury. That discussion takes place in the presence of the jury as it does in the presence of any others at the time in court. The court is open to all; but the decision of this question, whether there is evidence or not, rests with the judge and none other. Where the judge is of opinion that there is no evidence, it is not the course for him to read his notes to the jury, telling them that he thinks there is no evidence and hoping that they concur with him, but he tells them that there is no evidence, and, unless plaintiff accepts a nonsuit, tells them in law to find a verdict for defendant. If the judge be wrong in such direction, the constitutional mode of correcting the error is either to tender a bill of exceptions, or more commonly to move the court in banc. and not to argue at the judge through the jury or at the jury through the judge (per Pollock, C. B., in *Hodges* v. *Ancrum*, 11 Ex. 214).

If counsel dispute as to the right to begin to sum up evidence or reply, it is for the presiding judge to determine the dispute. The parties for the time at all events are bound by his decision. If it be afterwards clearly made to appear that the judge was wrong in his ruling, and that substantial injustice has resulted therefrom to either party, that party can have the error corrected by an application to the court in banc. (*Brandford* v. *Freeman*, 5 Ex. 734; *Doe Baker* v. *Brazne*, 5 C. B. 655.)

COLONIAL COUNSEL IN ENGLAND.

The following is an extract, which we take from the *Lower Canada Jurist*, from a letter addressed by the Registrar of the Privy Council to Robert Mackay, Esq., an eminent advocate of Lower Canada.

COUNCIL OFFICE, WHITEHALL,
November 25th, 1861.

In answer to your question, I beg to inform you that the Bar of the Privy Council is an open bar to all all advocates duly qualified in the Colonies and Dependencies from which appeals lie to the Queen in Council; and consequently any Canadian advocate would be heard by their Lordships in Canadian appeals.

(Signed,) HENRY REEVE,
Reg. P. C.

The communication is an important one, and as such we copy it for the information of our readers. We do not think that the members of the Bar in Upper Canada have hitherto been aware that they have the privilege which it mentions. The privilege is of great value. The knowledge of Colonial law acquired by counsel in England on occasion of a particular appeal is oftentimes too slender to enable them to do justice to the interests entrusted to them. Therefore it may be that in cases of importance some of our local bar will be found both ready and willing to avail themselves of the privilege.

Any person who has been duly called to the Bar of any of Her Majesty's Superior Courts in England, Scotland or Ireland, not being courts of merely local jurisdiction, are entitled to be called to the Bar in Upper Canada.

It might be well for the English Benchers to consider whether or not reciprocity might not be extended to Colo-

nial barristers desirous of removing to England. Very few perhaps would be found courageous enough to entertain the idea of availing themselves of any such measure of reciprocity; but that of itself is no reason why some such measure should not exist. It would be a great compliment to the Colonies, many of which have courts and laws as nearly as possible similar to those of the mother country. We make the suggestion for what it is worth.

RECORDERS' COURTS.

There appears to be some fatality as to the time for holding Recorders' Courts—there is no certainty about it. There is not a Session of Parliament without some legislation on the subject.

By the Municipal Institutions Act, sec. 377, it was enacted that there should be four sessions, to commence

2nd Monday in January.
1st Monday in April.
1st Monday in July.
1st Monday in October.

By the 23 Vict., cap. 50, the times were altered as follows:

2nd Monday in January.
1st Monday in April.
1st Monday in July.
3rd Monday in November.

The Attorney General has during the present Session introduced a bill which enacts, that the times shall be as follows:

1st Monday in March.
1st Monday in June.
1st Monday in September.
3rd Monday in December.

We presume these alterations are intended to relieve Courts of Assize in cities of some portion of the criminal business which, under existing arrangements, falls to the lot of the Superior Court Judges, and which might as well be tried before inferior tribunals.

BILLS OF SALE AND CHATTEL MORTGAGES.

Attorney General Macdonald has introduced a Bill designed to set at rest the conflict between the Courts of Queen's Bench and Common Pleas, as to the effect of a writ of execution upon a Bill of Sale or Chattel Mortgage executed but not filed.

It amends section 1 of Consol. Stat. U. C., cap. 45, by adding thereto the words, "and every such mortgage or conveyance shall operate and take effect from the day and time of the execution thereof."

The amendment is to be so far retrospective as "to apply to and effect all mortgages and conveyances which have been heretofore executed under and according to the provisions of the Act 20 Vic., cap. 33, or under and according the provisions of Consol. Stat. U. C., cap. 45, except in those cases which may have been heretofore *adjudicated* upon in any of the Courts of Law or Equity in Upper Canada."

NEW CHANCERY ORDERS.

MONDAY, 28th April, 1862.

SITTINGS OF COURT.

Sections 1, 2, 3, 4 and 5 of Order number Three of the General Orders of the 23rd December, 1857, are hereby abrogated and discharged.

The Judges of the Court will sit separately and by alternate weeks as follows:

One Judge will sit daily in each week for the dispatch of all business other than Re-hearings and Chamber business.

The business before such Judge will be taken as follows:

Monday	Motions.
Tuesday & Wednesday	Hearings pro confesso; Motions for Decree; further directions; Appeals from Master's Reports.
Thursday, Friday and Saturday.....	Hearings of causes; Demurrers (excepting during Re-hearing Term.)

SETTING DOWN CAUSES.

The party who desires to have a cause set down to be heard is to enter it with the Registrar for that purpose, at least fourteen days before the day for which the same is so set down.

LISTS TO BE PREPARED BY THE REGISTRAR.

The Registrar is to prepare lists of all causes entered for hearing, making a separate list of all the causes to be heard before each judge. Each cause is to be set down in the order in which it has been entered with the Registrar. Causes are to be called on and heard according to the Registrar's list, unless the court order otherwise.

NOTICE OF HEARING.

Notice of hearing must be served by the party setting down the cause upon all proper parties for a proper day falling within the week in which the judge in whose list the same is set down is to sit; and such notice is to be served not less than twelve days before the day for which such notice is given.

RE-HEARING OF CAUSES.

There are to be Four Re-hearing Terms in each year, commencing respectively as follows:

1.—The second Thursday in March.
2.—The first Thursday in June.
3.—The second Thursday in September.
4.—The first Thursday in December.

All re-hearing of causes are to be in Re-hearing Terms only.

Applications in the nature of re-hearings to discharge or vary orders made in court are to be made in Re-hearing Terms only, except with the leave of the judge pronouncing the order sought to be discharged or varied.

APPEALS FROM ORDERS MADE IN CHAMBERS.

One judge will sit daily in each week for the dispatch of business in Chambers.

Matters adjourned from Chambers under section three of Order thirty-four of the General Orders of the 3rd June, 1853, and applications in the nature of re-hearings to discharge or vary orders made in Chambers, are to be heard in full Court, on the last Wednesday of every month, except during Examination Terms.

The foregoing orders are to come into operation on the twelfth day of May next: but causes may be set down and notice may be given of proceedings to be taken under the said orders from the day of the date hereof.

READING DEPOSITIONS IN OTHER CAUSES.

Any party shall be entitled in future, upon notice, without order to use depositions taken in another suit in cases where, under the present practice, he is entitled to use such depositions, upon obtaining the common order for that purpose.

EXAMINATION OF PARTIES TO SUITS.

Any party defendant may be examined as a witness without order, on behalf either of the plaintiff or of a co-defendant; and any party plaintiff may be examined as a witness, without order, by a co-plaintiff or by a defendant in cases where, under the present practice, such examination may be had upon the common order being obtained for that purpose.

RE-TAXATION OF COSTS.

It shall be competent for any party against whom costs have been taxed by a deputy master of this court to obtain, as of course, an order for a re-taxation of the same, before the taxing officer of this court at Toronto.

It shall be the duty of the party obtaining such order to deposit with the deputy master and registrar with whom the papers are filed a sufficient sum to cover the expenses of transmitting the same to Toronto, and of the return thereof.

In case less one-twentieth be taxed off upon re-taxation, the costs of such re-taxation shall be added to the bill already taxed.

This order is to apply to bills of costs already taxed as well as to bills that may hereafter be taxed; but it is not to apply to cases where the costs have been paid or final proceedings have been taken upon the taxation of costs already had. Process for the levying of such costs is not to be deemed a final proceeding within the meaning of this order.

(Signed,) P. M. Vankoughnet, C.
J. C. P. Esten, V. C.
J. G. Spragge, V. C.

HABEAS CORPUS IN THE COLONIES.

The Bill now before the Imperial Parliament respecting the issue of writs of Habeas Corpus to the Colonies from England, enacts that "no writ of habeas corpus shall issue out of England by authority of any Judge or Court of Justice therein into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having authority to grant and issue the said writ and to insure the due execution thereof throughout such colony or dominion: Provided that nothing contained in this Act shall affect or interfere with any right of appeal to Her Majesty in Council now by law existing."

COMMON LAW PROCEDURE ACT.

Dr. Connor has, during the present Session of the Provincial Legislature, introduced a bill for the amendment of the Common Law Procedure Act.

Section 1 enacts that when goods or chattels have been seized in execution by a sheriff or other officer under process of the above mentioned courts, and some third person claims to be entitled, under a bill of sale or otherwise, to such goods or chattels by way of security for a debt, the court or a judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise, as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such court or judge may seem just.

Section 2 enacts that, upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the court or judge, whenever, from the smallness of the amount in dispute or the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

Section 3 enacts that in all cases of interpleader proceedings, where the question is one of law, and the facts are not in dispute, the judge shall be at liberty in his discretion to decide the question without directing an action or issue, and, if he shall think it desirable, to order a special case to be stated for the opinion of the court.

Section 4 enacts that the proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under the Common Law Procedure Act; and error may be brought upon a judgment upon such case, and the provisions of the Common Law Procedure Act, as to bringing error upon a special case, shall apply to the proceedings in error upon a special case under this act.

Section 5 enacts that the judgment in any such action or issue as may be directed by the court or judge in any interpleader proceedings, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties and all persons claiming by, from or under them.

Section 6 enacts that all rules, orders, matters and decisions to be made and done in interpleader proceedings under this act

(excepting only any affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment in the superior courts of common law at Toronto.

Section 7 enacts that the joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist, and judgment may be given in favor of the plaintiffs by whom the action is brought, or one or more of them, or in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the court to be entitled to recover; provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by a court or judge.

Section 8 enacts that, upon the trial of such a cause, a defendant who has therein pleaded a set-off may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs who establish their right to maintain the cause is or are indebted to him.

Section 9 enacts that no other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action.

Section 10 enacts that the plaintiff in replevin may, in answer to an avowry, pay money into court in satisfaction, in like manner and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions.

Section 11 enacts that such payment into court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction work a forfeiture of the replevin bond.

Section 12 enacts that, in proceedings to obtain an attachment for debts under the Common Law Procedure Act, the judge may in his discretion refuse to interfere where, from the smallness of the amount to be recovered, or of the debt sought to be attached or otherwise, the remedy sought would be worthless or vexatious

Section 13 enacts that whenever, in proceedings to obtain an attachment of debts under the act above mentioned, it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the judge may order such third person to appear before him and state the nature and particulars of his claim upon such debt.

Section 14 enacts that, after hearing the allegations of such third person under such order, and of any other person whom, by the same or any subsequent order, the judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the judge may order execution to issue to levy the amount from such garnishee, or the judgment creditor to proceed against the garnishee according to the provisions of the Common Law Procedure Act; and he may bar the claim of such third person, or make such other order as he shall think fit, upon such terms, in all cases, with respect to the lien or charge, if any, of such third person, and to costs, as he shall think just and reasonable.

Section 15 enacts that the provisions of the Common Law Procedure Act, so far as they are applicable, shall apply to any order and the proceedings thereon, made and taken in pursuance of the herein next before mentioned powers under this act.

Section 16 enacts that the superior courts of common law at Toronto, and every judge thereof, and any judge sitting at *nisi prius*, may at all times amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made if duly applied for.

Section 17 enacts that the judges of the said courts, or any four or more of them, of whom the Chief Justices shall be two, may from time to time make all such general rules and orders for the effectual execution of this act, and of the intention and object thereof, and for fixing the costs to be allowed for or in respect of the matters herein contained, and the performance thereof, as in their judgment shall be necessary and proper; provided that nothing herein contained shall be construed to restrain the authority or limit of jurisdiction of the said courts or of the judges thereof, to make rules or orders or otherwise to regulate and dispose of the business therein.

Section 18 limits the act to Upper Canada.

COSTS OF ARBITRATORS.

The practice of allowing arbitrators to be the judges of the amount of their own fees has been productive of much abuse—so much so, that we are glad to find the Attorney General offers to supply a remedy. He has introduced a Bill intitled, "An Act for regulating costs of arbitrators." It is short.

Section 1 enacts that the Judges of the Superior Courts of Common Law in Upper Canada, may from time to time establish a scale of fees to be paid to professional or special Arbitrators, such as barristers, attorneys, physicians, surgeons, engineers, architects, surveyors, and regular accountants, in all cases of arbitration in Upper Canada, and also fees to counsel and attorneys attending before arbitrators, and the allowances to witnesses for their attendance.

Section 2 enacts that every bill of costs upon any arbitration shall be taxed before the principal Master of the Court in which the same shall be pending, according to such scale of fees, and such Master may, in his discretion, call for evidence to satisfy him of the nature and importance of the questions submitted.

Section 3 enacts that no taxation of arbitrators' counsel or other fees under this Act, shall be made without an affidavit of the party, his agent or attorney preferring such bill, of the actual length of each day's sitting, and that the time charged for was *bonâ fide* occupied on the business of the arbitration; all other charges and disbursements to be proved in the usual manner.

Section 4 enacts that any arbitrator refusing to deliver his award to the party entitled to the same, on tender of his fees settled under authority of this Act, after a reasonable time shall have elapsed for the making up and executing the same, shall be deemed guilty of a contempt of court, and may be dealt with accordingly.

Section 5 enacts if any arbitrator shall recive for his fees a larger sum than shall be afterwards allowed on taxation, this difference shall constitute a debt due by him to the party who paid the same, and may be recovered with double costs (after demand and refusal) before any court of competent jurisdiction.

Section 6 enacts that the foregoing provisions which relate to arbitrators and witnesses, shall apply to all arbitrations in the county court of Upper Canada, provided that the fees shall be reduced by one-third, and that the taxation shall take place before the Clerk of the county court.

SELECTIONS.

THE BENCH AND THE BAR.

LORD JUSTICE SIR JAMES LEWIS KNIGHT BRUCE.

Towards the latter end of the last century, John Knight, Esq. of Fairlinch, in Devonshire, married a lady named Margaret Bruce, and became the father of three sons: the first of whom was John Bruce Pryce, Esq., an active county magistrate in the neighbourhood of Cardiff, and father of Henry Austin Bruce, Esq., M.P. for Merthyr; the second was the Rev. William Bruce Knight, Dean of Llandaff; and the third was the subject of this sketch, who was born at Barnstaple in Devonshire.

In 1817 he was called to the Bar at Lincoln's Inn. He had previously married Miss Newte, daughter of Thomas Newte, Esq., formerly of Duvale, in Devonshire, by whom he has had several children, of whom three are now alive.

In 1829 he was made Queen's Counsel, and in 1841 became Vice-Chancellor. In 1842 he was appointed one of the members of the Privy Council, and knighted.

For some time, in the year 1850, the excellent Vice-Chancellor Wigram, owing to failing sight, was unable to sit in Court. In the same year the Vice-Chancellor of England, Sir L. Shadwell, became ill; and, in consequence, for several weeks, until the rising of the Court in August, the whole business of the three Courts was conducted by Vice-Chancellor Knight Bruce alone. At the close of the sittings the then Attorney-General, Sir John Romilly, expressed in an address in court the sense entertained by the Bar on the occasion. The address is given at the commencement of the 4th volume of De Gex & Smale's Reports, and was in these words:—

"Before the Court rises for the vacation, I am desirous of saying, on behalf of the Bar, a few words. It is now for several weeks that the whole business of the Court of Chancery, distributed among the three Vice Chancellors, has been borne by your Honour alone. That business, at all times very heavy at this season, has been this year greatly increased by the numerous applications which have arisen under a new practice introduced into the Court. I am requested by the Bar to testify our respectful admiration at the knowledge and ability with which this mass of business has been disposed of, and to express our gratitude for the unvarying and unwearied attention with which your Honour has listened even to the youngest among us. I need not add, how gratifying it is to me to be made the organ of this communication."

Later in the same year, on the occasion of the death of the lamented Sir L. Shadwell, the Vice-Chancellor Knight Bruce addressed the Bar in the following words, also given in the book above referred to:—

"Mr. Attorney-General,—It is impossible for me to enter this Court to-day without a renewal of sorrow for the loss of one who has been so lately taken from us, and by whom this chair has been filled for so many years, that it is almost startling to hear from it another voice than his. With this feeling I am sure you all sympathise. We have lost at once a friend who was dear to us, and a Judge distinguished for his great knowledge of the law which he administered—distinguished for his various acquirements—distinguished for his unwearied patience—'swift to hear,' 'slow to wrath,'—pure and blameless in his life, an example of courtesy, gentleness and amenity, who never uttered a word intended to give pain, nor harboured one unkind thought, or one acrimonious feeling.—But he is gone.—*Flere et meminisse relictum est.*"

In 1851, when alterations were made in the Court of Chancery, and a fresh tribunal was appointed, Vice-Chancellor Knight Bruce was, with Lord Cranworth, selected for the new office thus created, and became a Lord Justice of the Court of Appeal in Chancery.

SIR HUGH MACALMONT CAIRNS, M.P.,

Sir Hugh Macalmont Cairns is the second son of the late William Cairns, Esq., of Cultra, in the county of Down, Ireland.

Sir Hugh was born 27th December, 1819, and was educated at Trinity College, Dublin, which he entered in 1834, taking first class in classics, and other honours, throughout his Collegiate course. Sir Hugh commenced his legal career early. In 1844, he was called to the Bar. As a Chancery Barrister he soon attained high rank, and in 1856 was appointed one of Her Majesty's Counsel, and a Bencher of the Honourable Society of Lincoln's Inn.

In 1852, at the general election of that year, Sir Hugh Cairns was returned as M.P. for Belfast. When, in the spring of 1858, the conservative ministry under Lord Derby was formed, Sir Hugh was made Solicitor-General and received the honour of Knighthood. In this capacity he did good service on two occasions that will long be remembered: on the 19th of May, 1858, on Mr. Cardwell's motion for a vote of censure on Government for the despatch transmitted to the Governor-General of India by Lord Ellenborough, in reference to the proclamation respecting the confiscation of Oude, Sir Hugh Cairns delivered a speech of great power, which was afterwards printed and widely circulated; and afterwards, in a speech which won universal applause for its clearness and philosophical precision, Sir Hugh obtained leave to bring in a Bill for the introduction of a reform, long and imperatively required. We refer to his Bill to simplify the titles to Landed Estates. Our leading law reformers had been talking about such a measure for years; and while they warned Sir Hugh of the difficulties in his way, they were compelled to confess their admiration and delight at his attempt. Even the *Times* acknowledged that on the latter occasion, besides the luminous arrangement and the clear and accurate statement which adorned it, the speech of Sir Hugh was distinguished from most of those usually heard within the walls of Parliament, by the abstract and philosophical nature of the principles on which it was based.

Sir Hugh married, in 1856, Mary Harriet, daughter of the late John Mac Neile, Esq., of Parkmount, County Antrim.

SIR WILLIAM PAGE WOOD, VICE CHANCELLOR.

Vice-Chancellor Sir William Page Wood, the second son of Sir Matthew Wood, Bart., M.P., was born on the 29th of November, 1801, and was named Page, after his mother, a Suffolk lady. He studied at Winchester—at the Auditoire, Geneva—and at Trinity College, Cambridge. In 1824 he took his Wrangler's degree; in 1825 he was elected a Fellow of Trinity; and in 1834 he was elected a Fellow of the Royal Society. In Michaelmas Term, 1827, he was called to the Bar, and in February, 1845, was appointed Queen's Counsel.

There was a general election in 1847, and Mr. Wood was elected for the city of Oxford, with his colleague, Mr. Langston without opposition. In 1849, Mr. Wood introduced a bill to substitute Religious Affirmation for Oaths in certain cases, and in 1850 he re-introduced the bill. In each year the bill passed the House of Commons, but was rejected in the Lords. The principles of it have since been fully embodied in the Common Law Procedure Act. When, in 1850, on the 28th of February, Mr. Hume moved a series of resolutions, with a view to the introduction of a household suffrage, vote by ballot, an increase in the number of representatives, the abolition of the property qualification, and the limitation of the duration of Parliament to three years, Mr. Wood spoke and voted in favour of the motion, stating that he differed in some details. When Mr. Gladstone introduced a bill in favour of giving the Church of England synodical action in the Colonies, Mr. Wood aided him by his speech and vote. On March 7th, 1850, Mr. Wood introduced a bill to prevent vestry and other meetings in churches, by authorising the vestry to raise, by a rate, a sufficient sum to erect vestry halls. This bill became law. In the memorable debate in that year on Lord Palmerston's foreign policy, Mr. Wood was one of the speakers in its favour.

On the question of admission of Jews into Parliament, Mr. Wood bore a distinguished part. On March 12th, 1849, on the motion of Mr. Wood, a committee was appointed to search for precedents in the case. On the 26th of July, 1850, the Baron Rothschild came to the table of the House, introduced by Mr. Wood and Mr. John Abel Smith, to take the oaths and his seat. A discussion ensued. Mr. Hume moved an amendment, in favour of the Baron being sworn on the Old Testament, which amendment was carried; and when the Baron had done this, Mr. Wood argued that on the part of the Baron there had been a valid taking of the oath. One of the last acts of Mr. Wood, before taking office, was to support Lord John Russell's bill for counteracting the aggressive policy of the Church of Rome. Shortly after this, Mr. Wood voted in the majority on Mr. Locke King's motion for introducing the £10 qualification for electors in counties, which led to the resignation of Lord John Russell, and the acceptance of office by Lord Derby in 1851. On the latter nobleman's failing to form an administration, Lord John Russell returned to office, and announced his readiness to introduce a measure for Parliamentary Reform. He soon afterwards requested Mr. Wood's acceptance of the office of Solicitor-General,—Lord Langdale's resignation of the Mastership of the Rolls having led to the appointment of Sir John Romilly to the Judicial Bench, and Sir. A. J. E. Cockburn having become Attorney-General. The date of his appointment is March, 1851. Oxford re-elected Mr. Wood, who was knighted (as is usual) on his appointment. In the general election for 1852, he was again elected by the city of Oxford to be her representative in the House of Commons. In the same year, the University of Oxford conferred on him the honorary degree of D.C.L. We have now reached the close of Sir William's political life. In 1849 he had accepted the office of Vice-Chancellor of the County Palatine of Lancaster, at the instance of Lord Campbell, then Chancellor of the Duchy, on the express condition that he was to be at liberty to introduce a bill for rendering that Court effective. This he achieved, and he resigned his office on being appointed Solicitor-General. In January, 1853, he was appointed one of the Vice-Chancellors of the High Court of Chancery. Sir William Wood has been a member of several royal commissions for amending the law; the most important of which were those for amending the practice of the Court of Chancery, and that for amending the law of divorce. He also acted with Lord Wensleydale and Sir Lawrence Peel on a commission for arbitrating between the King of Hanover and Her Majesty, on the King's claim to certain jewels in the possession of Her Majesty, as belonging to the crown of Hanover.

In January, 1830, Mr. Wood married Charlotte, only daughter of Major Moor, of Great Bealings, Suffolk.

ON THE RELIEF OF TRUSTEES DESIROUS OF RELINQUISHING THEIR TRUSTS.

Read at a General Meeting of the Society for promoting the amendment of the law, on Monday, Feb. 10th, 1862, by George Rochfort Clarke, Esq., M.A.

There is a part of the law relating to trustees, in which some amendment is required, and to which the attention of this Society should be directed. I, indeed, published two letters in January and March, addressed to Lord Chelmsford, then Lord Chancellor, on the subject. Since that time two acts have passed (22 and 23 Vic. c. 35—23 and 24 Vic c. 145,) which have diminished the difficulties of trustees whilst they continue in their trust; but nothing has been done to discharge the trustee altogether from his trust in the cases of which I am about to treat. The relief may be decreed but cannot be accomplished.

I allude to the case of a trustee, *entitled to be discharged* from his trust; who has filed a bill in Chancery for obtaining such discharge; in which suit an order has been made by the Court that he shall be so discharged, and that a new trustee shall be substituted in his place; followed by a reference to the proper officer to inquire and report as to the sufficiency of any proposed substitute; and no one can be found, satisfactory to the Court, who will accept the trust. In such a case, the Court is unable to give effect to its intention; and the object of this paper is to suggest that some attempt should be made to provide a remedy.

The position of the Court in such a case is thus described by Lord St. Leonards: "It is quite a mistake to suppose that a trustee, who is entitled to be discharged from his trust, is bound to show to the Court that there is some other person ready to accept the trust. The Court refers it to the Master to appoint a new trustee; but if no person will accept the trust, it may find itself obliged to keep the trustee before the Court, and not discharge him. The Court will, however, take care that the trustee shall not suffer thereby." (*Courtenay* v. *Courtenay*, 3 Jones and Lat., 533.)

The deed creating the trust may expressly entitle the trustee to be discharged. "The trustee may," in the language of Lord Langdale, "find the trust estate involved in intricate

and complicated questions which were not and could not have been in contemplation at the time when the trust was undertaken, and has, in consequence of that change of circumstances, a right to come to the Court to be relieved." (*Greenwood* v. *Wakeford*, 1 Beav., 581.) His longer continuance in the trust may become hazardous, or his character exposed to suspicion, by the misconduct of his co-trustee. (*Forshaw* v. *Higginson*, 20 Beav., 485.) The tenant for life may have encumbered his life estate with annuities and other charges, and the trustee may receive conflicting notices from contending incumbrancers, prohibiting him from allowing the *cestui que trust* to receive his income, and requiring him to pay the same to the incumbrancers, of whose title he cannot judge: or the *cestui que trust* may have passed through the Bankrupt Court or the Insolvent Court, and assignee may give notices, and require accounts: there may be lunacies or other incapacities; the trustee may have transferred to the Accountant General of the Court of Chancery all the trust moneys, under the Trustee Relief Acts (10 and 11 Vic. c. 96; 12 and 13 Vic. c. 74); he may have filed a bill, and obtained an order for the substitution of a new trustee; and yet, as Lord Leonard observes, the Court "may find itself obliged to keep the trustee before the Court."

The present practice of the Court of Chancery in many cases reduces such a trustee to a shadow, but retains him, through impotence, as a form, which incumbers, rather than assists, its proceedings. He ceases to act, and the Court acts, in his stead, as if it were itself the substituted trustee. For, as Sir John Romilly observes, "No person can be compelled to remain a trustee, and act in the execution of the trusts." (*Forshaw* v. *Higginson*, 20 Beav., 485.) By means of the Trustee Relief Acts he becomes divested of all funds, capable of being transferred, under those Acts, into the name of the Accountant General of the Court of Chancery, who thenceforth becomes virtually the trustee of those funds, subject to the direction of the Court. If there be real estate to manage, a receiver may be appointed; and when the tenants have attorned to such receiver, and he is invested with power to set and to let, to give notices to quit, and generally to manage the estate, what is he but subject to the direction of the Court, virtually a trustee, although the legal estate is not vested in him?

The old trustee thus becomes a shadow. Yet he remains a party in the suit, and is liable to be made a party in future adverse suits; and is subject to notices, on which he must take some step, and he incurs costs, and is harassed with an uncertain and undeserved responsibility. If proceedings at law are directed, his name must be used in all cases of covenant, or other contract made with him; as well as in ejectment and actions of tort, in respect of the estate legally vested in him. It would seem more reasonable that in such a case the estate, including choses in action, should at once vest in the Court, or that the Court should have power, until a more suitable trustee could be found, to transfer the trust, and, if I may use such an expression, with all its appurtenances, by a vesting order (as by 13 and 14 Vic. c. 60), without other conveyance to the Accountant General, or to a Trustee General in the nature of a receiver, according to the quality of the estate; or an official trustee might be appointed to act as an officer of the Court, alone, or jointly with the Accountant General or the receiver, or the remaining trustee, if any; in a manner analogous to "the official trustee of charity lands." (16 and 17 Vic. c. 137, ss. 47-52; and 18 and 19 Vic. c. 124, s. 15.) The power of combining the office of receiver and of trustee already exists, inasmuch as the Court will appoint a trustee to act as the paid receiver, when no other fit person can be found; and as the Court, when appointing new trustees, even as the practice now exists, does not consider itself limited to the number of original trustees, one such official trustee alone, or in combination as above suggested, might be found to be sufficient. The trustee so substituted might be a bare trustee, or he might be invested with some or all of the powers of the old trustee, at the discretion of the Court in each case.

By the substitution of such a person, the estate, in cases of complicated trusts, would generally be benefited. In hazardous and difficult trusts, a trustee, in order to avoid involving himself and others in a suit in Chancery, will for a time act to the best of his judgment, and may, honestly and prudently for the estate, incur great expenses and liabilities, and remain for years in uncertainty whether the Court of Chancery will ultimately relieve him.

At last he applies to the Court to be discharged from the trust, and in the meantime to be directed what to do. No person can be found to take his place as trustee; the Court slowly acquaints itself with the merits of the case, having no particular confidence in the trustee, and the estate suffers. It is probable that such estates would greatly benefit if they could be promptly placed in the hands of an experienced officer, having the entire confidence of the Court, and well acquainted with his powers and duties. The tenant for life, or his incumbrancers, could not justly complain of such an arrangement, inasmuch as they would have the remedy in their own hands, by finding a proper person to be substituted as trustee; and on the death of the tenant for life, each remainder man in succession would have a similar remedy.

Not only should the Court have power to appoint such person, but power should be given to the Court to wind up the trust as regards the old estate, and to give him such discharge as the Court might think him entitled to, by an order, which would operate as a release to the extent of the discharge, making such provision for the case of fraud, concealed or otherwise, as would harmonize with the present practice of the Court. The old trustee, if afterwards molested in any matter relating to the trust, should have power to plead the discharge in bar, at law, or in equity, to the extent to which it had been given, and also to apply to the Court for directions, and should be entitled to an equitable protection and relief in respect of costs or otherwise.

Should any objection exist to making the granting of such relief obligatory on the Court, such objection cannot apply to my present proposal to invest the Court with the necessary powers, and to leave it at liberty to deal with each case according to its discretion. Such discretion would probably be exercised in every case where the amount of property held in trust was ample to meet any expense occasioned by the appointment of an official paid trustee; and such discretion would be more freely exercised, if a separate officer, and, perhaps, ultimately an office, for the management of such trust estates should be established, towards the maintenance of which the trust funds under the management of such officer or office, might ratably contribute. But this is not a necessary part of my present suggestion, and even if such an officer were to be appointed or such office to be established, the trusts transferred to the care of such officer or office would, in the first instance, be limited to those very hard cases of which this paper treats. Though it is not improbable that the field of action would increase, as the convenience of having such an officer or office, for the temporary or permanent management of other trusts, should become apparent.

It cannot be reasonably objected, that it would be unjust to subject an estate to the charge occasioned by the appointment of such a trustee. For the right of such a trustee to relief in such a case is not only a right as against all parties, but is, if I may use such an expression, a right as against the estate itself: or a sort of equitable charge upon the estate in favour of such a trustee, to provide for him relief. For when an estate is settled by the intervention of trustees, the terms of the trusteeship are part of the settlement, and of the liabilities of the estate: and the provisoes and covenants for the relief

of trustees may be equitably considered to run with the estate as a charge upon it, so that the estate should bear all such costs and charges as may be necessary for the purpose of providing new trustees.

Neither can it be reasonably objected, that the cases now treated of are said not to be numerous. For the first answer to such an objection is, that where there is a wrong there ought to be a remedy. And another answer is, that until there is a remedy, the number of cases cannot be fully estimated: for such trustees know that it is useless to apply to a court of equity to be discharged from their trust, unless they are prepared with a substitute, and when that cannot be found they, their heirs and executors, as well as the estate, must rest hopelessly in their unhappy predicament. It may also be answered that such a trustee, as I suggest, would be found very convenient in many cases where it is desired to transfer the estate promptly, from an existing trustee. The trustee general might often prove a useful temporary resting-place, a cheap and speedy link in the conveyance, a safe and convenient party to be carried along in the suit. The necessity of appointing an administrator might often be avoided. The trusts of many sets of trustees, now carried along in the suit for conformity sake at considerable expense and inconvenience, might in many cases be vested for a time in one trustee general, so as to make one party in the suit for the time being; and such of the trusts as survived might be again restored to their former channels when the proper time should arrive. But though I throw out this in passing, yet all I propose at present is a remedy for an admitted wrong, by giving the Court of Chancery a discretionary power in an extreme case, upon the propriety of which most of us may agree. I therefore leave to the future, the discussion of the propriety of extending the application of such a trusteeship to other cases.

In conclusion, I thus sum up the present state of the law. The Lord Chancellor can decide that a trustee is justly entitled to be discharged from his trust, and even that the interests of all parties require that he should be so discharged; may restrain him from acting further in the trust; may take his place in performing every act belonging to the trust; may compel him or enable him to convey to one person one part of the trust estate, and may place the whole management of the residue of the trust estate in the hands of another; but cannot, after settling his accounts, remove him from the trust and end his suit with a quietus; though all parties be before the Court, and every fact known; and though the Court be most anxious to put an end to so unreasonable a state of things; all which would be remedied by providing a proper person to act as Trustee General or Official Trustee, and giving the Court power to substitute him or them, alone or in combination, in the place of the old trustee, till better could be found; and empowering the Court to give such a discharge to the old trustee as he might in all honesty and equity be entitled to receive.

A person well acquainted with the practice of the Court of Chancery, and who has great confidence in the equity of all its proceedings, may possibly think lightly of this grievance; but the trustee, who has before him the terror of an unascertained responsibility, and of unended litigation, is of another mind, and does not feel the grievance the less, because it does not afflict a multitude. He is equitably entitled to be quieted. The Court thinks so, but wants the power. I propose to give the power. Let it once be decided that this defect ought to be remedied,—and, by all means, in a better way than I have suggested, if such can be found,—and the details will be easily dealt with.

I purposely abstain from entering into details, or making minute suggestions, inasmuch as my present object is to induce this Society to consider and decide whether an attempt shall or shall not be made to perfect this part of the machinery of the Court of Chancery; and if that be decided in the affirmative, we can then consider the most effectual mode of doing it.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

CHAPTER IV.—(*Continued from page* 34.)

Of the Officers.

THE CLERK AND BAILIFF.

The Act provides that for every Division Court there shall be *one or more* Bailiffs (sec. 24). But it is clear that they do not constitute *one officer*—so that if two Bailiffs be appointed to a Court each may perform all legal acts required of a Bailiff by himself and in his own name alone. (*Corregal* v. *L. & B. Railway Co.*, 5 Man. & Gr. 219.)

The 23rd section speaks of the Judge's power to remove *any* Clerk or Bailiff, and the subsequent sections, particularly that providing for the securities to be given by officers, clearly show that every Bailiff has a separate and independent power.

The manner and form in which the Judge is to appoint Clerks and Bailiffs is not prescribed by the Act, and it may possibly be exercised by parol. (1 Ld. Rayd 166; Co. Litt. 616.) But as the nomination and appointment is delegated to the Judge in his judicial capacity, the better opinion seems to be that the appointment should be in writing and under the official seal of the Judge or by order of Court. (Sec. 11 Co. Rep. 4.)

The 25th section requires the Judge's direction as to the sureties to be given by officers, and the section 26 prohibits Clerk or Bailiff from entering on his duties till their securities have been approved; and, in view of the whole subject, the safe and proper course is for the Judge to appoint the officer in writing, and when the necessary securities are completed and filed, to pass the order of appointment.

Section 25 enacts as follows: "Every Clerk and Bailiff "of a Division Court shall by a covenant according to the "form A, or in words to the same effect, give security "with so many sureties, being freeholders and residents "within the County, and in such sums as the County "Judge may direct and shall under his hand approve and "declare sufficient."

The Judge will of course, on appointing an officer, prescribe the amount of the security to be given, with the number of sureties, according to the requirements of this clause. In practice two sureties are commonly required to join in the covenant, but where the amount is large it is not unusual to have three or four.

The sums in which the sureties are to be bound will be regulated by the probable amount of business in the particular Court. The sum for the officer, Clerk or Bailiff, should be at least equal in amount to that of all the sureties added together. A distinction may probably with propriety be made between the Clerk and the Bailiff, and

as more monies are likely to pass through the hands of the former larger security might be required of him. In addition to the security covenant, section 24 contains the following provision: "Every Division Court Clerk and "Bailiff shall give security by entering into a bond to Her "Majesty with as many sureties in such sums and in such "form as the Governor directs for the due accounting for "and payment of all fees, fines and moneys received by "them respectively, by virtue of their respective offices, "and also for the due performance of their several duties."

According to the forms furnished by the Government it would appear that *two* sureties are to join with the officer in the bond, and that the sum in which the officer is to be bound is to be "double that of the ordinary receipts for "one year or more at the discretion of the County Judge," and each of the sureties in one half the sum for which the officer is bound. It will be proper therefore, in the act of appointment, to show what is required in the bond to be given to Her Majesty.

The following forms of appointment by Judge and order thereupon are suggested.*

(To be continued.)

PROPOSED AMENDMENT OF DIVISION COURTS' ACT.

Mr. Angus Morrison, M. P. P. for North Simcoe, has introduced a bill to amend the Act respecting Division Courts. The following are its provisions:—

1. Any suit cognizable in a Division Court may be entered and tried in the Court the place of sitting whereof is nearest to the residence of the defendant or defendants; and such suit may be so entered and tried irrespective of where the cause of action arose, and notwithstanding that the defendant or defendants may at such time reside in a County different from the one in which such Division Court is situate and such suit is entered.

2. It shall be sufficient if the summons in such case is served as provided for in the seventy-fifth section of the Division Courts' Act.

3. This Act shall be read as incorporated with and as part of the said Division Courts Act, and the foregoing sections shall be considered as inserted next after section seventy-one in the said Act.

* The forms are taken from those used by one of the most experienced County Judges in Upper Canada.

JUDGE'S ACT APPOINTING CLERK OR BAILIFF.

I, Judge of the County Court of the County of by virtue of and in pursuance of the powers to me given and belonging by the Division Courts Act, do hereby appoint A. B., of the, &c., Yeoman, Clerk (or "Bailiff," or "a Bailiff") of the Division Court of the said County, to hold the said office during my pleasure. And I do direct that the said A. B. shall give security by entering into a covenant for the due execution of the duties of his office as required by law, and with *two* sufficient sureties in $ each, such sureties to be approved by me.

Bond to Her Majesty, A. B. in $ two sureties each $ } Given under my hand seal at this day of 186 Judge.

DIVISION COURT CORRESPONDENCE.

Owing to the crowded state of our columns, in consequence of our desire to make room for bills before Parliament, relating to law reform, we have been obliged to defer Division Court correspondence, including a valuable communication from Mr. Durand, until our next issue.

U. C. REPORTS.

QUEEN'S BENCH.

(Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law, Reporter to the Court.)*

SHAW ET AL. v. SHAW.

Taxes—Property not liable assessed—Distress—Pleading—Departure.

To an avowry, in a replevin under a distress for taxes, the plaintiffs pleaded that the house and land mentioned were exempt from taxation, being vested in Her Majesty for the public use of the Province, and occupied as a Custom House. Defendant replied that the assessment was not struck out or rescinded by the court of revision, or by the county judge, nor declared by either of them to be exempt. The plaintiffs rejoined that the property never was assessed.

Held, reversing the judgment of the county court, that the rejoinder was not bad as a departure from the plea, but supported it against the replication.

Semble, that departure is still a fatal objection on demurrer.

The plea was held good in the court below, and the judgment on that point was not appealed from.

When a previous pleading of the party demurring is bad, but not objected to, though the opposite party cannot claim to be heard against it, the court may in their discretion give effect to the faults apparent.

In this case the replication was bad, on the same ground on which the plea was supported, but the plaintiffs did not demur.

(H. T., 25 Vic.)

Appeal from the county court of Frontenac, Lennox, and Addington. Replevin.—Defendant, as collector, avowed for a distress for taxes in arrear during the years 1855, 1856, 1857, and 1858, on a house and lot in the city of Kingston, which he alleged was assessed in 1855 and 1858 to James Hopkirk, occupant, or John Counter, owner, and in 1856 and 1857 to James Hopkirk, occupant, or the Bank of British North America, owners. The goods in question were alleged to have been taken on the premises in possession of the plaintiffs, being the occupants thereof.

The plaintiffs pleaded to the avowries, that the said land, house and premises therein mentioned, during the years 1855, 1856, 1857 and 1858, were vested in and held by Her Majesty, and for the public uses of this Province, for a term of years, ending on the first day of April, 1859, and were occupied by the said James Hopkirk in his official capacity as a collector of customs for the port of Kingston, and as the Custom House of the port of Kingston, and for the public uses of this Province, and were not occupied by the said James Hopkirk or by any other person, otherwise than in an official capacity, or occupied or owned by any private occupant, or by the said John Counter or the Bank of British North America, and the said land, house and premises were exempt from taxation during those four years.

The defendant replied to this plea, that the said several assessments in the defendant's avowries, and in the plaintiffs' plea thereto mentioned, were not struck out or rescinded in the assessment rolls for said ward for said years, or any of them, by the court of revision, or by the county judge of the united counties of Frontenac, Lennox, and Addington, nor were the said land, house and premises, declared by the said court of revision, or by the county judge, to be exempt from taxation in any of the said years.

The defendant also demurred to the plea, on the grounds—1. That it is not alleged in said plea that the assessments in the said avowries of the defendant mentioned were struck out or rescinded from the rolls by the court of revision of the city of Kingston, or by the county judge of the united counties of Frontenac, Lennox, and Addington, owing to their said alleged exemption from taxation, or from any other cause in any of the said years, or that any steps were taken under the assessment laws of

Upper Canada with this result in any of the said years, or that the said court of revision or county judge in any of the said years had declared or ordained that the said land, house and premises were exempt from taxation for the cause alleged, or for any cause whatsoever.

2. That the said assessment appearing on the said rolls is conclusive, and warrants the defendant in all that is alleged he did; that said plea is no answer to defendant's avowries, and that notwithstanding anything alleged in the said plea defendant was authorised in making the seizure, and is entitled to prevail in this action.

3. That from the allegation in the said plea the remedy of the parties interested was by appeal to the court of revision against the assessment for said years, and thence, if necessary, to the county judge; and failing this remedy, either by not applying it or being unsuccessful in it, the assessment irrevocably stands, and may be collected as permitted by law.

The plaintiffs joined in demurrer to the plea, and rejoined to the defendant's replication, that the said land, house and premises, and the description and extent thereof, were not set down, designated, or contained in said assessment rolls or collector's rolls.

To this rejoinder the defendant demurred, assigning as grounds:

1. That said rejoinder is a departure from the plaintiffs' plea to the defendant's avowries, and is repugnant to and inconsistent with the plea: the plea admitting the setting down and assessment of the said land, house and premises therein mentioned, (that is, in the avowries mentioned,) on the collector's roll as in the avowries mentioned, and the rejoinder denying that they were so set down or contained in the said roll, or in the assessment roll,—in fact, contradicting the plea.

2. That it is a departure from, in that it does not support, the plea, or avoid or answer the defendant's answer to it.

3. That it is a departure from the plea, in that if effective it puts forward a new and different answer to defendant's avowries to, and independent of, that contained in the plea, and should have been pleaded in answer to defendant's avowries and not by way of rejoinder to defendant's replication thereto.

4. That it indefinitely postpones the period of, or prevents the getting to issue, by alleging entirely new matter.

5. That in this action, the plaintiffs' plea to defendant's avowries being like a defendant's defence to an ordinary action, all matters in answer to defendant's avowries should have been pleaded at once; and that the matter of the rejoinder is, if true, matter for a plea to defendant's avowries, and not of rejoinder to defendant's answer to the plaintiffs' plea to them.

6. That this rejoinder is not authorised by any thing alleged or contained in defendant's replication to the plaintiffs' plea, nor is there any foundation for it therein, which replication it leaves entirely unanswered.

7. That the rejoinder does not allege the necessity of what it denies, or that it was required by law, nor does it indicate any consequence of the omission.

8. That it seeks to raise an immaterial issue.

Judgment was given in the court below for the plaintiffs on the demurrer to the plea, and for the defendant on the demurrer to the rejoinder; and the plaintiffs thereupon appealed from the latter part of the decision.

Richards, Q. C., for the apellants, cited Ch. Arch. Prac. 286; *Few* v. *Backhouse*, 8 A. & E. 798; *Scott* v. *Chappelow*, 4 M. & G. 886; *Shouldice* v. *Fraser*, 7 U. C. Q. B. 60.

Read, Q. C., and *Agnew*, contra, cited Consol. Stats. U. C., ch. 55, secs. 9, 60, 61; *Durant* v. *Boys*, 6 T. R. 580; *Patchett* v. *Bancroft*, 7 T. R. 867; *Marshall* v. *Pitman*, 9 Bing. 595; *Hutchins* v. *Chambers*, 1 Burr, 579, 587; *Regina* v. *Boulton*, 1 Q. B. 66; *Allen* v. *Sharp*, 2 Ex. 352; *Earl of Radnor* v. *Reeve*, 2B. & P. 391; *Brittain* v. *Kinnaird*, 1 Brod. & Bing. 432.

The authorities referred to by the learned judge in the court below were, *The Municipality of London* v. *The Great Western Railway Co.*, 17 U. C. Q. B. 262; *Charleton* v. *Alway*, 11 A. & E. 993; *County Court Rule No.* 88.

Robinson, C. J., delivered the judgment of the court.

Upon the principal question in this case, which was raised by the demurrer to the plaintiffs' plea to the avowry, the judgment given in the court below in favour of the plaintiffs is not appealed from. The defendant has acquiesced in the judgment, which establishes that he had no legal right to distrain the plaintiffs' goods.

It is the plaintiffs only who appeal against that part of the judgment which is in favour of the defendant, and which determines that the plaintiffs' rejoinder to the defendant's replication to the plea to the avowry is bad in law, and that the defendant was therefore entitled to judgment.

The learned judge held the rejoinder of the plaintiffs to be a departure from their plea to the avowry, and therefore held it to be bad in substance.

We think the weight of authority is in favour of holding a departure to be bad on general demurrer,—that is, to be a substantial defect, and not merely matter of form,—though doubts have been expressed whether since the Common Law Procedure Act, which abolishes special demurrers, it can be treated as a fatal objection.*

But we do not take the rejoinder in this case to be subject to the exception of being bad for departure. The plaintiffs have not shifted their ground of defence. They no doubt mean still to rely on the fact that the premises were exempt from taxation by statute; and when the defendant, in answer to that defence, takes the ground that if there was such a reason for exemption it ought to have been advanced before the court of revision in order to have the assessment struck out of the roll, the plaintiffs could surely meet that by saying that the assessment was never on the roll, and therefore they could not apply to have it struck off. They were merely putting that forward as a reason why the defendant's objection to their plea could clearly not prevail. They might, it is true, have demurred to it, and if they had done so we think the court below must have held, consistently with the principles and the authorities on which the plea was held a good defence, that the replication could not be sustained; but still, if they had so satisfactory a defence to it in fact as that the premises had never been in fact assessed, and therefore there could be no appeal, they were at liberty to plead it, for it did not contradic their plea, but was consistent with it, and tended to support it.*

In *Smith* v. *Nicholls*, (5 Bing. N. C. 218,) Tindal, C. J., said, "that which is a departure in pleading is a variance in evidence; and if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure."

In *Wright* v. *Burroughes*, (3 C. B. 696,) that *dictum* was cited, and the court decided in accordance with it, Wilde, C. J., holding that a rejoinder which merely shewed that a title which the defendant had relied upon in his plea was not repelled by that which was alleged in the replication, was clearly *in maintenance of the plea*, and was therefore no departure.

But if the rejoinder had been bad as a departure, still the replication to which it was an answer was also bad, on the same principle on which the plea to the avowry was held a good defence, for if the property was exempt from assessment by statute, there was no necessity for going to the court of revision in order to have their decision on the point, as the cases of *Milward* v. *Caffin*, 2 W. Bl. 1380, and *Charleton* v. *Alway*, 11 A. & E. 993, fully establish; and though undoubtedly the plaintiffs' counsel could not claim to be heard upon exceptions to the replication, not having either demurred or given any notice of exceptions intended to be taken on the argument, still the court can in their discretion give effect to apparent faults in the previous pleadings, and it would in general be better to do so than to allow the judgment to be inconsistent with itself.

In our opinion the judgment given in favour of the defendant upon the demurrer to the rejoinder should be reversed, and judgment entered for the plaintiffs on that demurrer.

Appeal allowed.

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* See 2 Saund. 84 *f*; Stephen on Pleading, 6th Ed. 334, note *p*.

* See Stephen on Pleading 322, *Wright* v. *Burroughes*, 3 C. B. 696; *Smith* v. *Marsack*, 6 C. B. 495; *Owen* v. *Reynolds*, Fortescue 361.

Brown v. Livingstone et al.

Detinue, for cheque—Detention by the drawers alleging forgery—Pleading.

Detinue, for a cheque.—Plea, that defendants received the cheque from the plaintiff to present and collect it from the bank on which it was drawn; that they did present it, but payment was refused by the bank manager, who retained and keeps the same, alleging that the names of the drawers thereto are forged.

Held, on demurrer, that the plea shewed a good defence, for if the cheque was forged the detention was rightful, and if genuine, defendants lost control over it by no wrongful act, and the plaintiff's remedy was against the bank.

Declaration.—That the defendants, carrying on business in the city of Toronto, under the name, style and firm of The American Express Company, detained from the plaintiff a certain cheque belonging to the plaintiff for the sum of $200, dated the 30th of November, 1861, and drawn on the cashier or manager of the branch office af the Bank of Upper Canada in Hamilton, by certain persons carrying on business under the style and firm of E. L. Ritchie & Co.; and the said plaintiff claims a return of the said cheque or its value, and $100 for its detention.

Plea.—The defendants say that they received the cheque in the declaration mentioned from the plaintiff for the purpose of presenting the same to and for collecting the amount thereof from the cashier or manager of the branch office of the Bank of Upper Canada at Hamilton, upon whom the same purported to have been drawn by certain persons mentioned in said declaration as carrying on business under the name, style and firm of E. L. Ritchie & Co. And the defendants further say, that they did present the said cheque for payment at the said branch office of the Bank of Upper Canada, and that payment thereof was refused by the said manager, who alleged that the said cheque was not drawn by the said firm of E L Ritchie & Co. And the defendants further say that the said manager of the said branch of the Bank of Upper Canada refused to return the said cheque to the defendants, and retained and kept the same, alleging that the said E. L. Ritchie & Co. did not draw the said cheque, and that the signature purporting to be the signature of the said firm of E. L. Ritchie & Co. thereto is not their signature, but is false and forged; of all which the plaintiff had due notice before the commencement of this suit.

Demurrer.—That the said plea does not set forth any sufficient ground of defence to this action, and is no answer to the plaintiff's declaration.

Hector Cameron, for the demurrer, cited *Reeve* v. *Palmer*, 5 C. B. N. S. 84; *Jones* v. *Dowle*, 9 M. & W. 19; *Mathew* v. *Sherwell*, 2 Taunt. 439; *Wills* v. *Wells*, 8 Taunt. 264.

Galt, Q. C., contra.

Robinson, C. J., delivered the judgment of the court.

There is nothing in the record in this case to shew that the defendants received the cheque from the plaintiff upon any bailment that would make them responsible for it under all circumstances, except in case of its loss or destruction by the act of God or the King's enemies. The declaration is in the common form of a declaration in detinue, and the defendants plead that the cheque was given to them by the plaintiff for the purpose of its being presented by them to the person on whom it was drawn, and collecting the money upon it. That for all that appears was a contract of an ordinary character, requiring no more care than a provident person would have taken of the cheque under like circumstances, if it had been drawn in his own favour and he had gone to present it.

It cannot be said that the person going to present it did any thing wrong when he handed it to the officer of the bank for payment. He supposed no doubt that all was right, and that he would get the money; and he parted with the cheque for that purpose, and with that intent and no other. It cannot be held that he deprived himself of the power of returning it to the plaintiff by any wrongful act of his, for he was not expected to retain it, and he did nothing that was wrong in presenting it for payment. The defence is not that it has been lost by any casualty implying negligence in the defendants.

The person to whom it was presented had a right to the possession of it, in the ordinary course of business, so long as would allow of examining it and comparing the amount with the balance for which the person who signed the cheque had a right to draw. If the defendants had objected to let the cheque go into the hands of the bank manager, they would at once have excited suspicion of something wrong. Then when the manager looking at it affirmed it to be forged and detained it, he did only what was right if he believed it to be forged The defendants were not called upon to commit a breach of the peace in an attempt to force it from him.

The cheque is either forged or it is genuine. If it is forged the detention was a rightful act, and was no doubt rightly intended, and no injury has been committed. If it was a genuine cheque the plaintiff has a clear remedy against the bank, and must content himself with that. This action is detinue, and when it is admitted, as it must be, that the defendants had it not in their power to give up the cheque at the time when they are charged with having unlawfully detained it, and further, that it was by no wrongful act of theirs that they lost their control over it, there is no doubt that no authority can be found for sustaining the action under such circumstances. None of the cases cited are applicable. We think the plea shews a good defence.

Judgment for defendants on demurrer.

The Chief Superintendent of Schools, (Appellant,) in the matter of McLean v. Farrell.

School taxes—Right to collect after the expiration of the year—Appeal from the division court.

Held, on appeal by the chief superintendent of education, that a collector of school taxes might in 1861 collect by distress the taxes for 1859 and 1860, not having made his final return of such taxes as in arrear, and being still collector; and

Semble, that in this case the plaintiff who complained of the seizure having led to it by his own conduct, the proceeding should in the division court have been upheld at all events.

This was an appeal under "the Upper Canada Common School Act," Consol. Stats. U. C., ch. 64, sec. 108, from a judgment of the judge of the county court of Elgin, by the Superintendent of Education.

The action was brought in the division court for selling a cow belonging to the defendant for the payment of school taxes.

It appeared that the seizure was made for school taxes for the years 1859 and 1860. Defendant swore that the rate bill was given to him as collector in 1860 to collect, as the rate for 1859: that he went to the plaintiff, who promised to pay in a few days, but put him off from time to time until at last he was compelled to sell.

It was objected at the trial that the taxes imposed in 1859 and 1860 could not be collected in 1861.

The warrant was produced, and shewed that the plaintiff was taxed in 1859 for school taxes, $6.73, and in 1860 for $40.20.

The learned judge held that the defendant being *functus officio* so far as these taxes were concerned the sale was illegal, but considering that the plaintiff's conduct had been unreasonable he gave judgment in his favour for $11 only, being the amount for which the cow had been sold, without costs.

R. A. Harrison, for the appeal, cited Consol. Stats. U. C., ch. 64, sec. 27, sub-sec. 2, sec. 127; ch. 55, sec. 93–112; *Newberry* v. *Stephens et al.*, 16 U. C. Q. B. 65; *Chief Superintendent of Schools* v. *McRae*, 12 U. C. Q. B. 525.

No one appeared on the other side.

Robinson, C. J., delivered the judgment of the court.

We do not see why *Newberry* v. *Stephens*, (16 U. C. Q. B. 65) should not govern this case, but we have not the case fully before us on the evidence. Was the defendant a collector of the school trustees only, or a township collector?

It does not appear whether the township collector had or had not made up his final return for 1850 when he acted in this matter. The defendant was collector, it seems, when he seized and sold the cow, and when these rates were due. It is not shewn whether he sold for the rates of 1859 only, or for those of 1860 also.

Either way, the object of the act is to prevent the collector after he has made his final return and stated his inability to collect any certain assessment in arrear, which would lead perhaps to some proceeding of another kind being taken for collecting the money, from going on and collecting the arrear himself, and thus producing confusion by a double proceeding. Here it does not appear that any final return of this tax had been made as an arrear incapable of being collected in the ordinary manner, and we do not see why the collector might not go on and make it; and at any rate

in this case, as in others in the division court, the judge could give such judgment as law and equity might require, and so might have upheld a proceeding to which the plaintiff's own conduct and the indulgence shewn to him seem to have led.

We reverse the judgment, but do not with costs of the appeal.

Appeal allowed, without costs.

THE CORPORATION OF THE COUNTY OF LAMBTON V. POUSSETT.

Fees payable to Clerk of the Peace—Unauthorized charges paid—Right of County Council to recover back after accounts audited—Consol. Stat. U. C., chaps. 119, 120, construction of.

In this case the question was, whether certain fees could legally be claimed by the clerk of the peace, and how far the county, having paid them during several years upon accounts duly audited and passed, could recover back such as he was not entitled to. A special case was submitted, in which the several charges were stated and classified in schedules, which will be found below; and the court gave judgment, deciding that some items were sanctioned by law, some not, and that some depended upon the circumstances under which the services charged for were rendered. The following general principles were also laid down as applicable to the whole case.

Where a clerk of the peace, at the request of the justices or municipality, or of the county auditors, renders services which he is not bound to render, and for which no fee is allowed, though he might be unable to sustain an action for his charges, yet, when they have been duly audited and paid under no misunderstanding, the municipality cannot recover them back; and the same rule is applicable to disbursements, as for stationery, office furniture, &c.

The Consol. Stats. U. C. ch. 119, making it penal in the clerk to receive more than the legally established fees for services performed by him, does not apply to services or disbursements not properly belonging to his office; but the enactment is not confined to fees demanded of individuals for public services, nor does the penalty imposed interfere with the right to re-claim fees received contrary to the act.

Where the fees are within that act, and have been paid, they may be recovered back as money illegally received, though his accounts containing them have been audited and passed.

Under Consol. Stats. U. C., ch. 120, the clerks of the peace, and other officers, are not to make out their accounts against the government in the first instance, but against the county, who are to be paid or reimbursed by government after proper audit.

The schedule appended to that act was not intended to embrace all the expenses of criminal justice chargeable against the government, but only to remove all doubt as to those specified.

SPECIAL CASE.

This is an action on the common counts, brought by the plaintiffs against the defendant, for the recovery of $761.89, received by the defendant as clerk of the peace for the county of Lambton, for services alleged by him to have been rendered according to law for the year 1859 and a portion of 1860, and which sum of money the plaintiffs insist was received by defendant out of the funds of the county of Lambton, contrary to law; in which action the defendant pleaded the general issue.

The cause came on for trial at the Spring Assizes for the County of Lambton, for 1861, at Sarnia, before HAGARTY, J., when the following evidence was taken, and admissions made:

1st. Admitted by defendant that all the moneys mentioned were received by him.

2d. Admitted by plaintiffs that the services charged for were actually rendered, but defendant's right to recover therefor disputed.

Evidence for plaintiffs:

Archibald Young, sworn.—I was warden for 1860. I knew there were disputed accounts; there has always been a dispute between the clerk of the peace and the council, but no investigation till June, 1860. Previous reports had been made to the council that illegal charges were made. A committee was appointed in January, 1860, to examine; they sat in June, 1860, and reported to the June sessions the result, that a large amount of defendant's charges were illegal.

No. 1.	An account for quarter ending 31st March, 1859, was paid April, 1859	$228 33
2.	An account to June 30, 1859, paid in July, 1859,	144 31
3.	An account to Sept. 30, 1859, paid July, 1859,	143 06
4.	An account to Dec. 31, 1859, paid in Jan., 1860,	150 61
5.	An account to March, 1860, paid April, 1860	149 31
		$815 62
	Plaintiffs credit for actual disbursements	53 73
		$761 89

There is an item of $18 for a set of drawers to hold papers in office of clerk of the peace, not allowed by plaintiffs. These accounts were not investigated until this committee was appointed. I have been two years in council. I knew of no by-law or order to justify these charges. I am satisfied they were performed without order from council. Part of the dispute was, that the council were not liable for accounts audited and passed by the quarter sessions, unless satisfied of their correctness. These accounts were audited by the county auditors, and after audit warrants to treasurer issued by county warden, countersigned by the auditors.

Re-examined.—I signed one warrant for the account in 1860. It was only a matter of form signing after the auditors passing it. This system is now changed. I had no special resolution so to do. The warden's right to do this was disputed by the council.

Charles Taylor, sworn.—I was auditor for 1859 and 1860. The first account was March, 1859. Before this the quarter sessions had audited these accounts. We asked defendant were these charges right. He said they were right and legal, and we accordingly passed them. We continued auditing in this way.

Cross-examined.—I took the first account to one of the finance committee, and called his attention to it, expressly to some items which I doubted. Nothing was done on this. This was after the audit. I saw the drawers mentioned with defendant; he said they were necessary, as papers were in great confusion.

DEFENCE.

John Wilson, Q.C., objected, that as the plaintiffs paid with full knowledge, &c., they cannot now recover back from defendant. The learned judge overruled this objection, but reserved leave to move for a non-suit on this ground.

Alfred Fisher, J. P., sworn.—Book produced is record book of quarter sessions. I was present when order of July, 1854, was passed (copy put in); puts in tariff of 1845, established by judges under 8 Vic., ch. 38, published 1849, Mich. Term, 9 Vic.

Charles Taylor re-called.—In 1857, and since, constables' accounts were audited by county auditors. Defendant attended on these occasions with these accounts.

Alexander Vidal, treasurer of county, sworn. — Defendant attended with criminal justice accounts before the government county auditors. I considered his services indispensable for this, there being no county attorney. (This evidence refers to No. 6 class of charges.) As far as I knew of these disputed accounts, the government have not paid such charges direct to the clerk of the peace. I know that as treasurer no portion of this account has ever been paid or allowed by the government, either to the clerk of the peace or to the council, for such an officer. I am aware that some of these items now charged were claimed by defendant from government, and disallowed by the government county auditors; all these warrants produced were paid by me as treasurer, and allowed by council.

It was agreed upon the trial, and so endorsed upon the record by the learned judge, that the evidence taken should be made into a special case, with the accounts and exhibits filed, on which a nonsuit or verdict for plaintiffs might be entered for all or such portions of the items as the court might think the plaintiffs entitled to recover.

The plaintiffs contended that all the charges were illegal as against them; that if the defendant could charge them at all, it should be against the government, not the council. It was agreed at the trial that the defendant should present accounts with the special case, placing the charges in classes, under tariff or otherwise, as he claims them; and whatever sum should be ordered by the court, the same to be endorsed upon the record as the verdict, as if done at *nisi prius*. The court, as to costs, to direct as a judge would certify.

On the part of the plaintiffs, it was submitted that the several accounts produced at the trial, amounting to $761 89, and which was admitted to have been received by defendant, being accounts relating to the administration of criminal justice, were chargeable upon the consolidated revenue fund, and should have been so charged under 9 Vic., ch. 58, Consol. St. U. C., ch. 120, p. 975.

The defendant contended that none of the charges contained in these accounts are to be deemed expenses of the administration

of criminal justice within the meaning of the act above referred to, the expenses so to be deemed being limited by the schedule to that act, and none of the items in the defendant's accounts being embraced in that schedule.

1st. If the court is of opinion that the said accounts, or some portion of them, ought to have been charged to the government, and not to the county of Lambton, then a verdict to be recorded for the plaintiffs, and $761 89 damages, or such less sum as the court may find ought to have been charged to the government instead of the county.

2nd. If the court shall be of opinion that the said accounts do not come within the meaning of the act of parliament referred to, not being accounts relating to the administration of criminal justice within the meaning of that act, and if the court shall further be of opinion that the county of Lambton was not legally chargeable with the payment of said accounts, or some portion thereof, then a verdict to be recorded for the plaintiffs for such sum as the court may direct, not exceeding $481 40 (if the court shall be of opinion that these payments so made as stated can be recovered back.)

Pursuant to the understanding at the trial, the particular items of said accounts are arranged and classified, and each class represented by the items contained in the respective schedules hereto annexed.

Schedule No. 1, amounting to $74 25, the defendant claims to be entitled to under 8 Vic., ch. 88, and the tariff of 1845, and other statutes.

The charges represented by schedule No. 2, amounting to $8 25, the defendant claims under an order of the quarter sessions of the county of Lambton, made in July, 1854, in the following words, "It was ordered that the clerk of the peace obtain printed forms of recognizances, and other magistrates' forms, to be distributed amongst the magistrates for their use in cases of felony."

The charges represented by schedule No. 3, amounting to $101 85, defendant claims under an order of such sessions, made in November, 1854, in the following words: "The clerk of the peace having represented to the court that such instructions had been given to the county auditors as would preclude any allowance to him for correspondence, unless this court specially ordered him to write all letters that might be necessary in the discharge of the duties of his office, the court ordered that the clerk of the peace do write letters when necessary in the duties of his office, to all justices, coroners, constables, and other persons with whom it may be necessary to correspond, respecting any matter connected with the administration of justice or county business, and that he do pre-pay the postage of all letters sent by him by post, and that he be allowed such postage, and also the postage of all letters addressed to him in his official capacity; and also under the order made in July, and also under authority of that portion of the tariff of 1845, of which the following is a correct copy, namely, "All letters to officers of government or others upon special business connected with the administration of justice or other district purposes, when written by order of the justices, including a copy for the office."

The charges represented by schedule No. 4, amounting to $111 75, are not supported by any authority, but they have been uniformly paid to defendant in manner stated in the evidence at the trial, and defendant contends that they, as well as any other charges which may be held to be unsupported by legal authority, must be deemed voluntary payments, and cannot be recovered back.

The charges represented by schedule No. 5, amounting to $62 75, defendant claims under a resolution of the county council of date 15th of October, 1856, of which the following is a copy: "That the county clerk be authorised to grant a warrant to the constables for their fees and expenses at any time during the year, on receiving from any constable an account sworn to before any magistrate, and certified by him, and duly audited by the county auditors; and that it be the duty of such auditors to audit such accounts when called on so to do. Under this order defendant as clerk of the peace collected the constables' accounts up to June, 1860, and used from time to time, when a sufficient number of accounts had been sent in to him, to make a schedule of these accounts, give notice to the county auditors to attend the auditing, and remit the amount to the constables.

The charges contained in schedule No. 6, amounting to $36, defendant claims under an order of sessions of July, 1854, of which the following is a copy: "It was ordered that the clerk of the peace be allowed six pounds per annum, as salary for clerk to the government auditors, and preparing the accounts for audit, the salary to commence from the 1st of January last," which said sum was afterwards audited and ordered to be paid by the quarter sessions.

The charges contained in schedule No. 7, amounting to 75 cts., defendant claims under letters from the Provincial Secretary's office, similar to the one of which the following is a copy: "Secretary's office, Quebec, 14th March, 1861, Sir,—I have the honour to transmit to you herewith a commission, associating Alfred Nash, Esq., with the coroners already appointed for the county of Lambton. You will please notify Mr. Nash, who resides in Warwick, of his appointment.—I have the honour, &c. (Signed) E. A. Meredith, Assistant Secretary. To the Clerk of the Peace, Sarnia, U. C."

The remaining charges, amounting to $66, the defendant will not support, and consents to a verdict being recorded for that amount.

Schedules referred to in the above case:

SCHEDULE No. 1.

1.	Letter to Provincial Secretary, with copy of voters' list filed in my office, of the 75 cts. charged	$0 25
2.	Letter to the Inspector General for instructions as to audit of the criminal justice accounts in January next	0 25
3.	Letter, with half-yearly list of claims to unpatented lands, to the Commissioner of Cown lands	0 25
4.	Letter to Provincial Secretary, with copy of presentment of Grand Jury as to gaol	0 25
5.	Letter to Reeve of Bosanquet, in answer to his, respecting voters' list	0 25
6.	Drawing order for appointment of constables at the March sessions	1 00
7.	Receiving oath of allegiance of John Grant, Esq., J.P.	0 20
8.	Three copies of quarterly returns of convictions for commissioners of statistics	12 00
9.	Receiving and filing quarterly accounts of county officers	1 00
10.	Attending special sessions of justices to consider tenders for printing	1 50
11.	Copy schedule of convictions for office	4 00
12.	" " " printer	4 00

SCHEDULE No. 2.

1.	Making up assortment of blank forms for Neal Eastman, Esq., J. P., and mailing same	0 50
2.	Making up assortment of blank forms for W. Kimball, Esq., J. P.	0 50

SCHEDULE No. 3.

1.	Copy of presentment of grand jury as to gaol, for county council, and letter to county clerk therewith, and certificate (the certificate admitted by defendant to be wrong)	1 75
2.	Letter to Martin, sessions constable, about verifying his account	0 25
3.	Letter to Reeve of Florence, respecting an account against the county for a coffin made under order of coroner	0 25
4.	Letter to Mr. Morris, coroner, explaining to him why his account for inquest expenses has not been paid,	0 25
5.	Notices to constables of their appointments	30 00
6.	Letter to Sylvanus Cornell, J. P., advising on certain points enquired by him. (They had relation to his administering justice summarily)	0 50
7.	Letter to Wm. Robertson, Esq , J. P., respecting the supposed appointment of his father as constable	0 25

SCHEDULE No. 4.

1858, Decem.	Attending printer with advertisement for division court term	$0 25
	Attending to place up list of claims under Heir and Devisee Act in court house	0 25
	Entering return of baptisms in register	1 00
Feb'y 8.	Copy of advertisement of March sessions for printer	0 25
	Attending him therewith	0 25
	Notices to constables of their appointment at March sessions, at 20 cts. each	30 00
Mar. 24.	Attending the parties, delivering their warrants (after audit of quarter accounts)	0 50
	Paid for letter-book for clerk of the peace,	1 50
	Attending George Crossley, Esq., J. P., and advising him upon the circumstances under which to appoint a special constable	0 50

SCHEDULE No. 5.

1858, Decem.	Receiving and arranging constables' acc'ts.	2 00
	Schedule for county auditors and copy for office	1 00
	Attending both auditors to appoint meeting to audit	0 50
	Attending auditors with accounts	0 50
	Attending county clerk to prepare warrants	0 50
	Attending him afterwards for warrants when signed	0 25
	Attending the constables in town, delivering their warrants	0 50
	Attending county treasurer for amount due county constables	0 25
	Letters remitting their warrants	1 00

SCHEDULE No. 6.

1859, Mar. 24.	Half-yearly allowance for preparing criminal justice accounts, for allowance by the government county auditors	12 00
	Two similar items	24 00

SCHEDULE No. 7.

1859, June 29.	Letter to Henry Shoebottom, Esq., informing him of appointment to the office of coroner	0 25
	Attending county treasurer to instruct him to prepare returns of payments made by him under jury laws, and afterwards attending him for service (in consequence of requisition from provincial secretary)	0 50

The above case was argued in Trinity Term last by *Davis* for the plaintiffs, and *J. Wilson*, Q.C., for defendant.

The court, after hearing the argument, required each party to state more particularly in writing the ground or authority upon which each item in dispute was supported by defendant, or objected to by the plaintiffs; and during this term the following supplementary case was put in:

SUPPLEMENTARY CASE.

It having been suggested by the court that the parties in this cause should, in addition to the case already before the court, state further, the defendant on his part upon what ground he claims the items in dispute, and the plaintiffs upon what ground they resist the payment, it is agreed that the following further statement, signed in triplicate by the attorney for the plaintiff and by the defendant, shall be submitted to the court.

The defendant on the first point submitted, namely, whether the government is liable to pay all fees of the clerk of the peace, states that the Inspector-General refused to pay for services not defined in the schedule to the Act referred to in the case, Consol. Stats. U. C., ch. 120. And that when any of the charges mentioned in the schedule to the case, but omitted in the schedule to the Act referred to, have been presented, they are struck off, with a note in the following words: "not provided for."

This point will be brought better to the attention of the court by inspection of the tariff of fees allowed to clerks of the peace, made by the judges in 1845, under provision of the statute of 8 Vic., chap. 38, in which are the following items:—

No. 1.

Causing notice to be published of any special or adjourned session when directed	£0	2	6
Sending notice thereof to justice individually, for each notice	0	0	6
Attending each adjourned or special sessions	0	7	6

MISCELLANEOUS SERVICES.

Making out and delivering lists of orders on the treasurer, made at each court of quarter sessions	0	7	6
Copying orders of court, and carrying same to be published when requisite, for each order	0	1	3
Drawing every special order of the court of quarter sessions necessary to be communicated to any party, and entering it on record	0	2	6
Making up and transmitting to the Inspector General a return of a schedule of all convictions which have taken place before any justice or justices, or before the court, each list	0	5	0
Making and transmitting a return to the government of justices and coroners who have taken the oath, when required to be done, for each return	0	5	0
For every return or report required by statute or by the government, for which no remuneration has been provided in this table or by statute	0	5	0
Receiving and filing each oath of qualification of a justice of the peace	0	1	0
Drawing and recording appointment of inspector of weights and measures	0	5	0
Receiving and filing accounts, and demands at the general quarter sessions preferred against the district (county) in each session, and submitting for audit,	0	10	0
For filing each list, return or other paper	0	0	4
All letters to officers of government or others, upon special business connected with the administration of justice or other district purposes, when written by order of the justices, including copy for the office	0	1	3

The attention of the court is requested to the items in the tariff, and also in the schedule to chap. 120, in respect to the division courts. The Inspector General contends that the government does not provide for the orders for holding the division courts from time to time, the statute only applying to an alteration in the limits of division courts and the notices consequent thereon.

By the 22 Vic., chap. 124, Con. Stats. U. C., p. 987, the clerk of the peace is directed to advertise and exhibit lists of convictions; for each schedule he is to be paid by the treasurer of the county £1.

No. 2.

The clerk of the peace draws up advertisements of each session and attends the printer therewith, also advertisements of division courts.

The clerk of the peace also distributes the annual statutes to justices and county officers. In respect to these two and some other services, the duty is not imposed by statute, nor is any remuneration provided by tariff.

The clerk of the peace, by direction of the Provincial Secretary, notifies justices and coroners of their appointment, but is not required by any statute to do so, nor is there any remuneration specified in the tariff for this duty.

The clerk of the peace also claims allowance for stationery, at the rate of six dollars per quarter.

None of the items in number one, except those as to division courts, are included in the schedule to chapter 120, Con. Stats., U. C.

In reference to the first point submitted to the court on the original special case, the court is asked to pronounce whether the items number one, for which a remuneration is provided by the tariff, are all or any of them chargeable to the government as

expenses of criminal justice; and also whether the items number two are a legitimate subject of charge by the clerk of the peace; and if so, whether they are a charge to the government as a part of the expenses of criminal justice.

The plaintiffs dispute the right of the court of quarter sessions to order the clerk of the peace to correspond with justices and others on matters connected with their offices. The opinion of the court is asked upon this, in reference to schedule three of the case.

One class of items is claimed in schedule six of the special case, as having been audited and allowed by the court of quarter sessions under the provisions of chapter 119, Con. Stats., U. C., section 7, p. 972, and that audit is final and binding on the county treasurer. The opinion of the court is asked, whether the audit and order of the court of quarter sessions is to be obeyed by the county treasurer, without the further prior audit of the county auditors, or order of the county council.

All the items of the defendant's account are represented in the schedule to the case before the court. It is admitted in the case that the services have been performed.

All the items represented in schedule one to the case are provided for in the tariff of fees of 1845, and in the Con. Stats. U C., p. 987, as shewn by the several items in this supplementary case under the head of number one.

The items in schedule number two to the case are claimed for services performed under alleged authority of the court of quarter sessions, by its order of July, 1854, stated in the case, and until the dispute in question always allowed as a proper charge, in manner stated in the evidence.

The items in schedule three are provided for under the order of sessions of November, 1854, as stated in the case.

The items in schedule four are some of them for advertising the courts, and others of the items are for notices to constables, under authority of the order of November, 1854, and an item for an office letter-book and for instructions to a justice as to the mode of appointing a special constable.

The items in schedule number five are claimed under the items in the tariff set forth in number one of this supplement as to accounts.

The items in schedule number six are claimed, as stated in the case, under the order of the court of quarter sessions, and upon its audit, which the defendant submits is final.

The items in schedule seven are claimed as items embraced in number two of this supplement.

Robinson, C. J.—The plaintiffs in this action are endeavouring to recover back from the defendant $761 80, which the defendant admits he has received out of the county funds of the county of Lambton, and which, in accounts rendered by him as clerk of the peace of the county, he claimed to be due for certain services rendered by him as such officer.

The first question is, whether he was legally entitled to be paid out of the county funds, the whole or any, and what part, of these fees which are in question; and if he was not entitled to recover all or any of them, then the next question is whether the plaintiffs are legally entitled, under the circumstances, to recover back from him whatever sums he ought not to have received out of the county funds.

It is not disputed that the defendant did render such services as he has charged for. The plaintiffs insist, however, that he had no right to claim payment for them out of the county funds.

It is admitted by the defendant that for $66, part of the sum in question, he cannot shew any authority, and he consents that for that sum that a verdict may be entered for the plaintiffs; the fees composing that amount being, as I assume, fees which do not come under any of the seven classes of charges respecting which our opinion is desired.

Then we have, first, to see whether such fees as come under class number one are legally chargeable against the county funds.

It is a preliminary question, however, whether any fees chargeable for services to be rendered by clerks of the peace, and which come within the schedule at the end of the chapter 120, Consol. Stat. U. C., given as a schedule of heads of expenses which shall be deemed to be expenses of the administration of criminal justice in Upper Canada within the meaning of the Act, are to be paid to the clerk of the peace out of the county funds in the first instance, and to be afterwards included in a general account against the government of all such expenses as by the statute the government is to pay out of the consolidated revenue; or whether the council can refuse to entertain such charges, and can refer the clerk to the government, as the party from whom he is to claim compensation; or whether a middle course is not the one proper to be taken—that is, that the clerk should make out his account of fees for services connected with the administration of criminal justice against the county, which account, with vouchers and report, should be sent to the government, with the accounts of other county officers, of such a nature as the statute contemplates, and to await audit and payment by the government to the municipality.

I do not know what system may have been pursued under the power of regulation given to the Governor in council by the second clause of the Act, but it would seem that it would be very inconvenient if the council were to pay such accounts to the several officers before audit by the government auditors and final allowance by the government, for then occasions might be constantly arising for reclaiming from the officers any sums that the government county auditors or the inspector general may have rejected.

In either case, I think the intention and effect of the statute, ch. 120, is that the counties shall be paid or reimbursed by the government all such expenses as come within that statute, and have been audited by the proper auditors according to the regulations of the government; and not that the clerks of the peace, sheriffs, coroners, constables, and criers, are to make out severally their accounts against the provincial government for such services.

I do not, therefore, think that the clerk of the peace can be properly told that for charges relating to the administration of criminal justice he is to make out and present his accounts to the provincial government, and not to the county.

As to the several lists or schedules, seven in all, on which our opinion is desired as to the admissibility of the charges, we required that the defendant should in the first place refer us to the particular authority, by statute or otherwise, on which he rests for the several items; and that the plaintiffs should, on their part, specify their objections and the ground of them as regards each item, for the judges cannot be expected to search through the whole statute-book to see whether there is not some enactment referring to services rendered by clerks of the peace, under which each particular charge may be supported or rejected.

I do not think that the schedule appended to chapter 120 was intended by the legislature to embrace all the expenses of criminal justice that were to be charged against the government, but only to point out that all the charges specified in it were to be deemed within the Act, and thus to remove all doubt as to such charges. The last sentence of that s atute, page 980, makes that plain, for this is added to the schedule, "Together with all other charges relating to criminal justice, payable to the foregoing officers, specially authorised by any Act of the legislature."

Whether the schedule number one contains any charges that properly belong to the provincial government to pay as coming under the head of administration of criminal justice, I do not think material for us to consider, for that would not shew that the clerk of the peace is not entitled to charge them in his accounts against the county in the first place, and so of all the other charges. But the question is whether the several fees charged are fees to which he is entitled, and that is a question which we declined to go into until we were informed more particularly under what authority his several fees were claimed.

After it has been settled what charges are admissible and what are not, the question may arise which of them the council can justly claim should be paid (to the county, as it appears to me) out of the provincial revenue, and which not.

If the council has paid any charges which they have expected would be afterwards reimbursed by the government, and if they have found such charges rejected, either on the ground that they were for fees to which the clerk of the peace is not entitled, or for fees which, though properly demandable, are not chargeable against the provincial revenue, then a question will arise, whether the council having paid them under the sanction of their own

auditors, and upon their own judgment, can sue for them back because the government has declined to reimburse them.

If they are reclaimed from the defendant not as illegal charges, and if they were not in fact illegal charges, but are reclaimed because they were not chargeable against the provincial revenue under the statute 9 Vic., ch. 58, and were on that ground rejected by the government, then I think that no action can be supported by the county against the clerk to recover them back, whether in our opinion the Inspector General or the government auditors have or have not erred in drawing the distinction between the two classes of charges. It would be a question to be settled between the county and the government, in which the clerk of the peace would not be a party interested.

Then looking now at the case, after these explanations:

The first, sixth, and seventh charges contained in schedule number one are not supported, in my opinion, by any express legal sanction, and as this court has under such circumstances no authority, either to fix the amount for any of those services, or to pronounce that the clerk of the peace is entitled to any fee for them, we cannot properly enter into a consideration of any further question respecting them. The ground on which I think the charge number seven not admissible, is that the fee which is allowed for that service in the table of fees of 1845 is made payable by the officer to whom the oath is administered.

The charges in schedule number two, I do not find to have any legal sanction.

Of the charge in schedule number three, I do not find that the charge number five has any legal sanction.

The other charges may be all legal or not, according as the services for which they are made were rendered by order of the justices, as stated in page 22 of the printed tariff: and on that point I think that the recognition of them by the justices as incurred by their authority should, as a general rule, de deemed conclusive.

Schedule 4.—The charges in this schedule are admitted in the case to be unauthorised, and the only question in regard to them is whether, having been voluntarily paid with a knowledge of the facts, they can be recovered back.

Schedule No. 5.—I do not consider that the charges in this schedule have any legal sanction.

Schedule No. 6.—I do not find that there is any legal sanction for the charges contained in this schedule

Schedule No. 7.—I do not find that there is any legal sanction for the charges contained in this schedule.

There are some few of the charges of which we can only say, as in regard to charge 8 in schedule number one, that what is charged may or may not be right according to what the clerk may be able to shew had been required of him.

The fees for which alone I think the clerk of the peace can be said to have a legal sanction, supposing the service in each case to have been authorised, are, in schedule one, the charges 2, 3, 4, 5, 8, 9, 10, 11 and 12; and in schedule 3 the charges 1, 2, 3, 4, 6 and 7, subject to the remark I have before made respecting them. Of these charges I do not consider that any one of the charges embraced in schedule number one comes properly within those expenses of the administration of criminal justice, which, under Consol. Stats. U. C., ch. 120, are made charges against the provincial revenue. Of those in schedule three, I do not think that any one comes clearly within that statute.

The proper construction to be given to the statute, ch. 120, in my opinion is, that the legislature having evidently had before them the table of fees established in 1845 for the clerks of the peace, and made selections from it, (some of which it must be confessed seem to have no obvious connection with the administration of criminal justice), must be taken to have determined that the remainder of the clerk's fees in the schedule were not to be deemed expenses of the administration of criminal justice within the meaning of that act. And that the fees given in the schedule of the fees for the clerk of the peace in chapter 120, with the addition of "all other charges relating to criminal justice payable to that officer, specially authorised by any Act of the legislature, and immediately before the 9th of June, 1846, payable out of county funds," constitute all the fees of his office which are to be paid out of the provincial revenue. But it rests with those to whom the government has committed the duty under the statute, ch. 120, to audit and approve the accounts.

It only remains, I think, that we should express our opinion in regard to the right of the plaintiffs to recover back in this action against the clerk of the peace any fees which he has received, and for which we do not find that he had any express legal sanction.

I understand the clerk of the peace to be serving without a salary, and to be only remunerated by fees. In that case, if services are required of him for which he has no fee allowed him, and which he is not bound to render by any statute, or as necessarily belonging to his office, I take it he is no more bound to render such services than any stranger would be. If he does render them at the call of the justices, or in compliance with the request of the municipality or of the county auditors, he has at least an equitable claim to receive a fair compensation for the act done; and though he might not have been able to sustain an action at law for all such services (while for some he might), yet when the justices or the county council have audited and allowed such charges, and have paid them under no misunderstanding of the facts, nor any untrue representation of the officer, we consider that the municipality have not a legal right of action to sue for them back That would not be like the case of a public officer concerned in the administration of justice demanding a fee from an individual for a service rendered in the course of the administration of justice, or charging against and receiving from the government, or from a municipality, fees for services not rendered, or for which he had made charges not conforming to those authorised by law.

After auditors have had the accounts of the clerk of the peace before them, and have exercised their judgment upon them, and have passed them, not being misled by any improper conduct of the officer, I do not think they can reclaim in an action what they have so allowed. If they can, they can do it after the lapse of years, and long after the money which they have voluntarily paid for services rendered, and with a full knowledge of the facts, had been received and spent.

And so also as to such charges as those for stationery, a blank book for entering letters in, or a press to keep his papers in, I cannot hold that for them the clerk had a legal right to demand payment; but when those whose duty it was to audit and pay the accounts passed their judgment upon them, and looking at the circumstances, thought the disbursements were such as should in fairness be allowed for to the officer, I think there is no legal right to recover back the money from him.

The services allowed and paid to him for assistance rendered to the county auditors, are charges of which I take the same view. The county auditors need not have employed him, but they must have expected to remunerate fairly whatever person they did employ, and I think, if the defendant was called upon to give his time and attention to that duty, he had a claim to be paid for his time and trouble, which claim was at least just; and having been paid for it on an account rendered and audited, and when nothing illegal was done, and no imposition practised, he can keep what he has received as a compensation.

In looking over those charges of which it cannot be said that they have any express legal sanction, I do not think they are all such as that we can properly hold that an action can be sustained to recover them back after the accounts which contained them have been audited and allowed, and the money paid to the officer, with a knowledge on the plaintiffs' part of the facts, and in the absence of any untrue statement in regard to the service rendered, or of any infringement of an Act of Parliament in charging more than the fee allowed for the service.

But we must bear in mind that the chapter 119, of the Consol. Stats. of Upper Canada, section 8, makes it a penal offence in the clerks of the peace to receive any other or greater fee or allowance for any of the services performed by them than such as should be (and were) established under the authority contained in that act, unless such fees as might be allowed by some other Act of Parliament for other services. That clause does not apply, I think, to any disbursements made by the clerk of the peace, or services rendered by him which it did not properly belong to his office to render, and of course not to any fees for services which the justices were authorised to require him to render, and for

which when so rendered a fee is allowed by the tariff; but it does apply to such charges as the following in schedule number one, namely, 1, 6, 7; to charge 5 in schedule three, unless we can hold the notice to a constable of his appointment to come under the head of a letter upon special business, and so with the item in page 22 of the tariff, which I think would be a forced construction, though the charge itself is one that it would be reasonable otherwise to allow.

Also it applies to all the charges in schedule 4, except that item, "Paid for a letter-book for the clerk of the peace," which the justices could allow if they pleased; to all the charges, I think, in schedule No. 5; to those in No. 6, as they seem to have been for services necessarily rendered by him in virtue of his office as clerk of the peace, for which no allowance is made in the tariff, or by any statute since, though it seems perfectly just that he should be allowed to charge and receive a fair allowance for so necessary a duty; also to the items in schedule 7, which stand in principle on the same ground, except the first of the items, which is a notification to a coroner of his appointment, for which no allowance is made, unless that can be called a letter "upon special business," which I think it hardly can be. But the service is one that ought to be rendered, and for which there should have been an allowance made in the tariff.

Then as to the last mentioned charges, beginning with schedule No. 1, and going through, as I have just done—as they are fees or allowances received by the clerk, contrary to the 8th clause of chapter 119, Consol. Stats. U. C., is he liable to be sued for them, as money illegally received, after his accounts have been audited and passed?

That is a general question. We had occasion to consider it in the case of the *County of Haldimand* v. *Martin* (19 U. C. B. 178), which may be considered perhaps as in principle governing the present, though there were several matters to be considered in that case which were peculiar to it, and there is in this case, on the other hand, a peculiarity which makes against the defendant. I mean the clause in the statute, ch. 119, which expressly enacts, that no other or greater fee shall be received by any of the public officers mentioned in it, for services rendered by them respectively, than such as shall be established by the tariff which should be made under that Act, unless allowed by some other Act of Parliament for other services; and which imposes a penalty of forty dollars for any such offence.

Possibly the legislature meant by that, that the prohibition should extend only to the cases of fees that should be illegally demanded of individuals for public services, but I think we cannot understand in that sense only the plain language used. It may be argued also that the Legislature intended that the penalty should be all that the officer should be subject to, and that he should not be also required to refund the illegal fee or allowance. I think we cannot so determine.

And I also think that we cannot hold, in the face of that statute, that the fees received contrary to its express provisions are moneys which the officer in equity or good conscience may be allowed to hold, though he could not have recovered them by law. It seems to me that in a case like this, the language of the judges in *Steele* v. *Williams*, (8 Ex. 626,) applies with peculiar force; and that case is an authority so strong and clear against the defendant's right to retain the money illegally received by him, that it leaves it only to be considered by us whether the same principle can be applied in this case, where the defendant received the money from the municipality out of the public funds, as must have been applied, according to that case, in regard to any illegal fees which he had received from an individual for a service rendered to him by virtue of his office, for which service he is by the tariff allowed to be paid by the individual, as is the case with regard to several items contained in the tariff.

I can find no authority for drawing a distinction in favour of the defendant, founded upon the fact that he is sued by the county which paid the illegal charges out of the public funds. On the contrary, public policy seems to require that the law should be at least as strictly applied in such a case as in the case of an individual who had paid the illegal fee. But at the same time I do see very great inconvenience that would follow if accounts of this description should be allowed to be raked into long after they have been passed and paid, with a view of discovering any petty charges of a shilling or 1s. 3d., and making them the ground of a lawsuit to get back the money.

In *Brisbane* v. *Dacres*, (5 Taunt. 143,) the inconveniences and hardships of such a course are strongly pointed out, but I think we cannot apply the principle on which that case was determined to the case before us. The facts are in several respects so unlike that we could not rely on it as an authority in favour of the defendant.

I have endeavoured to make plain the conclusions I have come to. If my brothers concur in this view, we must leave it to the parties to apply what has been determined by us in such a manner as to shew for what sum the verdict should be entered, in addition to the sum mentioned in the case as submitted to, $66; and if it should be required, the master of this court will assist them in stating the account, and will refer to us if it should be necessary on any point that may seem doubtful.

BURNS, J., concurred.

MCLEAN, J., having been absent during this term, gave no judgment.

COMMON PLEAS.

Reported by E. C. JONES, ESQ., *Barrister-at-Law, Reporter to the Court.*

HOLDER, v. JACKSON.

Auctioneer—Contract with—Bidder—How far auctioneer is bound to accept all bids indiscriminately.

An auctioneer is not bound to accept all bids, as a matter of course, from persons present at his auction. An action, therefore, will not lie for refusing to accept such bids unless by reason of some special condition or terms of the sale.

(T. T., 25 Vic.)

Declaration, third count.—Also, for that the plaintiff had the reputation of, and was in the habit of attending sales at public auction, and purchasing articles thereat both on his own account, and on commission for other persons; and the defendant, as such auctioneer aforesaid, held the sale at public auction, in the second count mentioned, under the conditions hereinafter mentioned, that is to say: "Terms and conditions of auction sale of household furniture, bar fixtures, &c., Kingston, September 7th, 1858: each and every article to be taken as it may turn out, good, bad, or indifferent; any lot in dispute at the time of being adjudged to be re-sold to the highest bidder. Terms of payment, cash, prior to the goods being removed or delivered, which is to take place after the sale is closed, and any articles remaining unsettled for agreeable with the terms of sale will be re-sold on account and risk of the purchaser, but persons purchasing to the extent of fifty pounds or upwards, can have a credit of three months by furnishing approved endorsed notes." And the Plaintiff relying upon the said conditions of sale hereinbefore recited, did attend the said sale, and bid in and purchased a large number of articles thereat, other than those in the second count mentioned; but the defendant, after the plaintiff had so bid in and purchased a large number of articles at the said sale, as last aforesaid, wrongfully, maliciously, and without reasonable or just cause, wholly refused to accept the plaintiff's biddings for other and subsequent articles put up by the defendant, so being such public auctioneer, for public competition and sale at the said auction, although such biddings were at different times tendered to the defendant. And the defendant thereby prevented the plaintiff from becoming the highest bidder, and purchaser of a large number of articles at the said auction, whereby the plaintiff lost a large sum of money on the articles already purchased by him at the said auction, and lost divers profits and the benefit of the credit mentioned in the said recited conditions of sale, and was injured in his said reputation and business of purchasing at auction on commission, and in his credit, and was otherwise damnified. And the plaintiff claims forty dollars.

And as to the third count of the declaration the defendant says that the same is bad in substance, on the ground that an auctioneer at a sale by public auction is not compelled to receive indiscriminately the biddings of persons attending the sale, but has an unqualified discretion to exercise as to any particular bidder's credit and responsibility, and the consequent right to receive or refuse his bid.

The following points were insisted on the part of the defendant on the argument of the demurrer herein:

1st. That an auctioneer at a sale by public auction is not compelled to receive indiscriminately the biddings of persons attending the sale, but has an unqualified discretion to exercise as to any particular bidder's credit and responsibility, and the consequent right to receive or refuse his bid, and the conditions of sale are not estoppel.

2nd. That the plaintiff at the said auction sale was not bound to purchase, therefore there was no consideration to bind the defendant to sell, so that there was no mutuality. The contract was all on one side, therefore *nudum pactum*, and there was no complete contract of sale.

3rd. That the plaintiff should have averred that in the event of his having become the purchaser of goods at the said sale to an amount to have entitled him to the credit mentioned in the conditions of sale, that he had in his possession, or was prepared to, and could have furnished promissory notes for the amount of his purchases, that would have been approved of by the defendant according to the conditions of the sale.

G. W. Draper, for defendant, contended that the declaration was bad, because it did not aver that plaintiff was willing to purchase to £50, or give security. Gist of the action is whether an auctioneer has a right to refuse to take a bid or not. He cited Addison on Contracts, 89; *Payne* v. *Cave*, 3 T. R. 148; *Cooke* v. *Oxley*, 3 T. R. 653.

C. Gildersleeve, contra, contended that the plaintiff had the right to purchase, if the property was sold at auction. He cited *Fuller* v. *Abrahams*, 6 Moon. 306.

Richards, Q. C., for the defendant, referred to *Warlow* v. *Harrison*, 28 L. J. Q. B. 18; *Wardell* v. *Harrison*, 5 Jur. N. S. 318; S. C. 6 Jur. N. S. 66.

Draper, C. J.—The declaration charges the defendant with wrongfully, maliciously, and without reasonable or just cause refusing to accept plaintiff's biddings at an auction for articles offered for sale, when the plaintiff had already been the highest bidder for, and had certain other articles knocked down to him as the purchaser thereof. The inducement laid is that plaintiff was in the habit of buying at auctions for himself and on commission for other persons, (not averring notice thereof to defendant.) That defendant as an auctioneer was holding a sale at public auction on the following conditions: every article to be taken as it may turn out to be good, bad, or indifferent; any lot in dispute at the time of being adjudged to be re-sold to the highest bidder. Terms of payment, cash, prior to the goods being removed or delivered, which is to take place after the sale is closed. Any articles remaining unsettled for agreeably to the terms of sale to be re-sold on account and risk of the purchaser. Persons purchasing to the extent of £50 or upwards, can have a credit of three months, by furnishing approved endorsed notes. Plaintiff does not assert that he was the highest bidder for any article which was not adjudged to him, but that the refusal of his bids prevented his becoming the highest bidder. Nor does he aver that he purchased some articles with intent to buy others, enough together to amount to £50; that defendant's refusal to accept subsequent bids prevented this, whereby he was obliged to pay cash for what he did buy. His claim rests on the assumption that an auctioneer at a public sale must receive the bidding or offer of any and every person present and does a wrong to any person whose bidding or offer he declines to notice and receive.

I can understand that possibly an auctioneer may do a wrong to the seller, by refusing bids. As he is agent for the seller *ab initio* he has, I apprehend, the right to settle not merely the terms of sale, but to regulate the biddings; as for example, to say he will not receive any bid which does not advance a given sum upon the last preceding bid. He is under no contract with the intending purchasers, unless it arises from the expressed terms or conditions of sale, until by accepting their bids he becomes bound to complete the sale according to those conditions, as in case his conditions state the sale to be without reserve, he is bound as by a contract to sell to the highest bidder who is not the owner or agent for the owner, in other words, a bid by or on behalf of his principal is contrary to the contract to sell *without reserve*, and the auctioneer cannot receive it to the prejudice of the last preceding bidder. *Warlow* v. *Harrison*, (5 Jur. N. S. 318, and 6 Jur. N. S. 66.)

But in a sale such as it is stated in this count, I do not understand on what ground any person can claim as a right to be allowed to bid—to offer to become a purchaser. It will be going beyond any authority I have seen to hold, that by holding an auction under such circumstances there is an implied duty or contract to deal with any person who presents himself, and that the auctioneer, with due regard to his responsibilities to his principal has not a right to refuse to deal with any particular person. The principal might refuse from mere caprice to sell to A., B. or C., and might direct the auctioneer to refuse to sell to certain parties, and I can see no reason why the auctioneer (the agent) is bound by law to accept offers or bids, any more than his principal would be. There are no special circumstances shewn to prevent his exercising a discretion, which may be very necessary under the circumstances easy to imagine. In the absence of authority to the contrary, and in the absence of any sound reason that I can perceive to uphold a contrary decision, I think the defendant should have judgment on this demurrer.

Per cur.—Judgment for defendant.

Wilson et al. v. The Corporation of the United Counties of Huron and Bruce.

Reference—Order of—Counsel—Authority to bind by undertaking—Agent of defendants' attorney—As such power to bind defendants—Award.

The rule for a reference in this cause was granted on reading the consent to refer endorsed on the record at *nisi prius*; it stated that the cause and all matters in difference between the parties should be referred to S. C., and among other things, stated that the evidence as taken before the judge at *nisi prius* should be read before the arbitrator, and that any question of law which should arise, at the request of either party should be referred to the court, and costs of cause, reference and of the award to abide the event. The order of reference as made a rule of court differed from the above memoranda, in these among other things—1st, by directing these costs, &c., should be in the discretion of the arbitrator. 2nd, that the arbitrator should not be required to reserve any legal questions for the decision of the court.

Messrs. W. P. & B. acted throughout this matter as agents for the defendants' attorney, all the papers in the suit being served upon them; and W., one of the members of the firm, was counsel for the defendants in the cause both at *nisi prius* and before the arbitrator.

It was proved that on an undertaking of W. as counsel for defendants not to raise any question of law, the terms of reference were altered as above by consent of W. and of counsel for the plaintiffs.

On motion to set aside the award and final judgment, *held*, that W. had power and authority either as counsel or as agent for the defendants' attorney in his discretion in the matters in this suit to bind the defendants; and that accordingly defendants were bound by his (W.'s) undertaking as above, and the award must therefore be upheld.

(M. T. 25 Vic.)

R. A. Harrison obtained a rule *nisi* in the Practice Court, returnable here, calling on the plaintiffs to shew cause why the agreement dated 17th of August, 1861, should not be declared null and void on the ground that Adam Wilson, Esq., had no authority to enter into it so as to bind defendants, or, why so much of the order of reference and rule embodying the same as directs that the arbitrator shall not be required to reserve any legal question for the opinion of the court, but that his conclusion on the law and facts should be final; and that the arbitrator shall have power to fix the period for payment of any sum he may award, should not be rescinded or varied upon the ground that the order and rule depart from the terms of the consent for a reference, and why the award and final judgment entered in this cause should not be set aside on the following grounds: 1st. That the arbitrator exceeded his authority in determining questions of law and awarding as to costs in a manner not authorised by the terms of the original reference. 2nd. That the arbitrator in doing so acted under an agreement, dated the 17th of August, 1861, purporting to have been made between Hector Cameron, Esq., attorney for the plaintiffs, and Adam Wilson, Esq., acting for defendants, which agreement, so far as the said A. Wilson was concerned, was in excess of any authority which he possessed, and in no manner binding on defendants. 3. That the arbitrator ordered payment of the sum of money at a future day when no authority so to do was given by the terms of the original reference. 4. That the award is contrary to law in this, that under the first count of declaration, in respect to which the arbitrator awarded the plaintiffs $6500, the plaintiffs are not in law entitled to recover from the defendants the said sum, or any sum whatever. 5. That the award is con-

trary to law and evidence, in this, that under the third count, in respect to which the arbitrator awarded to plaintiffs $5962, plaintiffs are not entitled to recover from the defendants the said sum, or any sum whatever. 6. On grounds disclosed in affidavits and papers filed. Or why, notwithstanding the agreement of the 17th of August, 1861, and the award, the cause should not be again referred to the arbitrator upon the terms of the original reference, freed of the provision of the agreement of the 17th of August, 1861, on the ground that the agreement is not binding on the defendants, and was in excess of the authority of the said A. Wilson.

The rule was granted on reading, first, the consent to refer, endorsed on the record at *nisi prius*, which was that the cause and all matters in difference be referred to the arbitration of S. Connor, Q. C., with power to examine witnesses under oath, and the same power of amendment as a judge at *nisi prius*. Award to be made before the first day of Easter Term, then next or such other time as the arbitrator might in writing enlarge the reference to. A verdict to be taken for the plaintiffs, with $20,000 damages, subject to be reduced, increased, or a verdict entered for defendants by the arbitrator. The evidence as taken by the judge at *nisi prius* to be read before the arbitrator, and any question of law arising in the case to be referred to the court, at the request of either party; costs of the cause, reference and award to abide the event.

The order of reference as made a rule of court differed from this, by directing that the costs of the cause, reference and award be in the discretion of the arbitrator; and that the arbitrator should not be required to find specifically on the issues, but might award damages generally on the various counts. And by directing that each party should produce books, papers, &c., to the arbitrator, and that the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period for payment of any sum he might award, without delaying plaintiffs' right to enter judgment.

The award, dated the 24th of August, 1861, after divers recitals determined the first and third counts of the declaration (the first count being a special count on a contract entered into between plaintiffs and defendants, and the third being an aggregate of the common counts) in favour of the plaintiffs, and the arbitrator assessed damages of plaintiffs, in respect of the matter in the first count, and the issues joined thereon, at $6500, and in respect of the matter in the common counts at $5962. The arbitrator ordered the costs of the cause in respect of the first and third counts, when taxed to be paid by defendants. No damages were assessed to plaintiffs on the second count, and no costs thereon given to either party. Each party were to pay their own costs of the reference. The defendants to pay the costs of the award. The verdict to be reduced, and the judgment entered for plaintiffs on the first and third counts for the respective sums above mentioned, amounting together to $12,462. The amount of judgment including costs, when taxed, and of award to be paid by defendants to plaintiffs on the 15th of October, 1861, but that delay was not to affect the plaintiffs' right to enter judgment.

The affidavit of Robert Gibbons, warden of the united counties, stated, among other matters, the making of an agreement, dated the 16th of August, 1861, between the counsel for the defendants, Adam Wilson, Esq., and the plaintiffs' attorney, to the effect following: that such agreement should be taken as part of the order of reference, and as if embodied in the original submission. That the arbitrator should not be required to find specifically on the issues, but might award or assess damages generally, er on the different counts. That the costs of the cause, reference, and award, should be in the discretion of the arbitrator. That the arbitrator should not be required to reserve any legal questions for the opinion of the court, but his conclusion and award on the law and facts should be final, and that he should have power to fix the period for the payment of any sum he might award, but that provision was not to affect the plaintiffs' right to enter judgment under the reference and award.

Mr. Gibbon's affidavit then stated that Mr. Wilson had no authority whatever from the defendants to enter into that agreement, nor any power or permision so to do. That defendants had no knowledge of said agreement until about the 20th of September. That defendants desired and intended to have all legal questions referred to the court. That the award was not served on defendants' counsel until the 12th September, 1861, and defendants had no knowledge of its contents until it was too late to move to set it aside.

Malcolm C. Cameron, the defendants' attorney, also made an affidavit, that he did not authorise Mr. Wilson to enter into the agreement set out in the award, nor had he any knowledge thereof until he received the award about the middle of September last. That such agreement was entered into by Mr. Wilson, without the knowledge, permission, or authority of the defendants, or their attorney. That several legal questions were raised before the arbitrator by defendants' counsel, (Mr. Wilson,) which, if referred to the court, would, as the attorney believes, be found in favour of defendants. That the award was not served on defendants, or their attorney, nor had they any knowledge of the contents thereof until it was too late to apply to the court against it last term.

An additional affidavit of Mr. Gibbon was put in, reiterating the statements of the fermer one, and adding, that from the moment the defendants became aware of the contents of the award, and the consent of Mr. Wilson to the alteration of the rule of reference, it was determined to resist the award and to apply to set it aside. That he never led the plaintiffs to believe the money would be paid as directed by the award, of which they had notice served on them until after last term, nor were they aware of the publication of the award, nor had they any notice thereof until after the period aforesaid. Annexed to this affidavit is the affidavit of Alexander M. Ross, treasurer for the united counties, stating that he was the principal party engaged in advising with the counsel in this case, at Toronto, and was in frequent communication with A. Wilson, Esq., Q. C., who was acting for defendants, and is well acquainted with the facts attending the case and arbitration. That he has carefully read over the affidavit of Mr. Gibbons, and knows it to be true in substance and in fact, except the paragraph denying that Mr. Gibbon ever led the plaintiffs' attorney to believe the money would be paid, and that he believes to be true.

The defendants' attorney made a second affidavit denying that Mr. Wilson had authority or permission from defendants or their attorney to make the agreement of the 17th of August, 1861, and asserting that the award was not served on defendants or their attorney, nor had they any knowledge of its contents or any notice of the publication thereof until it was too late to apply to the court last (*i. e.* Trinity) term to set it aside, and that judgment has been entered and execution placed in the sheriff's hands in this cause.

The plaintiffs' atttorney made an affidavit stating that immediately after the commencement of this suit, the defendants' attorney instructed him to serve all papers in this suit on Mr. Adam Wilson, or on the firm of Wilson, Patterson & Beaty, of which firm Mr. Wilson is a member, and treat him and his firm as the agents of him, the defendants' attorney, in consequence of the usual agent of the defendants' attorney being retained on behalf of the plaintiffs. That Mr. Wilson and his firm acted throughout this suit as agents for the defendants' attorney, and received and served all papers and documents herein. That the award was made and published by the arbitrator herein, on the Saturday before last Trinity Term and the plaintiff's attorney having received notice on that day from the arbitrator that he had published his award, he served on the same day notice on Mr. Wilson that the award was published. That it was distinctly understood by both parties during the argument before the arbitrator that the award would be published before Trinity Term. That on the first or second day of Trinity Term the plaintiffs' attorney had a conversation with Mr. Wilson as to the award, when Mr. Wilson spoke in general terms of the contents of the award. That up to or about the 24th of October, 1861, plaintiffs' attorney had no intimation that the defendants meant to contest the award, but had been previously led to believe by conversation with the treasurer, and with the attorney of defendants, that they acquiesced in the award and would pay the amount, and that at the request of the attorney for defendants he delivered to him his bill of costs and affidavit of disbursements about the 1st of October. That Mr. Wilson acted as agent for the defendants' attorney, and as counsel for defendants throughout the whole case. That the arbitrator was not

requested to state any question of law for the opinion of the court, there having been merely a conversation whether he should be so requested. That after the evidence had been given and a long argument concluded, a discussion arose between the counsel and the arbitrator as to the authority of the latter, and the necessity for reserving any question of law. Mr. Wilson stated that the only question of law as to the first count that could be raised was in reference to the agency of Bosanquet & Co. That the arbitrator intimated that he would have to find as a fact that the said firm were the agents of the defendants alone, and such finding would virtually determine the suggested question of law, and from the evidence, the finding on the questions of fact necessary to raise questions of law must be in favour of the plaintiffs, when Mr. Wilson suggested that if the plaintiffs' counsel would leave the whole question of costs to the arbitrator, and allow him to fix a time for the payment of the money awarded, he (Mr. W.) would be disposed not to raise any question of law, and after consideration for a day or two, the agreement altering the terms of the reference was arrived at; the only inducement for the plaintiffs' counsel to consent to alter the terms of the reference was to avoid further delay. That the defendants' attorney was not present at the trial, nor at any sitting of the arbitrator, nor at the argument of the demurrers, but Mr. Wilson attended at all the sittings of the arbitrator, nearly thirty, except two or three at the beginning and the whole management of the case from the drawing of the pleas until the taxation of costs on the 24th of October, 1861, was entrusted to and conducted by Mr. Wilson.

Richards, Q. C., and Hector Cameron shewed cause, citing *Swinfen* v. *Swinfen*, 18 C. B., 485, and 3 Jur. N. S. 1109; S. C. 1 C. B. N. S. 364, and 5 H. & N. 890; *Thomas* v. *Harris*, 27 L. J. Ex. 353; *Chambers* v. *Mason*, 5 C. B. N. S. 59; S. C. 4 Jur. N. S. 1037; *Hall* v. *Featherstone*, 3. H. & N. 284; In re Hobler, 8 Bea. 101; *Rees* v. *Waters*, 16 M. & W. 269.

R. A. Harrison, in support of the rule, cited *Wade* v. *Simeon*, 13 M. & W. 647; *Furnival* v. *Bogle*, 4. Russ. 142; *Hargrave* v. *Hargrave*, 12 Beav. 406; *Colledge* v. *Horn*, 3 Bing. 119; *Brooks* v. *Parsons*, 1 D. & L. 691; In re Burt, 5 B. & C. 668; *Hayward* v. *Phillips*, 6 A. & E. 119; *Potter* v. *Newman*, 4 Dow. P. C. 504.

Draper, C. J.—The first question is, whether this application is not too late. The rule *nisi* was moved on the 4th day of Michaelmas Term (21st November) in the Practice Court returnable here. The award is dated the 24th August last. The following Monday, August 26th, was the first day of last Trinity Term. No application of any kind was made until the 24th of October, 1861, when a summons was obtained in Chambers to stay proceedings. This appears only from the statement of counsel in argument, from some of the affidavits referred to in drawing up the rule *nisi* being marked as filed in Chambers on the 24th October, 1861, and attached to the copy of award and other papers put in on moving for the rule *nisi*. The delay to move is accounted for on the part of the defendants, by statements contained in the two affidavits of the warden of the united counties, (the defendants,) and in two affidavits of the defendants attorney, one of each having been sworn the 21st October, 1861, and used on the application in Chambers; the others being sworn on the 16th and 18th November respectively. The one first sworn by the warden, states that the award was not served on defendants' counsel until the 12th of September, 1861, nor had defendants any knowledge of its contents until it was altogether too late to set the same aside last (Trinity) term.

The first affidavit made by defendants' attorney states that the award was not served on defendants or their attorney, nor had they any knowledge whatever of the contents thereof until it was too late to apply to the court last (Trinity) term.

In his second affidavit the warden repeats his former statement, and adds that defendants had no notice whatever served on *them*; that such award was not made until after last term; nor were *they* aware of the publication of the award, nor had *they* any notice whatever thereof until after the period aforesaid.

And the second affidavit of the defendants' attorney states that the award was not served on the *defendants* or their attorney, nor had they any knowledge whatever of the contents or any notice of the publication thereof until it was too late, &c.

There is a palpable inadvertance involving an apparent inconsistency in the manner in which the term "defendants" is used, as if they were individuals instead of being a corporation. It would have been more to the purpose to deny notice and knowledge on the part of those officers of the corporation, notice to whom would be notice to the "defendants." The second affidavit of the defendants attorney is inconsistent with the idea that in denying notice or knowledge to or on the part of the "defendants" he can refer to and include implied or legally imputed notice or knowledge, or he would not have stated that the award was not served on the defendants or their attorney, since service on him as their attorney would for all purposes now under discussion, have been service on them; notice of publication or of the contents of the award to him would have been notice to, or service on, his duly authorised agent as the defendants' attorney would have been notice to, and service on, himself.

On the other side two affidavits are made by the plaintiffs' attorney, the first sworn on the 26th of October, the last on the 29th November. In the first it is stated that the defendants' attorney and their treasurer within the last month "both led him to believe that the money would be paid on the 15th October as directed." That the defendants counsel, meaning Mr. Wilson, was aware of the terms of the award within the first two days of Trinity Term, although a copy of the award was not then served, "but a notice of publication of the award was served on the defendants before the first day of Trinity Term." And further, that Mr. Adam Wilson acted as agent for the defendants' attorney and as counsel for the defendants. This affidavit was known to the warden when he made his second affidavit, as the 15th paragraph thereof shews, and must, I think, have been also known to the defendants' attorney. And yet in all the affidavits filed on behalf of the defendants, all reference to Mr. Wilson as agent for the defendants' attorney is most studiously avoided, not a word is said of any communication to or from him on the subject of his making the agreement of the 17th August, or of his being agent of the defendants' attorney, or of his having had notice of publication, or even being served with the award, though the warden swears the award was not served on the defendants' counsel until the 12th of September, 1861, a fact not otherwise appearing on the papers before us, except by an endorsement on the copy of the award, which is attached to an affidavit of the defendants' attorney sworn the 10th November, that such copy was not served until the 12th of September, 1861, as appears by the memorandum thereof endorsed thereon by the counsel for the defendants.

The second affidavit made by the plaintiffs' attorney states more fully that on the same day the award was made, he served Mr. Wilson with notice that the award was published. That Mr. Wilson, on the first or second day, knew generally the contents of the award, and that he acted as agent for the defendants' attorney. And that plaintiffs' attorney was told by defendants' attorney to serve all papers in the suit upon Mr. Wilson, or the firm of Wilson, Patterson & Beaty, of which Mr. Wilson is a member, and to treat him and his firm as the agents of the defendants' attorney in this suit, and that Mr. W. and his firm acted throughout this suit as agent for defendants' attorney, and received and served all papers and documents therein. And again, that defendants' attorney was not present at the trial or any of the sittings of the arbitrator, and that the whole management of the defendants' case from the drawing of the pleas until the taxation of the costs was entrusted to and conducted by Mr. Wilson.

From the manner in which Mr. Wilson's alleged want of authority to make the agreement of the 17th August is pressed upon us, I do not doubt that his character as agent of the defendants' attorney would have been repudiated if he had not filled that position. I conclude that Mr. Wilson especially, and his firm generally were agents in this cause for the defendants' attorney; and that they had notice of the publication of the award before Trinity Term. I doubt as little that if there had been any omission on Mr. Wilson's part duly to advise the defendants' attorney of the proceedings, we should have heard of it unless the matter was so entirely left to Mr. Wilson's management as to make this unnecessary. The very guarded and confined language in which the defendants' attorney denies notice or knowledge, fails to satisfy me that he was not informed by Mr. Wilson of the steps and proceedings taken in the cause, and I think justifies the conclusion that he had an ac-

tual as well as imputed knowledge which arose from services on' and notice to, his agent.

And if the application had been merely to set aside the award, I should have been prepared to hold it too late, not having been made in Trinity Term, or possibly because not made within the first four days of that term.

But a difference is taken in this case, where a judgment entered upon an award is moved against, and it appears settled that such a motion is not so limited in point of time, but it can only be made on objections apparent on the face of the award, and the argument for the plaintiffs is, that the agreement of the 17th of August being set out on the award, the objection is open on this motion. and that as Mr. Wilson had no authority to bind the defendants by it, the award is bad.

The form of the objection is that Mr. Wilson, as defendants' counsel had no authority to change the original submission, and vary and extend the authority given to the arbitrator.

I take it to be sufficiently established that Mr. Wilson filled not only the character of counsel for defendants, but also of agent to the defendants' attorney. Many decided cases shew the authority of an attorney to refer a cause, to select the tribunal by which the matter in dispute between his client and the opposing party shall be decided, and some of them extend to counsel also. I refer generally to *Swinfen* v. *Lord Chelmsford*, 6 Jur. N. S. 1042; *Filmer* v. *Delber*, 3 Taunt. 486, which is approved in *Faviell*, v. *the Eastern Counties Railway Company*, 2 Exch. 344, a case particularly applicable, for there as here, the defendants were a corporation, and there, though not here, it was objected that it should be shewn that their attorney had authority under seal to defend or refer the cause. The language of the judges as to the authority of the attorney to refer a cause is explicit, and if this be so, it carries with it power to alter or vary the terms of the submission. The case of *Hatton* v. *Royle*, 8 H. & N. 500, does not conflict with this view while the case of *Withers* v. *Parker*, 4 H. & N. 524, and in error, 5 H. & N. 725, shews the authority of the agent for the attorney to be as effectual in the matters entrusted to him as that of the attorney himself.

Upon either ground, therefore, viewing Mr. Wilson as counsel for the defendants, or as agent for the defendants attorney, especially entrusted as he was, I am of opinion that he could and did bind the defendants by his agreement of the 17th August, 1861. This is the only objection apparent on the face of the award, or at all events any others apparent on the award depend on it, and as I think it fails, the rule must be discharged.

HAGARTY, J.—In this application it is admitted that the reference was duly made at *nisi prius* as endorsed on the record. This was signed by Mr. Wilson as representing the defendants. It contains a provision that any question of law should be referred to the court at the request of either party.

The chief point urged against the award is the agreement of the 17th August, 1861, as an alleged excess of authority on Mr. Wilson's part. This gentleman, as is abundantly evident, was entrusted either as counsel or agent for defendants' attorney with the management of the defendants' case before the arbitrator.

It appears to me to be of no moment whatever as to which position he filled. It is sufficient to say that on him devolved the legal management of the case, and it is not pretended that he acted otherwise than in perfect good faith and to the best of his judgment. I also consider that in this branch of the application it is quite immaterial whether he had or had not authority to make this agreement. To my mind it disposes of the question simply to state the fact that the arbitrator was not requested by defendants' counsel or agent to reserve any legal question for the court.

It must be borne in mind that we are not now discussing any dispute between the client and his professional adviser, but we are asked to set aside an award and judgment as against defendants on an alleged excess of authority.

I think the law would be in an intolerable state, and the conduct of suits rendered almost impracticable, if the court were bound to accede to defendants' view of the powers and duties of an advocate. It is matter of every day practice for counsel to take the responsibility of the entire management of a case, to decide on not pleading a particular defence, to decline calling or cross-examining a particular witness, to take or to abstain from taking legal exceptions; to accept a nonsuit, withdraw a juror, &c., &c.

As the court of Exchequer decided in *Swinfen* v. *Lord Chelmsford*, "counsel has complete authority over the suit, the mode of conducting it and all that is incident to it, such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as in his discretion ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial," &c. I do not think that even the vivid imagination of the counsel for Mrs. Swinfen, in all the stages of her celebrated litigation, ever conceived much less induced him to urge that the conduct of a counsel in such a matter as not asking an arbitrator to reserve a legal question for the court, could, if not assented to by his client, invalidate an award otherwise good.

This disposes of the substance of the application. I think we can hardly be expected to consider it as a fatal objection in the defendants' mouth, that the large sum ordered to be paid by them was made payable at a future day and not forthwith. Such day, moreover, being now long past. As to the costs, they stand very much in the same position. By the admitted reference, they were to abide the event, which was against the defendants. The arbitrators' decision places the payment on a more favourable footing for defendants.

As to whether this application is too late, I have not considered it fully. I incline to agree with the plaintiffs. In my view, the case wholly fails on the merits. I think the rules should be discharged with costs.

Per cur.—Rule discharged.

CHANCERY.

(*Reported by* THOMAS HODGINS, Esq., LL.B., *Barrister-at-Law*).

STANBURY V. MILLIKEN.

Judgments—Priority—Partnership.

Judgments recovered against two, out of three, members of a firm for a partnership debt, are available only against what may appear upon winding up the partnership to belong to the two judgment debtors.

This was a motion to dispense with payment of the purchase money of certain property into court. The question raised was whether judgment creditors of two partners of a firm—which firm were the original mortgagees—were entitled to rank on the proceeds instead of the assignee of the firm. It appeared that plaintiff was a derivative mortgagee, Ross, Mitchell & Fisken being the original mortgagees. Bone & Co., and Gagne & Co. were creditors of Ross, Mitchell & Fisken, but only sued and recovered judgment against Ross and Fisken; after which Ross, Mitchell & Fisken were adjudged bankrupts under a Scotch sequestration and their estate vested in one Robson as trustee. It was alleged that as Ross, Mitchell & Fisken had paid off plaintiff that the judgments could attach, but Ross, Mitchell & Fisken alleged they paid off plaintiff as acting for their trustee Robson.

McDonald for Robson, Ross, Mitchell & Fisken.

McGregor for Bone & Co. and Gagne & Co.

Davis for the purchaser.

SPRAGGE, V. C.—The Master finds the plaintiff has been paid off by Ross, Mitchell & Fisken and that nothing is due to him, and he then finds the amount paid by them as due to Robson, the trustee of their sequestered estates. He also finds the judgments of Bone & Co. and Gagne & Co., proved against the interests of Ross and Fisken after settlement of partnership affairs. In settling the priorities the Master places Bone & Co. and Gagne & Co. as incumbrancers upon the estate of Milliken, in addition to the mortgage to Ross, Mitchell & Fisken—this is erroneous. Suppose the judgments of Bone & Co. and Gagne & Co. had been against Ross, Mitchell & Fisken instead of against the two partners, their priority would have been the second on that of Ross, Mitchell & Fisken upon the estate of Milliken to the extent of their judgment. The judgments are against the two only; it is admitted, however, for the purpose of this argument that the judgments are for debts of Ross, Mitchell & Fisken. Another question is, what is the effect of such a judgment? Now, what was determined by *Ex parte Higgins* and the *Commercial Bank* v. *Ave-*

rill (Gr.) was that the joint debt is merged in the judgment recovered. The judgment recovered is not against the partnership, though in respect of a partnership debt, and now only available against what the two judgment debtors have in the partnership or may appear after winding it up after payment of the creditors of the partnership, and is of course available against them individually. It therefore became unnecessary to consider whether the plaintiff was paid off by Robson as is alleged, or by Ross, Mitchell & Fisken as found by the Master.

O'REILLY V. WILKES.

Deed or Mortgage—Breach of Covenant.

Certain trustees conveyed to A. and took back from him a deed to erect buildings on the property to the value of £2,000, or in default that he would execute a re-conveyance. *Held* to be a mortgage for £2,000, and that subsequent purchasers and incumbrancers were entitled to redeem.

The Bill set forth that the plaintiffs are the trustees of the marriage settlement of Caira Robbins Wilkes, wife of George Samuel Wilkes, a defendant hereunto appointed under and in pursuance of the powers in the said settlement, and of an act of the Parliament of Canada, passed in the session held in the fourteenth and fifteenth years of the reign of Her Majesty Queen Victoria, and chaptered one hundred and sixty-nine.

That in pursuance of the powers vested in them by the said act and for the purpose of securing the erection of buildings on a portion of the remainder of the land vested in them for the purposes of the said settlement and making other improvements thereon, plaintiff agreed to sell to the said Wilkes, at the written request of the said Caira Robbins Wilkes, the parcels of land hereinafter more particularly described, for the sum of two thousand pounds, which was to be expended in erecting buildings and making other such permanent improvements on that other parcel of land vested in plaintiffs as such trustees.

That in pursuance of such agreement for sale, plaintiff by deed dated the 26th August, 1854, conveyed to the said Wilkes certain lands.

That in further pursuance of such agreement, by an Indenture dated the said 26th August, 1854, the said Wilkes re-conveyed the said two parcels of land to plaintiffs in consideration among other things herein stated, of the premises (being the said agreement for sale) and for the purpose of securing the performance of the condition of the said indenture, and the indenture was declared to be made upon the condition that if the said Wilkes should and did erect buildings and make other improvements upon that part of the remainder of the said real estate held upon the said trusts, according to plans and drawings of said buildings and improvements to be approved of by the said Caira Robbins Wilkes and plaintiffs, or two of them, which the said Wilkes was to furnish to the value of two thousand pounds, and interest thereon from 23rd March, 1854, within two years from that day, the value thereof to be ascertained and determined by architects and builders to be named by plaintiffs, or two of them, then the indenture should be void and of no effect; and the said Wilkes covenanted with plaintiffs that he should and would within the said two years furnish plans and drawings of the buildings and improvements above mentioned, and submit the same to the said Caira Robbins Wilkes and plaintiffs, or two of them, and would obtain their approval, and would within the said two years erect the buildings and make the improvements corresponding with said plans and drawings, on that part of the estate above mentioned, of the full value of two thousand pounds and interest thereon as aforesaid, without any default whatever; and after breach of the said covenant or default in performing the stipulations contained in the above condition, he would execute all proper conveyances unto plaintiffs to convey said parcels or tracts of land to them upon the trusts and for the uses mentioned in said settlement and Act of Parliament, free from all incumbrances created by him or any one examining under him.

That the said Wilkes had not fulfilled his said covenant, and had neglected to furnish any plans or drawings of the proposed buildings and improvements, and submit them to plaintiffs and the said Caira Robbins Wilkes, or any of them, and the said Wilkes hath not expended the said sum of two thousand pounds, or any sum, in making improvements in pursuance of the said agreement on the lands in that behalf mentioned.

The prayer was that the said George Samuel Wilkes may be decreed specifically to perform the said covenant to convey to plaintiffs the said premises free from incumbrances, and for relief against other defendants.

Proudfoot for the plaintiff.

Wood for defendant Morrell.

Hector for defendant Skelsey.

Hodgins for the infant defendants.

ESTEN, V. C.—The bill in this cause recites that in pursuance of a settlement and of an Act of Parliament (14 & 15 Vic., c. 169), an agreement was made with the defendant, Wilkes, for the conveyance of certain property to him, and that he should erect buildings and make other permanent improvements thereon to the extent of £2000. The Act gave a power to the trustees to sell portions of the trust property and to invest the proceeds in improving the other portions. Some time after the passing of the Act the trustees conveyed the land to Wilkes for the consideration set out in the deed, namely, £2000, which was to be expended in erecting buildings upon the same property. He then mortgaged back to them—that is, he makes a deed with a condition that upon default he would reconvey and execute all such conveyances as might be necessary—and he also covenants to expend the money in the manner set out in the instruments. The defendant, Wilkes, makes default, and the trustees' estate thereupon becomes absolute. The bill then is filed to have the property reconveyed to the trustees under the covenant. The parties are Wilkes and those to whom he sold or mortgaged, for of course those who received title from him are bound by his covenants—the deeds having been registered and all parties having notice. At the examination of witnesses the defendant, Wilkes, and Mr. Wood, the solicitor for Morrell, were examined as to certain improvements said to have been made upon the property, so as to set the value of them against the amount claimed by the plaintiffs. Wilkes states he did not perform the covenant to expend money on the property—that what he did expend was not intended to be in part performance—that it was his wife's money—that he felt rich and thought he could perform the covenants hereafter. Mr. Wood states that when he applied to Wilkes about the improvements when taking the Morrell mortgage, Wilkes told him he would get the amount of them endorsed on the deed to the trustees. I must, however, leave the evidence of both out of the question. The money expended is stated to have been his wife's, and it is not reasonable or proper to suppose that it was expended in part performance of his covenants. The intendment seems to be against its being so. Then what decree am I to make in this suit? Am I to make such a decree as the plaintiffs ask? All claiming under Wilkes had notice of his covenants and are bound by them. And then if I should make a decree as the plaintiffs ask, am I to order a reconveyance without giving further time to perform the covenants? And then what time am I to give? If Wilkes had two years to perform the covenants, how many years, or months, or weeks, am I to give to the other defendants to erect the buildings? I cannot fix a time. I must look at the whole transaction as I think it ought to be looked at, and as I think it was intended to be—and declare the deed to the trustees to be a mortgage for £2000. It could not be material whether the £2000 was to be paid in money or expended on the property—for the property had passed from the trustees to Wilkes. I think there should be the usual decree of foreclosure as on a mortgage, or a sale if the defendants wish it. The bill must be dismissed as against the infant defendants with costs.

CHAMBERS.

Reported by ROBERT A. HARRISON, Esquire, Barrister-at-Law.

WILSON ET AL. JUDGMENT CREDITORS, V. THE CORPORATION OF THE UNITED COUNTIES OF HURON AND BRUCE, JUDGMENT DEBTORS, AND THE BANK OF MONTREAL, GARNISHEES.

Garnishee clause of C. L. P. Act—Money paid under sec. 138 of the assessment act as redemption money of land sold for taxes, not a debt.

Moneys paid by the owners of land sued for taxes within one year from the day of sale as redemption moneys to the County Treasurer, for the use and benefit

of the purchasers, and banked in the name of the County Treasurer, cannot be attached at the instance of a creditor of the Corporation of the County as a debt due by the Bank to the Corporation of the County.

(Chambers, April, 1862.)

Hector Cameron, in November last, obtained an order in this cause to attach debts due to defendants by garnishees and a summons to garnishees to pay over.

This was granted on an affidavit which did not shew the grounds of deponents' belief that the garnishees were indebted, though the fact of belief was stated, nor did the affidavit shew that there had been any execution issued against defendants, and its return, nor what was the nature of the debt believed to be due from the garnishees to the defendants.

R. A. Harrison shewed cause, and at the same time moved to rescind the attaching order. He objected,

1st, that the order could not be made when the judgment debtor was a corporation; for the judgment debtor, if a corporation, could not be examined. C. L. P. Act. Con. Stat. chap. 22, sec. 287, 288.

2nd. When the judgment debtor is a municipal corporation, the Con. Stat. U. C. cap. 54, sec. 221, gives a special remedy, which must be followed.

3rd. A foreign corporation cannot be garnishees. *Lundy* v. *Dickson*, 6 U. C. L. J. 92.

4th. If remedy is granted at all, it cannot be till that given (see No. 2) is exhausted.

5th. Affidavit of belief insufficient without shewing nature of debt or ground of belief. *Cataraqui Road Co.* v. *Dunn*, 8 U. C. L. J. 27; *Hazlewood* v. *DeBergue*, *ib.* 28.

6th. Amount of debt should be shewn either in affidavit or summons to pay over. *Melbourne* v. *Tulloch*, 8 U. C. L. J. 184.

7th. The alleged debt not due by the garnishees to the judgment debtors. Con. Stat. U. C. cap. 55, secs. 110, 111, 112, 124, 137, 148, 143.

He also objected,

1st. That money in garnishees hands in name of Treasurer and not for judgment debtors.

2nd. Cannot be paid either to judgment debtor or judgment creditor without a breach of trust.

3rd. The debt contemplated by the statute is a personal debt.

4th. No privity between judgment debtors and garnishees. *Stephens* v. *Badcock*, 3 B. & Ad. 355; *Baron* v. *Husband*, 4 B. & Ad. 611.

An affidavit was filed on behalf of the garnishees, made by the Treasurer of the judgment debtors, that in November, 1861, there was no money deposited with the garnishees in the name of the judgment debtors, and that the judgment debtors have no claim whatever on the garnishees; that some time before the attaching order the garnishees had an account open with the Warden of the corporation of Huron and Bruce, but at the time of service of the order and since, there have been no funds to the credit of that account; that when the attaching order was served deponent had $3,107 55, which he deposited with the garnishees in his own name simply, and not otherwise; that of this sum he had before the attaching order was served, issued cheques for $845 96, which were in the hands of *bona fide* holders; that $109 50, was the property of the Liverpool & London Insurance Company, of which he (deponent) was agent; that $988 25, was his own, and the whole balance was money received by him as redemption money paid by the owners of land sold for taxes, which money was held by him for the benefit of parties who had purchased said lands, and held the sheriff's certificate, which certificate might be presented to him (deponent) at any time.

Richards, Q. C., supported the order and summons, citing *Barlow* v. *Roberts*, 6 H. & N. 93; *Ex parte Turner*, 6 Jur. N. S. 1172.

Draper, C. J., I am of opinion that the summons must be discharged and the attaching order vacated.

I proceed entirely upon the objection No. 7, and the affidavit, though I may add that this case confirms me in the propriety of the position adopted by several of the judges of requiring in the first instance that the affidavit on which the attaching order is granted should disclose the nature or character of the debt sought to be attached.

The only money which the judgment debtors can have even a pretext to claim are those stated in the affidavit to be redemption moneys. It is enough to see what that phrase means to dispose of this matter.

Certain lands have been charged with taxes; the taxes having been sufficiently long in arrear, the treasurer of the county within which the lands are situate issued his warrant to the sheriff to levy the taxes thus in arrear. The sheriff acting on the warrant sells the land, and thus levies the taxes in arrear, and must pay to the treasurer the moneys thus collected. These moneys may or may not according to circumstances, be the property of the municipality of the county; but the taxes are thus satisfied.

Within a year from the sheriff's sale the owner of the land sold may redeem it. This is done by paying to the treasurer "for the use and benefit of the purchaser or his legal representatives, the sum paid by him, and ten per cent. thereon." The treasurer, it is true, receives this money *virtute officicii*, but the statute appropriates it at the very instant of payment for the use and benefit of the purchaser who, by reason of this payment loses the right to obtain a conveyance from the sheriff. Nor does it, in my opinion, make any difference that the county is responsible to the parties interested for paying over moneys received by him. The county has the treasurer and his sureties to look to for indemnity. Thus then the money was never for an instant the money of the judgment debtors in this case, and it cannot be said to be their money deposited with the garnishees either legally or equitably.

Whether under any possible circumstances the Bank of Montreal still holding the redemption money might have been called to pay it over to the successor of the present treasurer it is unnecessary to enquire. As the matter stands the judgment debtors have no claim against the garnishees, and therefore the judgment creditors must fail on this application.

Barlow v. *Roberts*, 6 H. & N. 93, does not apply. There is no analogy between attaching a debt due to a testator's estate on a judgment recovered against the executors and the present case.

Ex parte Turner, 6 Jur. N. S. 1172, is also, I think, clearly distinguishable.

Wilson et al. Judgment Creditors v. The Corporation of the United Counties of Huron and Bruce, Judgment Debtors, and John McDonald, Esquire, Sheriff of the United Counties of Huron and Bruce, Garnishee.

Garnishee clause of C. L. P. Act—Money in hands of sheriff arising from sale of lands not a debt. Con. Stat. U. C. cap. 55, secs. 124, 127.

Moneys in the hands of the sheriff arising from a sale of lands for taxes pursuant to sec. 137 of the Assessment Act, under a warrant directed to him pursuant to sec. 124 of that act, cannot be attached at the instance of creditors of the Corporation of the County in which the lands are situate, as being a debt due from the sheriff to the Corporation of the County.

(Chambers, April, 1862.)

This was an application similar to the last. The first six objections were repeated; also the 7th, referring to the assessment. Con. Stat. U. C. cap. 55, secs. 110, 111, 112, 115, 124, 137, 143, 154, 160, 161, 163, 165, 166, 193.

In this case it appeared that the moneys in the garnishee's hands were collected by him under a warrant from the treasurer of the United Counties of Huron and Bruce, to levy on certain lands stated in a schedule annexed, the arrears of taxes set opposite to each lot. The sale was made on the 26th November, 1861, and not being finally concluded was adjourned till the 10th December following. The attaching order was dated on 26th November, 1861. The debt of the judgment creditors was recovered on a claim for work and labour, and on an alleged breach of contract respecting certain debentures made by the judgment debtors. The judgment debtors had, as was sworn before the commencement of this suit, issued debentures to the amount of £13,000, on the credit of the taxes which the garnishee was directed to levy, which debentures are unpaid, and a much larger amount is due upon them than the garnishee has collected.

S. Richards, Q. C., for judgment creditors.

R. A. Harrison for garnishee.

Draper, C. J.—This case differs from the last in some respects. The moneys which the garnishee has collected are *prima facie* at least, the moneys of the judgment debtors.

I understand that on behalf of the garnishee it is asserted that the lands by the sale of which the taxes are to be levied are the lands of non-residents, and if this be conceded then the moneys collected by the sheriff, the garnishee, are by the assessment act declared to belong to the "Non-Resident Land Fund," (sec. 154) and the treasurer's duty is to open an account with every municipality with that fund, and the County Council may issue debentures on the credit of that Non-Resident Land Fund, (sec. 160) which as I understand in the present case has been done, which debentures are to be negotiated and the proceeds paid into that fund, and the interest on the debentures, and the principal when due, are to be paid out of that fund. A provision is made for distributing the surplus money of the non-resident land fund, reserving a sum dependent on the amount of such debentures which is unpaid, and each municipality of the county is to have a rateable portion of such surplus, according to the arrears due on non-resident lands in such municipality.

I take the effect of this to be a specific appropriation by the Legislature of the moneys arising from the sale of lands of non-residents for taxes, and that such specific appropriation is as effectual to prevent the judgment creditors obtaining payment of the moneys, as a prior assignment of the debt would be in ordinary cases.

The same order must be made as in the last case.

PRIVY COUNCIL.

BEFORE LORD CHELMSFORD, LORD KINGSDOWN, LORD JUSTICE KNIGHT BRUCE, SIR EDWARD RYAN, LORD JUSTICE TURNER, SIR JOHN TAYLOR COLERIDGE.

MAROIS, *Appellant* and ALLAIRE, *Respondent*.

Right of Appeal to the Privy Council.

Held, that notwithstanding the 34 Geo. III. cap. 6, s. 30, and the 12 Vic. cap. 37, s. 19, the judgment of the Court of Queen's Bench is not final in all cases, where the matter in dispute does not exceed the sum or value of five hundred pounds sterling, and does not relate to any fee of Office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents, or such like matters or things, where the rights in future might be bound, and that the Privy Council can in its discretion allow appeal in such cases.

That the case of *Cuvillier* v. *Aylwin* (2 Knapp 72) did not receive that full and deliberate consideration, which its great importance demanded.

That the case of *Cuvillier* v. *Aylwin* is overruled.

(10th February, 1862.)

The action before the Superior Court in Quebec, was one directed against four defendants, who were sought thereby to be condemned, jointly and severally, to pay to Allaire, the plaintiff, the sum of £165 8s. 7d., with interest at 4½ per cent, for a few weeks previous to the institution of the action, borrowed by them (as plaintiff pretended), trading as bankers in partnership, under the name of "La Caisse d'Economie de St. Roch," from him, the plaintiff.

It was pretended in the Superior Court, that all the defendants were officers of La Caisse d'Economie de St. Roch, a charitable institution founded under the auspices of La Société de St. Vincent de Paul, and that by the constitution and by-laws of that Caisse, none of its officers were to receive any compensation for their services; that the defendants, instead of properly discharging their duties, traded for their own benefit with the monies of the Caisse, the consequences of which were its bankruptcy, and the non-payment to the plaintiff of the amount of his deposit.

The Superior Court condemned the four defendants, jointly and severally, to pay to the plaintiff the sum of £165 8s. 7d. with interest at 4½ per cent. from 18th April, 1855, and costs.

An appeal was instituted by Marois from that judgment, but it was confirmed, the motivés only being changed.

On the 10th February, 1862, the following judgment was pronounced by the Lords of the Judicial Committee of the Privy Council on Marois' petition for leave to appeal.

This petition for leave to appeal depends upon the same Act of the Province of Lower Canada as the case of *Macfarlane* v. *Leclaire* from the Court of Queen's Bench at Montreal, which their Lordships have just disposed of (34 Geo. III. cap. 6), but the questions raised in the two cases are entirely different. Upon the present petition it is not denied that the matter in dispute is not of the value of £500 sterling, but the petitioner prays that he may have leave to appeal granted to him upon the special circumstances of his case. The sum actually recovered in the action against the petitioner is only £165 8s. 7d. with interest at 4½ per cent., but he states that in consequence of his having been held to be liable to the plaintiff in that action as a member of an incorporated society carrying on a banking business for a loan or deposit made by the plaintiff to or with the Banking Company, other depositors in the Bank have brought numerous actions against him, by which he is sought to be rendered liable to claims amounting to upwards of £4,000. It was argued, but not very strongly pressed, that the existence of these actions following upon the judgment might possibly bring the case within the class of exceptions in the 30th section of the Act, and so entitle the petitioner to appeal, although the immediate sum or value in dispute is less than £500. It would be difficult, however, without straining the words of the Act, to make the exceptions apply to the petitioner's case. But the petitioner contends, that although he is precluded from an appeal in consequence of the insufficient value of the matter in dispute, and is unable to bring himself within the exceptions, that it is still open to him to apply to Her Majesty in Council for leave to appeal, and that the peculiar circumstances of his case justify the application.

He maintains that the jurisdiction by way of appeal from all Colonial Courts is a prerogative of the Crown, which cannot be taken away except by the express words of an Act of the Legislature to which the Crown has given its assent; and that in the Colonial Act in question, not only are there no words to take away the prerogative, but that it is expressly reserved by the 40th section, in which it is declared that nothing in the Act contained shall be construed in any manner to derogate from certain specified rights of the Crown, "or from any other right or prerogative of the Crown whatsoever." But here the petitioner is met by the case of *Cuvillier* v. *Aylwin* (2 Knapp, 72), in which the very point which he raises was decided in the Privy Council against him. If the question is to be considered as concluded by this decision his petition must be at once dismissed; but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 40th section of the Act on the prerogative of the Crown.

Their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves. The petitioner must understand that the prayer of his petition will be granted, but at the risk of a petition being hereafter presented from the opposite party, upon which his appeal may be dismissed as incompetent.

Their Lordships will, therefore, humbly report to Her Majesty that leave ought to be granted to the petitioner to enter and prosecute his appeal upon lodging a deposit of £300 in the Registry of the Privy Council as security for the costs of the respondent.

Petition granted.

GENERAL CORRESPONDENCE.

Assessment—Income—when taxable—Personal Property.

DRUMBO, 10th April, 1862.

TO THE EDITORS OF THE LAW JOURNAL.

SIRS,—1. A., a clerk in a store at a salary of $400 a year, has no real or chattel property; says it takes the whole of his salary to clothe and board him during the year. Is he liable under the Assessment Law to be assessed for his salary as an income?

2. B. has a House and Lot in a village, is assessed for it $200; is also a clerk in a store at a salary of $400, has no

chattel property; says it takes all of his salary to support his family, or the most of it, and any part of his salary it does not take to support his family he expends in improvements on his house and lot, for which he is already assessed. Is he liable to be assessed for his income, or salary as an income?

3. C., an Innkeeper, is assessed for his house and lot $1000, has no chattel property, makes $2000 a year at his calling as an Innkeeper, but says it takes it all to keep up the expenses of his house. Is he liable to be assessed for what he makes as an income?

4. D., a Carpenter, has a small house and lot in a village, for which he is assessed $200, has no chattel property, makes at his trade $800 a year, but says it takes it all to support his family and improve his property, for which he is already assessed. Is he liable to be assessed for an income?

5. E., a School-teacher, owns 100 acres of land, is assessed for it $2000, has chattel property to the value of $400, but says he owes debts to the amount of his chattel property, but is receiving $400 a year salary for teaching. Is he liable to be assessed for his salary as an income?

6. F., a Tanner, has a tannery and a house and lot in a village, is assessed for them as real property $1500, has $1000 worth of stock on hand, but says he owes for his stock, therefore is not assessed for it, but derives an income from his trade as a tanner, of $500 a year, but says it takes it all to support his family and carry on his business. Is he liable to be assessed for his income?

7. G., a Merchant, is assessed for real property to the sum of $1000, has a stock of goods in his shop to the value of $4000, but says he owes for them all, so he is not assessed for his stock, but derives an income from his calling as a merchant of $1000 a year, but says it takes it all to support his family. Is he liable to be assessed for his income?

My opinion of the law from the 34th clause of the Consolidated Assessment Act is, that if B as clerk in a store last year received a salary of $400, although it may have taken it all to improve his house and lot and to support his family as he alleges, and he has no chattel property, that he is liable to be assessed for his salary as an income. What is your opinion?

Yours, &c.,
COUNCILLOR, 5th Ward, Blenheim.

[We cannot see any difficulty in applying the law to the several cases put by our correspondent. It is by sec. 34 of the Assessment Act provided that "no person deriving an income *exceeding* $200 per annum from any *trade, calling, office* or *profession*, shall be assessed for a less sum as the amount of his nett personal property than the amount of such income during the year then last past; but such last year's income *shall be held* to be nett personal property unless he has other personal property to a greater amount." Each of the persons mentioned by our correspondent is deriving an amount exceeding $200 per annum from a trade, calling, office or profession. His income of last year must be held to be the nett amount of his personal property. On that he is taxable, whether or not he spends it in the support of his family, improvement of his house, or otherwise. We therefore answer each question put by our correspondent in the affirmative.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. HARROP, *Appellant*, v. FISHER, *Respondent*. *May* 3.

Bill of exchange—Indorsement.

A bill of exchange, payable to the order of the drawer, and handed over by him without any endorsement to the person who discounts it, cannot be indorsed by that person, *per proc.* for the drawer, without any further authority to do so.

Q. B. HEYS v. TINDALL. *May* 25.

Negligence of house agent—Question for jury.

Plaintiff had employed defendant as a house agent, to let or procure a tenant for her house. Defendant introduced as such tenant an insolvent person, being aware of his condition at the time.

Held, that defendant was liable to indemnify plaintiff the loss she had suffered through the incompetency of the tenant to pay the rent and other expenses.

Held also, that the judge was right in directing the jury to use their knowledge of business in deciding what was the duty of the defendant as a house agent.

Ex. C. *May* 14.

TREW *and another* (*Executrix and Executor, &c.*) v. THE RAILWAY PASSENGERS ASSURANCE COMPANY.

Life insurance—Accidental death—Drowning—Evidence.

A. had effected an insurance with defendants, whereby the defendants were to pay the assured a certain sum if he should sustain any injury caused by accident or violence within the meaning of the policy. Proviso, that no claim should be made by the assured in respect of any injury, unless caused by some outward and visible means of which satisfactory proof could be furnished, or for injury caused by natural means. A., being at Brighton, went to bathe, and his clothes were subsequently found, but there was no proof that he was ever after seen alive. A body, much decomposed, was afterwards washed ashore, at a possible distance from Brighton, which A.'s relatives thought was his.

Held (reversing the judgment of the Court of Exchequer), first, that there was evidence to go to a jury of the identity of the body, and death by accidental drowning; and secondly, that assuming the identity of the body proved, and the death to be caused by the external action of water, irrespective of disease, the injury was one caused by accident within the meaning of the policy, and that the representatives of the assured were entitled to recover

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Ex. C. CASTLE AND OTHERS v. SWORDER. *May* 25

Vendor and vendee of goods—Constructive acceptance by vendee—Statute of Frauds—Bailment.

A. sold to B. by parol certain goods (spirits). It was agreed that they should remain in A.'s bonded warehouse for B. for six months, rent free, after which the price should be payable. An invoice of the specific goods was sent by A. to B., and the goods were entered in A.'s warehouse books as transferred to B. After the six months B. applied to A. to take back the goods or else resell them for him (B.)

Held, that there was evidence to go to the jury of a constructive acceptance of the goods by B. within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3.

Judgment of the Exchequer reversed.

C. P. CHAPPELL v. COMFORT AND ANOTHER. *May* 29.

Ship and shipping—Demurrage—Assignee of bill of lading.

A ship was chartered under a charter party to bring a cargo from D. to L., certain working days being allowed for unloading at L. A bill of lading was signed by the master, by the terms of

which the cargo was to be delivered to the assignee of the bill, "paying freight." In the margin of the bill of lading it was stated that there were eight days for unloading in L. The bill of lading was assigned, and the assignee received the cargo in L., and paid the freight. The vessel having been detained over the eight days in unloading,

Held, that the assignee of the bill of lading was not liable to pay for demurrage on such detention.

E. X. COLLARD v. THE SOUTH EASTERN RAILWAY CO. *May* 34.

Carriers—Goods sent for sale and injured—Measure of damages.

Hops were delivered to a railway company to be carried to London, and were injured by water on the road, some being destroyed and the remainder requiring several days' preparation before they could be rendered marketable. In the interval the market fell.

In an action against the company a verdict was found for the plaintiff.

Held, that the jury were right in taking into their consideration the difference between the value of the hops on the day when they should have been delivered and the day on which they were actually delivered in a marketable condition.

Q. B. BARTLEY v. HODGES. *June* 4.

Colonial sequestration—Debt contracted in England.

A certificate of discharge under the insolvent law of Victoria is no defence to an action on a bill of exchange drawn upon defendant by an English creditor, and accepted by defendant in England.

E. X. JONES v. PLATT. *May* 8.

Interrogatories administered before declaration—Infringement of patent—Statute of limitations.

The Court refused leave to administer interrogatories in an action for infringement of a patent before declaration, where the patent had expired more than five years before the writ was issued, and the interrogatories were directed to a discovery of the articles made and sold by the defendant during a period of several years.

Q. B. PAYNE v. REVANS. *May* 27.

Malicious prosecution—Reasonable and probable cause—Malice—Jury.

In an action for a malicious prosecution the question of malice was never in terms left to the jury. The Court made a Rule absolute for a new trial, although the rule *nisi* was not obtained on the ground of mis-direction.

Q. B. REGINA v. BOYES. *April* 30.

Privilege of witness to refuse an answer tending to criminate himself—Duty of Judge to compel witness to answer.

Upon the trial of the defendant for bribery a witness was called upon to give in evidence the receipt of a bribe by him from the defendant. Upon his objecting to answer, on the ground that his answer would criminate himself, a pardon under the great seal was offered and accepted by him; but he still refused to answer on the same ground.

Held, that as the pardon protected the witness against every proceeding except an impeachment by the House of Commons, and as there was no probability whatever, under the circumstances of the case, that witness would ever be subjected to such a proceeding for the matter which he was called upon to give in evidence, he was not privileged from answering.

Held also, that the Judge was bound to compel the witness to answer.

C. C. R. REGINA v. PARKER AND ANOTHER. *June* 1.

Evidence—Confession—Inducement in presence of persons in authority.

Upon an indictment of two brothers—J. for stealing and G. for receiving—It was proved that J. and a third brother, W., were in the service of the same master; that J. G. and W. were at G.'s house when a policeman found the stolen goods there, and sent for J. and G.'s master, and, the five having gone together into G.'s parlor, charged W. and J. with stealing and G. with receiving; that upon this W. said, "Well, J., you had better tell Mr. W. (their master) the truth." Neither the master nor the policeman dissented nor made any remark, whereupon J. confessed. On his way to the station, J., of his own accord, made a further confession. Upon being taken before the magistrates they discharged W., but committed J. and G. for trial.

Held, J. and G. having been convicted on the evidence above, that the conviction was right.

E. X. *May* 1.

WESTHEAD AND OTHERS v. SPROSON AND ANOTHER.

Guarantee of past and future debts of another—What consideration valid.

A. guaranteed to B. the past and future debts of C., in consideration of B. agreeing to supply C. with such goods as C. might require, and B. might think fit to supply.

Held, that a future supply of goods by B. to C. was a condition precedent to a right on B.'s part to sue the guarantor for the past debts of C.

That an agreement to supply only such goods as B. "might think fit," was not a good consideration for the guarantee.

Q. B. WILT, AMOR v. AMISS. *April* 19, 28.

Donatio mortis causâ—Policy of life assurance.

A policy of life assurance may be the subject of a *donatio mortis causâ*.

B. C. *June* 11.

DAVENPORT v. VICKERY (In the matter of an award).

Arbitration—setting aside an award—Improper reception of evidence.

Where a letter book, containing copies of letters which had been adduced in evidence before an arbitrator, and marked by him as read, was, at the close of the case, left in his hands in order that he might, before making his award, refer to the copies so adduced; and he referred to a copy of a letter contained in the book which had not been marked as having been adduced in evidence, HILL, J., directed that the case should be referred back to the arbitrator, in order that the party against whom the letter complained of had been used might have an opportunity of explaining its contents; but refused to set aside the award.

Q. B. DAY v. HEMING. *June* 4.

Demurrer to pleas—Action for work and labour—Illegal contract.

Where a printing press is not registered according to the provisions of 39 Geo. III., c. 79, s. 28, a plea setting up this as a defence to an action for work done by the plaintiff in printing a book for defendant is good. In this case the pleas in which this defence was pleaded, were held bad, as not excluding a due registration of plaintiff's printing press, and the Court refused to allow an amendment.

C. P. *May* 30.

DE PASS AND OTHERS v. BELL AND WOODHOUSE.

Bill of exchange—Consignment of goods—Bankruptcy.

The plaintiffs, consignees of goods, accepted a bill drawn by the consignor, under an agreement that they were to be paid the amount of the bill out of the proceeds of the goods, the deficiency, if any, to be made good, and interest on the amount of the bill from maturity till the goods were realized to be paid by the consignor. The consignor becoming bankrupt, without having negotiated the bill, it was presented by the defendants, the assignees, and paid to them by the plaintiffs in ignorance of the character in which they held. The goods realising less than the amount of the bill.

Held, in an action brought by the plaintiffs to recover the deficiency, that they were not entitled to recover.

C. P. LEADER AND ANOTHER v. REYS. *May* 2.

Costs 15 & 16 *Vict., c.* 54, *s.* 4—*Detinue—Return of goods—Nominal damages—County court.*

In detinue for goods of a greater value than £50, where the goods had been returned after action brought, and the jury had awarded only nominal damages for their detention,

Held that the plaintiff is entitled to costs, though the Judge refused to certify under 15 & 16 Vic., c. 54, s. 4, on the ground that the plaint could not have been entered in the county court.

The test of the jurisdiction of the county court is the actual value of the goods sought to be recovered.

Q. B. LEE v. GRIFFIN. *May* 9.

Statute of frauds—Work and labour—Contract.

A. agreed to make for B. two sets of artificial teeth, according to a model of her mouth, which he took for the purpose.

Held that this was a contract for the sale of goods within the 17th section of the Stafute of Frauds, and that A. could not recover on the common count for work, labour and materials.

Q. B. *Ex parte* MANSERGH. *June* 11.

Certiorari—Court martial—Proceedings in colonial courts.

The Court will not interfere by *certiorari* to review the proceedings of a court martial, except where a person's civil rights have been affected.

The Court has no power to quash the proceedings of a Court in India or elsewhere out of England and its adjacent parts.

C. C. R. REGINA v. DAVIS. *June* 1.

Assault—Evidence—Bailiff of county court—Warrant sufficient proof of authority to arrest—Sheriff.

Upon indictment for assaulting a bailiff of a county court in the execution of his duty, the production of a county court warrant for the apprehension of the prisoner, is sufficient justification of the act of the bailiff, in apprehending the prisoner, without proof of the previous proceedings authorising the warrant. (WILLIAMS, J., *dubitante.*)

Q. B. REGINA v. GRAHAM. *June* 6.

Vestry meeting—Election of churchwarden—Illegal closing of the poll by chairman.

The chairman of a vestry meeting, held for the purpose of taking a poll for the election of a churchwarden, has no power to close the poll on account of disturbance.

REVIEWS.

OSGOODE HALL EXAMINATION QUESTIONS, GIVEN AT THE EXAMINATIONS FOR CALL WITH AND WITHOUT HONORS, AND FOR CERTIFICATES OF FITNESS, WITH CONCISE ANSWERS, AND THE STUDENT'S GUIDE; A COLLECTION OF DIRECTIONS AND FORMS FOR THE USE OF STUDENTS-AT-LAW AND ARTICLED CLERKS. By Calvin Browne and Edward Marion Chadwick, Students-at-Law. Toronto: Rolle & Adam, Law Booksellers and Publishers.

For a long time past, the examinations at Osgoode Hall for call to the bar and for certificates of fitness have been in some degree conducted on paper. The questions are put and the Student under examination is required to answer them on paper. His answers are afterwards examined, and upon the result his success in a great measure depends.

The questions from term to term put are based upon particular books. Among these may be mentioned Blackstone's Commentaries, Vol. I.—Addison on Contracts—Smith's Mercantile Law—Byles on Bills—Story on Partnership—Williams on Real Property—Watkins on Conveyancing—Dart on Vendors and Purchasers—Coate on Mortgages—Jarman on Wills—Russell on Crimes—Story's Equity Jurisprudence—Justinian's Institutes—Story's Conflict of Laws—Taylor on Evidence—Stephen on Pleading—Statutes—Pleading and Practice in Law and Equity generally.

The authors of the book before us have made a collection of these questions, and at great trouble appended the answers. The result is a volume of nearly 400 pages, royal 8vo. So far as we have been able to judge, the questions are answered with much care. The authors not only have given us the particular answer to each question but very wisely referred to the authority upon which the answer is given. In this way a person in doubt as to the correctness of a particular answer is enabled to satisfy his mind and so remove the doubt.

The chief use of a work of the kind is to aid the student in the prosecution of his studies. The abuse of it will be to study the book itself, and not the many books to which it relates. The authors are particularly careful to state that the design of the work is to aid the student in the reading of the books upon which he will be examined, and not that their book should be read in lieu of the books appointed for examination.

We have no hesitation in stating our belief that the book, if used as designed by the authors, will be of great benefit to the student, but if used contrary to their design will be worse than useless. The mere "cram" will never do for the rigid self examination. It is intended that the text book shall be first diligently read, and then that the student, in order to test his knowledge of it, shall examine himself by the book now before us, occasionally referring to the answers to verify his knowledge, not to supply it.

The work is printed in good clear type; the paper is not so good as it might be, but quite as good as one generally sees in books published in Canada. The binding is sheep, and upon the whole the volume presents a creditable appearance.

The authors may well be envied by their fellow students. The process of preparing such a work for the press must have had the effect of thoroughly grounding them in the books upon which they have worked. The completion of their undertaking has had the effect of giving their names to fame—if not to fortune. We fear, however, that pecuniarily there is not much encouragement to writers of law books in Canada.

The price of the volume is only $2. We wish it a ready sale. It deserves it. No student should feel satisfied without procuring a copy. We are told that so far the sale has been all that can be desired.

APPOINTMENTS TO OFFICE, &c.

SHERIFF.

JOSEPH A. WOODRUFF, Esquire, to be Sheriff of the County of Lincoln.—(Gazetted April 12, 1862.)

NOTARIES PUBLIC.

JOHN WEBSTER HANCOCK, of Berlin, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 12, 1862.)

CHARLES P. HIGGINS, of Ingersoll, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 12, 1862.)

SYDNEY JOHNSON WALKER, of Odessa, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 12, 1862.)

MICHAEL FLEMING, of Sarnia, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 19, 1862.)

WILLIAM A. MITTLEBERGER, of St. Catharines, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 19, 1862.)

THOMAS WARDLAW TAYLOR, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted April 19, 1862.)

TO CORRESPONDENTS.

COUNCILLOR—Under "General Correspondence."

DIARY FOR JUNE.

1. SUNDAY ..... *1st Sunday after Ascension.*
2. Monday ..... Last day for Notice of Trial County Court.
8. SUNDAY ..... *Whit-Sunday.*
10. Tuesday ..... Quarter Sessions and Co. Court Sittings in each County.
12. Thursday..... Sittings of Court of Error and Appeal commences.
15. SUNDAY ..... *Trinity Sunday.*
22. SUNDAY ..... *1st Sunday after Trinity.*
29. SUNDAY ..... *2nd Sunday after Trinity.*
30. Monday ..... Last day for County Council finally to revise Assessment Rolls, and to appoint School moneys by C. S. S. Chief Superintendent to report state of Grammar School.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

JUNE, 1862.

BAIL TO THE LIMITS.

The law of debtor and creditor is much less rigorous at present than it was in the early history of Upper Canada. Both in England and here much has been done to relax if not to abolish imprisonment for debt.

The first step was to suppose the debtor in custody when he had the privilege of locomotion within circumscribed limits, from time to time increased in extent. The next step was to suppose him on the limits when he had the privilege of going where he pleased.

It is interesting to trace the gradual relaxations of the law on the subject of bonds to the limits, and in truth it is necessary to do so in order to understand the effect of that which now goes by the name of a limits bond.

Close custody is the starting point: originally the only limits were the four walls of the gaol. This was the law till 1822.

On 17th January, 1822, the Legislature passed the 2nd Geo. IV., cap. 6, intituled "An Act for assigning limits to the respective Gaols of this Province." It recited that it was expedient to assign certain limits to the gaols within Upper Canada in which debtors might have the benefit of exercise and air without subjecting the Sheriff or other officer in whose custody the debtor might be to any action at law for an escape. It authorized the Justices of the Peace, in Quarter Sessions assembled, from to time, in each district in Upper Canada, to order, determine and appoint certain limits of ground not exceeding six acres to each and every gaol, and that after the establishment of such limits it should be lawful for any debtor confined in such gaols to be and remain at any part or place within such limits without subjecting the Sheriff or other officer in whose custody such debtor might be, to any action or suit for an escape from such gaol or limits. It was not made incumbent on the Sheriff to give the benefit of the limits to a debtor till furnished with satisfactory security that the debtor should not at any time during his confinement "go or remove beyond such established limits." If there was a breach of the condition of the bond, the Sheriff was enabled to sue upon the bond and to recover the amount for which the debtor was in custody, and costs. Provision was made for the assignment of the bond to the judgment creditor upon request. The assignee was authorized to sue upon the bond in his own name. An acceptance of an assignment of the bond was made to operate as a discharge of the Sheriff from all responsibility in respect of the debtor. The Act was an experiment merely, and was made to have force for four years and no longer.

On 30th January, 1826, the Legislature passed the 7th Geo. IV., cap. 7, by section 1 of which the previous Act was extended for four years further. Provision was by the same act made for the surrender of the debtor into close custody by his bail.

On 17th February, 1827, the Legislature passed the 8th Geo. IV., cap. 9. It recited the 2nd Geo. IV., cap. 6, and authorised the Justices of the Peace for the District of Niagara, in sessions assembled, from time to time to order, determine and appoint certain limits for the Gaol in that District, not exceeding sixteen acres.

On 30th January, 1830, the Legislature passed the 11th Geo. IV., cap. 2, continuing the 2nd Geo. IV., cap. 6, for four years longer.

On 6th March, 1830, the 11th Geo. IV., cap. 3, was passed. It consolidated and made permanent the provisions of previous acts. It authorized the Justices of the Peace, in general Quarter Sessions assembled, in each and every district other than the District of Niagara, to assign and make as limits to the respective gaols "sixteen acres of ground contiguous to the gaols." Authority was given to extend the limits of the gaol in the Niagara District to twenty-six acres. The debtor while on the limits was in law considered as in the custody of the Sheriff. The judgment creditor was authorized to administer interrogatories to his debtor while on the limits. Neglect or refusal to answer for twenty days subjected the debtor to confinement in close custody.

On 6th March, 1834, the Legislature passed the 4th Wm. IV., cap. 10. It enacted that the limits of the respective gaols situate in any town in Upper Canada should be co-extensive with the limits of the towns in which situate. In the case of gaols not situate in towns, the justices of the peace were authorised to extend the limits

to the distance of half a mile on each side of the gaols. A debtor upon the limits withholding, upon request of the creditor, an account of his effects, was made liable to be committed to close custody. Provision was made for the examination of a judgment debtor as to his means of satisfying the debt. If it were made to appear that he had the means, he was liable to be committed to close custody. Provision was also made for enabling, under him certain circumstances, to regain the limits.

On 28th July, 1847, the Legislature passed the 10th & 11th Vic., cap. 15. It enacted that the gaol limits to the respective gaols should consist of the whole of the district in which situate. Persons in gaol under process for non-payment of costs, were declared to be entitled to the benefit of the limits in the same manner as if in custody in execution for debt. Persons entitled to the limits were required to enter into a recognizance or bail piece, conditioned that the debtor "should remain and abide within the limits of the gaol of the district, and not depart therefrom unless released by due course of law," and also "should well and truly obey all notices, orders and rules of court, touching or concerning such debtor remaining or continuing upon the limits, or being remanded or ordered therefrom." The sureties were required to justify in double the amount of the sum for which the debtor was arrested. The recognizance was then filed in the office of the clerk of the court from which the writ authorizing the arrest issued. Notice thereof was then given to the creditor in like manner as in case of bail to the action. Upon the production to the Sheriff of a certificate from the clerk of the court that the recognizance of bail and affidavit of justification had been filed, the Sheriff was authorized to give the debtor the benefit of the limits, and the Sheriff himself was thereupon discharged from all responsibility respecting the debtor, unless again committed to close custody by due form of law. The bail were bound to produce the body of the debtor within such time as the court or judge might direct, but provision was made for granting such further time and relief to the bail as the court or judge might deem equitable.

On 14th June, 1853, the Legislature passed the 16th Vic,, cap. 175; section 7 enacted that it frequently happened that persons in custody entitled to the benefit of the gaol limits were compelled to go to prison until a rule or order for the allowance of the recognizance of bail. For remedy it enacted that it should be lawful for the Sheriff to take from the party arrested a bond conditioned "that such person would not depart the gaol limits," and "should forthwith surrender himself to the custody of the Sheriff for re-committal to close custody, upon a rule of court or judge's order being made for that purpose, and should in other respects well and truly observe and obey all rules of court or judge's orders in relation to such party." Upon receipt of this bond the Sheriff was required forthwith to allow the party arrested the benefit of the imits. If after the giving of the bond the debtor delivered to the Sheriff the certificate that the recognizance of bail above mentioned and affidavit of justification had been duly filed, the debtor and his sureties were discharged from all liability on the bond to the Sheriff. If the certificate were not produced within one month from the execution of the bond the Sheriff was authorized to commit the debtor to close custody. A right of action on the bond was given to the Sheriff in the event of a breach. It was, however, provided that the Sheriff, upon request of the creditor, might assign over the bond to him and so release himself from responsibility. The party accepting the assignment of the bond was authorized to sue in his own name.

On 3rd April, 1855, the Legislature passed the 18th Vic., cap. 69; section 5 of which enacted that notwithstanding the dissolution of a union of Counties, debtors on the limits at the time of the dissolution should, continue to have the benefit of the limits of both counties.

On 19th June, 1856, the Legislature passed the 19th Vic., cap. 43, commonly called "The Common Law Procedure Act, 1856." It consolidated all previous acts, without substantial variation.

On 10th June, 1857, the Legislature passed the 20th Vic., cap. 57; section 25 of which enacted that in all cases in which any Sheriff should take a bond to the limits, to enable the debtor to put in the ordinary recognizance of bail to the limits, such bond should, in addition to the ordinary conditions, contain a further condition that the debtor "should within thirty days from the delivery thereof to the Sheriff, cause and procure the bond or that substituted for it, according to provisions hereinafter mentioned, to be allowed by the Judge of the County Court wherein the debtor was confined." For this purpose, upon reasonable notice by the debtor given to the Sheriff, the latter was required to cause his bond to be produced before the Judge. Upon allowance endorsed by the Judge the Sheriff was discharged from all responsibility unless the debtor was committed to close custody in due form of law. The allowance was required to be made upon motion by the debtor, and four clear days notice thereof given in writing to the plaintiff or his attorney. If the Judge refused the allowance of the bond then the debtor was enabled to cause another bond to be made to the Sheriff in the same terms and under the same conditions, to be executed without any further application to the Sheriff, and was also enabled to move in the like manner and upon the like notice for the

allowance thereof. The bond if allowed and endorsed was substituted for and took the place in all respects of the bond first given.

On 6th May, 1859, the Legislature passed the 22nd Vic., 2nd Sess., cap. 33; section 6 of which enacted that persons giving bail under a writ of *ca. sa.*, or writ of attachment should not be bound to remain or abide within the gaol limits, but might depart therefrom at their discretion. It also enacted that the bond to the Sheriff should not contain that part of the usual condition that the debtor should remain and abide within the limits of the gaol, but that the condition should provide that the person arrested "should observe and obey all notices, orders and rules of court touching or concerning the debtor or person ordered to pay, or his answering interrogatories, or his appearing to be examined *viva voce* or otherwise, or his returning or being remanded into close custody." It was declared that the party or his bail should not be entitled to claim longer time for so observing and obeying than he would have been entitled to if the party had remained on the limits as before the passing of the Act. Power was given to the Court to grant further time if the Court were of opinion that the same might be done without substantial injury to the interests of the party entitled to receive the money.

Such is now the law as consolidated in Con. Stats. U. C. cap. 24, sec. 24, *et seq.*

The effect of 22 Vic., 2nd Sess., cap. 33, was to make a bond to the limits a bond without limits. It is as it were the retention of the shadow by some process of Legislative photography, though the substance is no more. One step more and legal custody for debt is gone—vanished like a dream. We have seen how, little by little, it was blotted out of the Statute book, till now its appearance is so faint that its very existence is a matter of uncertainty. What it is can only be ascertained by a knowledge of what it was. That knowledge we have here endeavored to impart.

COMMON LAW COURTS.

DELIVERY OF JUDGMENTS.

QUEEN'S BENCH.

Monday, 16th June ..... 10 o'clock.
Saturday, 21st June..... 2 o'clock.

COMMON PLEAS.

Monday, 16th June ..... 2 o'clock.
Saturday, 21st June ..... 10 o'clock.

COMMON LAW—RULES OF COURT.

FEBRUARY 14TH, 1862.

It is Ordered, That the several sheriffs in Upper Canada shall be allowed, in addition to the fees and disbursements heretofore authorised for services rendered by them in the county courts, to charge and receive the fees and disbursements following:

For return of Writ of Execution against Lands or Goods, where nothing has been made under the writ..£0 2 6

For removing or retaining property taken under any statute of this province relating to replevin, reasonable and necessary disbursements and allowances, to be approved by the clerk, or by order of the judge.

JOHN B. ROBINSON, C. J.
W. H. DRAPER, C. J., C. P.
WM. B. RICHARDS, J.
JOHN H. HAGARTY, J.
ROBERT E. BURNS, J.

FEBRUARY, 15TH, 1862.

It is Ordered, That the form of Writs of Assignment of Dower to be used under the statute 24th Vic., ch. 40, shall be as follows:

The Writ of Assignment of Dower required to be issued after a judgment in an action of Dower has been entered in favour of the demandant, shall be in the form hitherto in use in Upper Canada.

And the Writ of Assignment of Dower required to be issued under the second clause of the said statute, when the right of dower is acquiesced in by the owner of the estate, may be as follows:

UPPER CANADA.
County of——} VICTORIA, by the Grace of God, *&c.*

TO THE SHERIFF OF THE COUNTY OF ——

GREETING:

WHEREAS, A. B., widow, who was the wife of C. D., deceased, demands against E. F., the third part of (here describe the estate in which dower is claimed, as in other writs of assignment of dower) as the dower of the said A. B. of the endowment of the said C. D., heretofore her husband: *And whereas* it has been made to appear to us in our Court of Queen's Bench, (or Common Pleas, as the case may be,) in Upper Canada, that the said E. F. is the owner of the said real estate out of which such dower is claimed, and that he acquiesces in the said claim, and is willing to assign to the said A. B. her proper dower, but that the said A. B. and E. F. are not agreed as to the admeasurement thereof: *We therefore command you*, that without delay you do deliver to the said A. B. seisin of her third part of the said —— with the appurtenances, to hold to her in severalty by metes and bounds; *And* that you do proceed in the execution of this our writ, according to the provisions of the statute, in that behalf passed by the Legislature of our province of Canada, in the twenty-fourth year of our reign.

Witness, *&c.*

(When the Demandant has married again since the death of her late husband, under whom she claims dower, her name and description must be made such as to suit the circumstances.)

JOHN B. ROBINSON, C. J.
W. H. DRAPER, C. J., C. P.
ROBERT E. BURNS, J.
WM. B. RICHARDS, J.
JOHN H. HAGARTY, J.

BILLS BEFORE THE LEGISLATURE.

An Act respecting the appointment of Commissioners for taking affidavits and affirmations in the United Kingdom of Great Britain and Ireland, to be used in this Province.

(Introduced by John Crawford, Esq., M.P.P.)

WHEREAS it is desirable that the Governor in Council should be empowered to appoint Commissioners for taking affidavits and Affirmations in the United Kingdom of Great Britain and Ireland to be used in this Province: Therefore Her Majesty, &c., enacts as follows:

1. The Governor in Council may, by one or more commission or commissions under his hand and seal, from time to time empower such and as many persons as he may think fit and necessary (such persons being practising Attorneys of Her Majesty's Courts of Record at Westminster, or Writers to the Signet in Scotland, or Attornies of the Four Courts in Dublin,) to administer oaths and take and receive Affidavits, Declarations and Affirmations in the United Kingdom of Great Britain and Ireland, in or concerning any cause, matter or thing depending, or in any wise concerning any of the proceedings to be had in the Courts of Queen's Bench and Common Pleas, the Superior Court, and the Court of Chancery, or any other Court at Law or Equity of Record in this Province, whether now existing or hereafter to be constituted; and every oath, affidavit, declaration or affirmation taken or made as aforesaid, shall be of the same force as if taken or made in the particular Court to which the same relates, or in which any such affidavit, declaration or affirmation is entitled or intended to be used.

2. The oaths, affidavits, declarations and affirmations aforesaid, shall be of the same force as if taken or made in open Court, and shall be filed in the office of the Court in which the same are intended to be used, and may be read and made use of in the said Court as other affidavits or affirmations taken in such Court; and any person wilfully forswearing himself in any affidavit or making false declaration or affirmation made or taken before any of the Commissioners appointed under this Act, shall be liable to the same pains and penalties as if such affidavits, declarations or affirmations had been taken in open Court.

3. Any affidavit or affirmation proving the execution of any Deed, Will or Probate or Memorial thereof, for the purpose of registration in this Province, may be made before a Commissioner appointed under this Act.

4. The Commissioners so to be appointed shall be styled "Commissioners for taking affidavits in and for the Canadian Courts."

5. No informality in the heading or other formal requsites to any affidavit, declaration or affirmation made, or taken before any Commissioner under this Act, shall be any objection to its reception in evidence if the Court or Judge before whom it is tendered shall think proper to receive it.

An Act respecting the Court of Error and Appeal in Upper Canada.

(Introduced by Hon. J. A. Macdonald, M.P.P.)

Her Majesty, &c., enacts as follows:

1. The Presiding Judge of the Court of Error and Appeal in Upper Canada, whenever appointed as such by commission under the great seal, according to the provisions of the Act passed in the twenty-fourth year of Her Majesty's reign, chaptered thirty-six, shall have rank and precedence over all the other Judges of Her Majesty's Courts of law and equity in Upper Canada.

2. The said Presiding Judge appointed by commission under the great seal as aforesaid, previous to entering upon the duties of his office, shall take the following oath before the Governor in Council:

OATH.

I, —— ——, do solemnly and sincerely promise and swear that I will, duly and faithfully, to the best of my skill and knowledge, execute the powers and trusts reposed on me as the Presiding Judge of the Court of Error and Appeal in Upper Canada. So help me God.

3. Any retired Judge heretofore or hereafter appointed the Presiding Judge as aforesaid, who shall hold a patent for an annuity of two-thirds of the salary annexed to the office from which he had retired, shall be entitled in addition to the same, to receive yearly from and out of the Consolidated Revenue Fund of this Province, a sum equal to one-third of the amount of his annuity, which additional sum shall be paid in the same manner and at the same time as such annuity.

4. The sixth section of the thirteenth chapter of the Consolidated Statutes for Upper Canada is hereby repealed, and the following substituted therefor, that is to say:

"Five Members of the Court shall be necessary to constitute a quorum."

5. The eighth section of the Act in the next preceding section mentioned is hereby repealed, and the following substituted, that is to say:—

"The Court of Error and Appeal shall hold its sittings at the City of Toronto, on the fourth Thursday next after the several Terms of Hilary, Easter and Michaelmas, and may adjourn from time to time and meet again at the time fixed on the adjournment for the transaction of business.

An Act to render Wills made in conformity with the laws of either Upper or Lower Canada, effectual to pass Real Estate in the other section of the Province.

(Introduced by A. Morris, Esq., M.P.P.)

WHEREAS, owing to the intimacy of the subsisting relations between Upper and Lower Canada, persons domiciled or temporarily resident in one section of the Province, frequently die possessed of Real Estate in the other section, and greater facilities ought to be afforded for the easier transmission of such property by Will, and a remedy ought to be provided for inconveniences that are of frequent occurrence, arising from the absence of such provisions:

Therefore, Her Majesty, &c., enacts as follows:

1. In case of the death of any person in either Upper or Lower Canada, after the passing of this Act, having regularly and legally made a Will according to the forms and solemnities required to pass Real Estate, (*immeubles*) by the law of that section of the Province in which the Will is made, such Will shall be held and taken to be, and shall be effectual and sufficient to pass Real Estate (*immeubles*) situate in the other section of the Province, in accordance with the true intent and meaning of such Will.

2. Wills made and executed in Lower Canada, in the customary manner, may be registered in Upper Canada in the same manner that other Wills made and executed or published out of Lower Canada, may be registered; and a notarial or other authentic copy of such Will, shall, for the purpose of registration thereof, have the same force and effect that a probate of Will now has.

LAW SOCIETY OF UPPER CANADA.

EXAMINATION FOR CERTIFICATES OF FITNESS.

STORY'S EQUITY JURISPRUDENCE.

1. State the two kinds of mistakes and the general rules as to the interference of the court in each kind.

2. What are the rights of the *cestui que* trust in respect of a purchase of his estate by his trustee?—and on what principle are these rights founded?

3. Define constructive notice, and give an example.

4. When is time deemed in equity to be of the essence of the contract?

5. What is the effect when property, real or personal, is willed in trust, without the appointment of a trustee?

6. Against what classes of persons will the vendor's lien attach? and what is the effect on the lien of a receipt for the consideration money expressed in or endorsed on the deed?

STATUTES, PLEADINGS AND PRACTICE.—EQUITY.

1. What jurisdiction has the Court of Chancery for Upper Canada in respect of wills?

2. In what cases can the court make a vesting order?—and what is the effect of such an order?

3. Under what circumstances and on what terms will the time fixed for payment of mortgage money be delayed?

4. What is the effect of the defendant's not denying in his answer an allegation of the bill?

5. How can a plaintiff bring before the court facts which have occurred since the institution of the suit?

6. State the process for obtaining the usual administration order.

SMITH'S MERCANTILE LAW.

1. Define "a general agent" and "a particular agent," and state the rule as to the authority of each to bind the principal.

2. What is the *jus accrescendi*?—and what is the exception to its application? How is the exception worked out in cases of real estate?

3. What is the meaning and result of *barratry*? Give an example.

4. In sales of goods under an agreement to be completed *in futuro*, when does the property in the goods pass to the buyer?

5. What are the rights of a creditor who has contracted to receive payment by a bill, if the bill be not delivered as agreed?

6. State the origin and limitations of the doctrine of lien at common law.

WILLIAMS ON REAL PROPERTY.

1. How can a person seised in fee simple convey so as to vest the fee in himself and another as joint tenants?

2. What is requisite to entitle a man to take lands as tenant by the curtesy of England?

3. Do the words "grant" and "demise" respectively imply any, and if any, what covenants?

4. An estate is limited to A. for life, with remainder to B. in tail, remainder to C. in fee. How can the issue in tail, and how can the remainder in fee be barred?

5. What leases must be by deed?

6. Explain the law of Hotchpot, and the effect of the statute of this province on the subject.

7. A lease to A. for life, remainder to B. for life; is this a vested or contingent remainder?

8. How must a will to pass lands by devise be executed?

9. Explain the object and effect of the statute "De Donis," 13, Ed. I.

10. A. leases lands to B., and in the lease B. covenants with the lessor for himself and assigns to dig a well on the demised premises during the second year of the term; B. during the first year assigns to C. The well is not dug at any time. Can the lessor sue both B. and C., or which?

11. A. conveys land to B. in 1861, who does not register the conveyance; A. subsequently conveys to C. who does register; what must C. prove beyond conveyance to establish priority over B., in ejectment against him?

12. An estate is conveyed to A. and B. in fee in trust to sell; do the grantees take as joint tenants or tenants in common? Give the reasons for your answer.

13. A lessee for a term assigns to B. to the use of C.; in whom is the legal estate?—and why not in the party other than him you may name?

STATUTES PLEADING AND PRACTICE LAW.

1. Can an action be brought as for lands bargained and sold on an *indebitatus* count, when no conveyance is made? Give the reasons for your answer.

2. Draft a plea in abatement for non-rejoinder of a co-contractor as a defendant.

3. How many days are allowed to plead in abatement?

4. Are goods of a defendant bound as against a purchaser from the time of the delivery of the execution against them to the sheriff, or from time of their seizure?

5. State what must be shown by affidavit to obtain the oral examination of a judgment debtor, pursuant to 22 Vic., c. 96—Consol. Stats. U. C., cap. 24.

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. Does the law recognise an absolute ownership in real estate? Give reasons for your answer.

2. Mention the incidents of the usual covenants in an indenture of lease.

3. Can one person have more than one estate in the same land at the same time? Answer fully.

4. Give instances of technical rules, or canons, which obtain in the construction of wills, even against the intention of the testator.

5. What is meant by an innocent conveyance?

STORY'S EQUITY JURISPRUDENCE.

1. What are the requisites to constitute a valid assignment of equitable property?

2. What jurisdiction has Equity in cases of awards?

3. When will Equity decree the cancellation of a deed?—and on what principle is the jurisdiction exercised?

4. Distinguish between the Stat. 13 Eliz. and the Stat. 27 Eliz., as to fraudulent conveyances.

5. How may incumbrances on an estate be extinguished?

TAYLOR ON EVIDENCE.

1. When may interrogatories be administered?
2. When are declarations against interest admissible, and why?
3. Mention some of the matters of which the courts will take judicial notice.
4. In what cases will a leading question be allowed?
5. How is the question of a privileged communication affected by the doctrine of *lis mota*?

BYLES ON BILLS.

1. In what material respects do promissory notes and bills of exchange differ from ordinary simple contracts?
2. Is evidence admissible to show that the true relation of the parties to a bill or note is different to their apparent position on the same?
3. If the time of payment of a note is uncertain, does that vitiate it?
4. When may a note become extinguished?
5. Distinguish between a guarantee and a promissory note?

SMITH'S MERCANTILE LAW.

1. What is the difference between an *open* and a *valued* policy on a ship?
2. What is general average, and what articles are liable to contribute to it?
3. Is it necessary in order to make a binding contract within the 17th section of the Statute of Frauds, that both parties should sign the memorandum? Give your reasons.

ADDISON ON CONTRACTS.

1. Are there any, and if so, what contracts under seal, to the validity of which as between the parties to the instrument, a consideration is necessary?
2. Is it a defence for the non-performance of an absolute contract, that such performance became impossible? Give your reasons.
3. Can money given to a person to be employed for an illegal purpose, be recovered back at any, and if so, what time?

BLACKSTONE, VOL. I.

1. Upon what statutes does the right of a subject to a writ of Habeas Corpus depend?
2. In what instances has Parliament assumed the right of altering the succession to the Crown of England?
3. What is the common law duty of a coroner; are there any statutory duties imposed on him in this province?

STEPHENS ON PLEADING.

1. When does a discontinuance take place in pleading?
2. What is the difference between the old and present system of pleading as regards profert and oyer?
3. Is the damage in any, and if so, what cases, a material point put in issue, and if so how is it put in issue?
4. What is the method, if any, at present for taking objection to a pleading which under the old system would have been bad on *special* demurrer?

STATUTES, PLEADINGS AND PRACTICE.

1. State the effect of the "Dormant Equities Act."
2. What statutory provisions exist as to partition?
3. In what cases is it necessary to make all the *cestui que trustent* parties to a bill in Chancery, notwithstanding the recent Orders?
4. Give a definition of "multifariousness."
5. What is the practice of bringing defended and undefended causes to a hearing?
6. What cases, if any, are there over which a County Court has no jurisdiction?
7. Can an equitable defence be set up at law to an action of ejectment? Give your reasons.
8. What is the effect of an omission to state in the margin of a demurrer some substantial matter of law intended to be argued? Is it any objection to the demurrer being *argued*?
9. Are there any, and if so, what cases in which mesne profits can be recovered on the trial of an action of ejectment?
10. How many different kinds of juries can be had for the trial of civil causes in Upper Canada?

THE BENCH AND THE BAR.

On Friday, 23rd May, ult., a meeting of members of the Bar of Upper Canada was held at Osgoode Hall. Resolutions were passed for a dinner to be given to Sir J. B. Robinson, Bart., upon the occasion of his retirement from the Chief Justiceship of Upper Canada, and congratulating him on his appointment to the office of President of the Court of Appeal. It was also resolved that an Address be presented to the Hon. Wm. Hume Blake, late Chancellor of Upper Canada, on the occasion of his retirement from that office, and that the members of the bar should attend in open Court to congratulate Hon. Archibald McLean on the occasion of his elevation to the Chief Justiceship of Upper Canada. Resolutions were also passed congratulating, Hon. P. M. Vankoughnet on his elevation to the office of Chancellor, and complimenting Hon. Joseph Curran Morrison on his appointment as a puisne Judge of the Common Pleas.

On the following day, all the Judges of the Queen's Bench, Common Pleas and Chancery, assembled in the Court of Queen's Bench to witness the presentation of the addresses authorized by the resolutions. The bar attended, and Henry Eccles, Esq., Q. C., Treasurer of the Law ciety, *pro tem.*, acting as spokesman, made an appropriate address to Chief Justice McLean, Chancellor Vankoughnet, and Mr. Justice Morrison, to which they severally replied.

The dinner to Sir J. B. Robinson will take place on Thursday, 19th June, instant.

SELECTIONS.

IS A WITNESS BOUND TO CRIMINATE HIMSELF?

The rule, that a witness shall not be compelled to answer questions tending to criminate him, is a well known and established rule of English law, to which it seems peculiar. The policy of the principle which it embodies has, indeed, been questioned, but with little reason, although it must be admitted that it has sometimes been pushed too far in practice. Our object at present is not to discuss the merits of the rule, but

to direct attention to an important practical question affecting its application which has been raised in our times, and, after having during several years caused no little difference of opinion on the Bench and in the Profession, appears settled by a recent decision in the Court of Queen's Bench.

The point is this:—A witness refuses to answer a question on the ground that the answer might tend to criminate him. If the judge sees that the answer might have that effect, he ought, of course, to allow the objection. But suppose he does not see that—an event likely enough to occur, for the witness must necessarily know much more about the matter than the judge—is he conclusively bound by the statement of the witness that it would have that effect, so as to be compelled to allow the privilege, and excuse the witness from answering?

This question was started, we believe, for the first time, in *Reg.* v. *Garbett* (1 Den. C. C. 236), on a case reserved from the Old Bailey; but it became unnecessary to decide it, as the case went off on another point. A few years after, however, the case of *Fisher* v. *Ronalds* (12 C. B. 762) came before the Court of Common Pleas. In that case a new trial was moved for on the ground that the judge at Nisi Prius had improperly refused to compel a witness to answer a certain question; and the Court unanimously held, in a decision which we think no person would question, that he had done right, as, under the circumstances, the witness was privileged. But two of the judges went far beyond the actual point before the Court. Maule, J., said, "It is the witness who is to exercise his discretion, and not the judge. The witness might be asked, "Were you in London on such a day?" and though apparently a very simple question, he might have good reason to object to answer it, knowing that if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless if the witness were required to point out how his answer would tend to criminate him." And Jervis, C. J., uses language somewhat similar. The first idea that suggests itself to the mind on reading this case is, that no judge could have used language so sweeping and dangerous, and consequently that there must be some error in the report. But the other reports of the case (22 L. J., C. P., 62; 17 Jur., part 1, p. 393) completely agree with the above, so that this hypothesis must be abandoned.

The startling proposition that every witness, the most mendacious or the most profligate, may effectually shelter himself from giving any evidence if he will only swear that the answer to every question put might criminate him, soon attracted attention. In *Osborn* v. *The London Dock Company* (10 Exch. 701; 1 Jur., N. S., part 1, p. 93), Parke, B., on the above dictum being cited, denied the doctrine in the most positive terms, referring to various authorities as inconsistent with it. Alderson, B., however, spoke with considerable diffidence upon it; and in that case also it became unnecessary to decide the point. In a subsequent case, however, of *Sidebottom* v. *Adkins* (3 Jur., N. S., part 1, p. 631), in 1857, the question arose whether, where interrogatories are administered to a defendant in Chancery, his statement on oath, that the answers to the interrogatories would criminate him, is conclusive on the judge, so as to compel him to disallow them. *Fisher* v. *Ronalds* and other cases were cited; but Sir J. Stuart, V. C., ruled in the negative, saying that some surprise had been excited in his mind by the opinions expressed by Jervis, C.J., and Maule, J., in that case. On the other hand, in 1858, the case of *Adams* v. *Lloyd* (3 H & N. 351; 4 Jur., N. S., part 1, p. 590) came before the Court of Exchequer, in which Pollock, C. B., expressed himself as follows:—"Certainly I have always thought that the law on that subject was correctly stated by Maule, J., in the case of *Fisher* v. *Ronalds*.* * * The only exception I know is this—where the judge is perfectly certain that the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the judge is right in insisting on his answering the question." And, lastly, in the case of *Ex parte Fernandez* (10 C. B., N. S., 39, 40; 7 Jur., N. S., part 1, p. 579), Willes, J, expresses himself in a way which shews that at least he entertained doubts respecting the correctness of the doctrine in *Fisher* v. *Ronalds*.

In this state of the authorities arose the case of *Reg.* v. *Boyes* (1 B. & S. 311; 7 Jur., N. S., part 1, p. 1158), decided in Trinity Term, 1861, which seems conclusive on the question. That was an information for bribery at an election for a member of Parliament, and one of the witnesses who was called on the part of the prosecution refused to give evidence as to the alleged bribery, sheltering himself under the rule of law before us. A pardon for the supposed bribery was then given him, but he still refused to answer, until the judge decided that he was bound to do so. A rule for a new trial having been obtained, on the ground, among others, that the judge had done wrong in this respect, it was argued in support of it, that although by the pardon the witness was protected from prosecution on the part of the Crown, he was still liable to impeachment by the House of Commons for bribery, in which event, according to the express provision of the Act of Settlement, 12 & 13 Will. 3, c. 2, s. 3, the pardon of the Crown would not avail him. *Fisher* v. *Ronalds* and some other authorities were referred to during the argument, but it is worthy of observation that *Sidebottom* v. *Adkins*, *Adams* v. *Lloyd* and *In re Fernandez* were not. Perhaps the last had not then been reported, but the first is expressly cited, and the second obviously referred to in the judgment. The Court (consisting of Cockburn, C. J., Crompton, Hill, and Blackburn, JJ.) took time to consider; and Cockburn, C.J., afterwards delivered their unanimous judgment as follows:—

"Upon a review of the authorities we are clearly of opinion that the view of the law propounded by Lord Wensleydale in *Osborn* v. *The London Dock Company*, and acted upon by Sir J. Stuart, V.C., in *Sidebottom* v. *Adkins*, is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the Court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We, indeed, quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by Alderson, B., in *Osborn* v. *The London Dock Company*, that a question, which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril.

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford a party, called upon to give evidence in a proceeding inter alios, protection against being brought, by means of his own evidence, within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable,

was sufficient to justify the withholding of evidence essential to the ends of justice. * * * It appears to us that the witness in this case was not, in a rational point of view, in any way in the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings, and that it was therefore the duty of the presiding judge to compel him to answer."

The rule for a new trial was accordingly discharged.

CHARITABLE TRUSTS.

(*Read by* VICE CHANCELLOR *Sir* W. PAGE WOOD, *before the Jurisprudence Department of the National Association for the promotion of Social Science.*)

I would willingly bring before the consideration of this Department several subjects of deep interest, which I could only refer to very briefly in my general Address; but many reforms of the most pressing importance involve considerations too extensive to be dealt with in any paper that I have leisure to frame, or indeed that the Department would have patience to listen to.

A general revision of the law of property is required. The distinctions of property into real and personal—its transmission, and the evidence of transmission—its appropriation to the discharge of the general liabilities of the owner—are matters the importance of which, as subjects to which Social Science should be applied, can scarcely be exaggerated; and they may well occupy the attention of several committees to be appointed for their detailed examination. I will venture, therefore, only to offer some remarks upon a portion of our jurisprudence with regard to the disposition of property, which appears to me to be sufficiently isolated for the purpose of separate discussion. I refer to the laws which regulate the disposition of property for purposes called charitable.

The power over property, which our law concedes to its immediate possessor, has become so extensive, that many persons appear to forget the mode in which such power has been acquired, and the gradual advancement of civilization which is indicated by its existence.

There is in many minds a vague notion that man has a natural right to 'do what he likes with his own,' and that this right extends not merely to his enjoyment, during his own life, of such material advantages as he may acquire, but to the disposition of those advantages, and their mode of enjoyment by others, after his decease. That there is a natural *desire* on the part of all men to exercise such control over that which they possess is indisputable; but, whatever view may be taken of the existence or non-existence of a moral sense, anterior to positive legislation, which by forbidding violence, secures to the individual the enjoyment of the acquisitions of his own industry there cannot, upon reflection, be any doubt that upon positive law alone must depend the disposition of such acquisitions on his decease. When by death he necessarily parts with their possession, who is to become their owner?

Accordingly we find, as might be expected, considerable variety in laws relating to the succession to property of deceased owners; sometimes it is reclaimed by the State, sometimes by the original donor; more frequently it is allotted to the family of the deceased; but with a variety of modifications as to their respective shares, and it is only at a late period of civilization that an owner is allowed by testamentary provision to exercise a posthumous control over its destination, either to the partial or entire exclusion of the State or of his kindred.

This control is in addition to any 'natural rights' he may be supposed to possess, whatever meaning be assigned to that expression.

No doubt, as civilization has advanced, it has been found that industry is encouraged, and the stability of political institutions is secured in proportion to the security afforded to the possession of property, and the enhancement of the privileges conferred on those who acquire it. Nevertheless a limit has, in every system of jurisprudence, been found necessary, beyond which the owner *at any given period* of *a given property* has not been allowed to control its destination.

Thus in our own country, property cannot, as a general rule, "be tied up," to use a very suitable expression, beyond a period of twenty-one years after the decease of persons in existence when the act of disposition takes effect; those persons may be many or few, and may be selected arbitrarily, but a limit, and a sufficiently precise one, is secured. In order to prevent a repetition of such wills as that of Mr. Thellusson, the postponement of enjoyment of *income* is restricted to the still narrower limit of twenty-one years, simply.

But to this limitation of the owner's control over the disposition of property, the power allowed of making what are called charitable gifts or bequests, forms a remarkable exception. The history of this exception in countries where Christianity has prevailed (and I believe a similar history might be written with reference to all countries where any religious system is established), is so well known that I shall not dwell upon it. As soon as corporate bodies acquired property for religious purposes, the combination of an undying succession in the owners, and of a religious trust fixed upon the property, rendered it in fact inalienable, or, in other words, the owner at any given period was thus empowered by his donation of property to a religious corporation irrevocably to fix its destination.

On the formation of mercantile and trade guilds, donations, either for the general use of the guild, or for application to charitable purposes connected with it, had the like effect.

The evil consequences of such an anomalous power were soon felt, and gave rise to the various Statutes of Mortmain. These statutes, however, were levelled principally at the withdrawal of land from general commerce, and from the feudal consequences of changes of ownership, and were passed, moreover, at a period when personal property, from its nature, could scarcely be so "tied up."

Before the existence of either public funds or shares in large adventures, such as those of the East India and South Sea Companies, perpetual trusts could scarcely be attached to personalty, otherwise than by transforming it into land, either by purchase or mortgage, and the trust would then fall within the operation of the mortmain laws.

The Act of George II., however, by which the alienation of property for charitable purposes is now principally governed, effected to deal with donations of stock, but in such a manner that the statute is, in that respect, almost a dead letter.

I may, with sufficient accuracy for the purpose of this paper state our present law as to charitable gifts or bequests to be as follows:—

1. No posthumous or testamentary disposition whatever can be made, either of land, or of any interest in land (such as a term of years, rent-charge, mortgage, or the like), for a charitable purpose.

2. No charitable gift can be made of land or any interest in land by the owner in his life-time unless certain formalities are observed, and unless he survive the gift twelve months, and if he reserve any benefit to himself the whole gift is void. Subject to these conditions, land to any extent may be devoted to charity.

3. As to purely personal estate, whether consisting of stock or otherwise, there is an unlimited power in the owner of devoting it, either in his life-time or by will, to any charitable purpose, subject merely to certain formalities as to gifts of stock, not important to be noticed.

I shall not dwell on the various modifications made by special statutes, whereby the alienation of land to a limited extent for certain descriptions of charitable endowment is authorized.

The purpose of my present paper is to call attention, 1stly, to the apparent policy of our law with regard to charitable bequests; 2ndly, to the inconsistency and incompleteness of the law with reference to that policy; and, 3rdly, to the expediency of revising that policy itself.

1.* The policy of that law appears to be this, to discourage on the one hand the withdrawal of land either from the family of the owner, or from general commerce, in order to devote it to charitable objects; but, on the other hand, to permit or even, I may say, encourage the devotion of personal estate by its owner to the same class of objects. I say encourage, because our law sanctions the exercise of a power on the part of the existing owner of personal property by which he can direct and control its application to any amount for centuries, provided the object be one which the law recognises as charitable. A power which it does not concede to him with reference to trust for his own family.

2. The mode in which that policy is effected is inconsistent and incomplete. It is inconsistent, because in its effort to prevent land being withdrawn from commerce, and at the same time to leave personal estate unfettered, it has effectually prevented the application of a considerable portion of such personal estate to charitable objects; for instance, all money laid out on mortgage, no doubt from the possibility of the foreclosure of the mortgage converting it into real estate. But it would have been very easy to provide specially for "interests in land" of such a description, by simply prohibiting the gift of anything but the money secured, to be realized by a sale, for there are few mortgage deeds in which there is not a power of sale. No ground can be assigned for preventing a person holding stock and mortgages from dealing with the money value of the one in the same way as with that of the other. If it were thought advisable to prohibit a sale of land under a will, and the application of its produce to the endowment of a charity, regard being had to the interests of the heir, surely no such ground exists with reference to the mortgages which, like stock, vest in the executor.

But, further, the law is incomplete with reference to its own policy. I need hardly do more than allude to its incompleteness of definition, partly indeed touched upon under the last head, and the many nice distinctions to be found in decided cases of what is, or is not, 'an interest in land.' I would rather, under this head, indicate the want of completeness of the law, which endeavours to discourage the withdrawal of land from general commerce, and yet permits its alienation to any extent by an act, *inter vivos*, for charitable purposes. It is true that the conditions imposed, namely, that the property shall be parted with absolutely without any interest being renewed to the donor, and that the gift shall, even then, fail, if the donor die within the year, have tended greatly to check any such alienations of land; but these special regulations would rather appear to be pointed to another very serious difficulty regarding the policy of charitable gifts, namely, the necessity of preventing gifts made under a superstitious notion of purchasing the favour of the Almighty in the last moments of earthly infirmity. It is difficult, in this point of view, however, to suggest any reason why such precautions should be confined to the disposition of real estate.

3. The more important question remains—Whether it be not expedient to revise the whole policy of our law with reference to so-called charitable dispositions of property?

First let us consider the extent of the legal signification of the term charity.

A charitable disposition, in law, is the appropriation of property to some general public purpose, as contrasted with gifts to individuals for their own use; and the only limit to such gifts (provided the regulations of the Statutes of Mortmain be observed) is that the purposes be not contrary to positive law, or to the policy implied in all law, viz.: to the principles of religion or morality. In other words, the existing owner, although he is confined to the limits of twenty-one years after lives in being with regard to any power over property to be exercised on behalf of his family, is allowed to appropriate the same property for ever to any public purpose (consistent with law, religion, and morality) that his imagination may devise.

I will give an instance or two of bequests upheld as charitable.

One testator, not long since, bequeathed £300 a year to be for ever applied as a pension to some person who had been *unsuccessful* in literature, and whose duty it should be to support and diffuse by his writings the testator's own views as enforced in the testator's publications. An inquiry was directed as to whether the testator's publications contained anything contrary to religion or morals, and this being answered in the negative, the so-called charity was established.

In another case a testator gave a fund to trustees, one-half of the income of which was to be distributed amongst fifteen maidens of his parish of the poorer sort, between eighteen and twenty-five years of age, who should be the prettiest, and should have been most regular in their attendance at church, and the other half among fifteen spinsters, who should be upwards of fifty years old with the like 'qualifications.'

The trustees declined so invidious a selection of objects except under the direction of the Court of Chancery, which established the charity, independently, however, of the personal qualifications.

I have purposely selected these fanciful dispositions, in order to bring fully before you the question whether it be reasonable that the owners of property should have the power of fixing its destination for ever to upholding such whims.

But a much wider field offers itself in the consideration of the numerous bequests of greater or lesser amount for specific charities, not absurd in themselves, but as experience has shown, far from beneficial in their application, such as doles of bread or other food, small pensions, clothing, coals, and the like, frequently qualified also with a preference to those who have attended the church services.

Upon this part of the case two questions arise. First, how far experience will justify us in saying that society is benefited in any degree by gifts of this description?

I ask you to inquire into their results in practice. I believe that in all towns where such gifts exist to any great amount, you will find the paupers more numerous than in other towns of like population; and if they should happen to be, as is often the case, old boroughs returning members to Parliament, you will find the grossest political corruption and jobbing in the disposition of this petty patronage. I have had information on these points from a most intelligent gentleman, whose official duty it was to inquire into such charities. In one city five brothel-keepers were for some time annual recipients of small pensions left by some charitable testator. I have very recently been staying in Essex, where a parish was pointed out to me, the poor of which receive a large amount of like bequests, and the wages of independent labourers in that parish have sunk to 8s. a week, whilst in every parish around it they stand at 10s.

Secondly. A question arises whether, if gifts of this kind be objects deserving so much consideration as to justify the extraordinary power over property involved in their creation, there ought not at least to be some qualification imposed upon that power, subjecting the bequest from time to time to a legal control, which may give it a more useful direction.

This last observation leads me to the consideration of the degree of control already exercised by the Court of Chancery over charitable bequests. If a testator points out by his will a precisely defined object or institution to which the bequest

* In the valuable observations made by Mr. Hodgkin during the discussion that ensued on this paper, it was correctly observed that all the earlier statutes were levelled against the withdrawal of land from the feudal consequences of change of ownership.

is to be applied, the Court of Chancery has nothing to do but to execute the trust; but if the testator merely indicates the general character of the charity, then a scheme is directed by the Court for the application of the fund. Again, if the intention of the testator, however well defined, cannot be carried into effect exactly according to his conception, or if the objects he has pointed out subsequently cease to exist, the Court of Chancery directs a scheme for the appropriation of the fund *cy près*, as it has been termed, that is to say, approximating as nearly as possible to the testator's directions, rather than that his (so-called) charitable purpose should fail. I may give, as a well known instance of this doctrine, the case in which a Jewish testator made a bequest in order to found a school for the instruction of children in the Jewish religion. This bequest failed from its being then contrary to law so to instruct children; but Lord Hardwick applied the fund to the instruction of children at the Foundling Hospital in the Christian religion. It would probably have surprised the testator, could he have known that this was considered to be executing his intentions as nearly as possible. Another more satisfactory instance is the case of Bettin's Charity for the Redemption of Slaves taken by Barbary Corsairs. This fund had accumulated, for want of objects, to nearly £200,000, and was applied by Lord Cottenham to schools, the testator having, in another part of his will, devoted a large portion of his property to that purpose.

I need not pause to inquire how this power has been derived, nor to investigate the original power of Commissioners under the Statute of Charitable Uses; but it is important to notice its existence, for to my mind it indicates a reasonable mode of dealing with the whole subject of charitable gifts in future.

Having now reviewed our existing law, I will proceed, briefly, to state what appear to me to be its leading defects.

1. I think it unreasonable to allow any existing owner the privilege of fixing for ever the destination of any portion of his property, whether real or personal. It is impossible that any human sagacity can foresee the best mode of promoting, through all time, the welfare of the nation or any less extensive section of the community, such as the testator's native county, or town, or parish. But to allow the owner of a given field, or a given amount of stock, to say that it shall for ever be devoted to that which at the moment appears to such owner to be of public benefit, is to constitute him, in effect, a legislator, whose enactments can only be reversed by the sovereign will of Parliament. The evil has been felt, and partially met by the limited power vested in the Court of Chancery of filling up the crude and incomplete sketches of testators, and remodelling them entirely when they are incapable of any effect as originally framed. But in the far more numerous class of cases, these petty enactments must be allowed their full operation, and it is only when some paramount interest of the community calls attention to the evil that the Legislature interferes to remedy it. Of this we have a recent example on a large scale, in the Acts relating to our two Universities, which have authorised the Colleges and the Commissioners to set at nought multitudinous provisions in the deeds and wills of benefactors to Colleges confining the benefit of the foundation within narrow limits, as being at variance with a more enlightened view of public benefit.

2. I am of opinion that the distinction between the devotion of real or personal estate to charitable purposes is not sound. The feudal consequences of a tenure by a corporate body no longer require our consideration. No economical evil results from the mere fact of land being held by corporate bodies on charitable trusts. The estates held by the Colleges in our Universities, and still more the land held by the public Companies of the City of London in Ireland, will bear comparison, as to their cultivation and management, with any lands held by individual proprietors. Full powers of sale and exchange should be conferred on trustees for charities, and the evils to be apprehended from motives of superstition or vanity with regard to posthumous charity ought, I think, to be met. But this latter mischief affects bequests of personalty, as well as those of realty.

3. I am of opinion that all posthumous charity should be very strictly regulated. It is very rare that charity properly so called can, in any sense, be predicated of posthumous gifts. The preference of the poor in general to the testator's own relatives is far more often the result either of superstition or vanity than of benevolence. I remember having heard the late Sir Robert Peel state that the grand-children of a so-called munificent founder of a great public institution in London had applied to him for a grant of public money on the ground of their having been beggared for the public benefit. At the same time I recollect an anecdote of a man at Marseilles having borne through life the character of a miser, who by his will stated that he had observed the suffering occasioned by want of water in the town, and had resolved to sacrifice all his own comfort to provide for that want, and now devoted his accumulations to that purpose. This, no doubt, was true charity. I would not then prohibit, but regulate very strictly, gifts by will for charitable purposes.

4. With regard to the directions of schemes for the application of indefinite charitable gifts, and remodelling charities by *cy près*, I think that a less expensive machinery than the Court of Chancery is desirable; and further, that the regulating power should be extended so as to make charitable endowments more generally available to the exigencies of the time.

I will proceed now to throw out some suggestions for the remodelling of the law with reference to Charitable Endowments, rather with a view to elicit opinion and to direct public attention to the subject, than as an elaborate scheme, ripe for legislation.

My proposals then would be to the following effect:

1. That either real or personal estate may be disposed of by deed for any charitable purpose selected by the donor, subject to the following conditions:

i. That a definite scheme be laid by him before the Charity Commissioners and approved of by them.

ii. That the gift is not to take effect until the expiration of one year from the execution of the deed, with power for the donor to revoke the deed at any time during the year; and the deed to be *ipso facto* revoked by his death within that period.

iii. The gift to be absolute, without reserving any beneficial interest to the grantor beyond any patronage he may exercise with regard to the charity.

iv. The deed itself to be executed in the presence of, and attested by the Commissioners, or some person deputed by the Commissioners to witness its execution, and not necessarily in the presence of any other witness, and to be enrolled as now provided.

The control of the Commissioners should extend only to the details of the scheme in cases of additional endowment of any existing charity already established under any degree or order of Commissioners under the statute of Elizabeth, or by the Court of Chancery, or with the assent of the Charity Commissioners, and in certain other cases to be specified, as for example, hospitals, schools, or the like. But, in other cases, the Commissioners to have power to reject a scheme, but for the cause to be assigned, either wholly or in part subject to an appeal to the Court of Appeal in Chancery.

Simple gifts of stock or money or other chattels to the treasurer or trustees of any existing charity, already approved by the Commissioners, or established by any order of the Court of Chancery, for the general purposes of the charity, to be free from the above provisions. But with that excep-

tion, no gift *inter vivos* is to take effect without conforming to them.

The Legislature might provide, of course, limits within which alone the power of the Commissioners should be exercised other than those I have suggested; and in any discussion of a Bill there would be numerous suggestions to that effect. I am not proposing a Bill, but suggesting a line of action.

2. That there should not be any power of making a charitable devise of land or any bequest of money exceeding a given amount, in value (say £200), to endure beyond the period allowed by law for the appropriation of money in other cases, except in favour of some existing charity already established under any decree or order of the Commissioners under the statute of Elizabeth or of the Court of Chancery, or already established with the assent of the Charity Commissioners. And if exceeding the above amount, such devise or bequest, even though it be to any such existing charity, to be by will executed at least twelve months before testator's decease, and attested by a solicitor.

3. That the Charity Commissioners shall have power from time to time (subject to an appeal to the Court of Appeal in Chancery), on the application of the Attorney-General, either *ex officio* on the relation of responsible relators, to remodel the application of the income of any charitable funds in cases where such income is applicable in sums not exceeding, say £10 each for the benefit of individuals by way of pension, dole, clothing, or the like, so as to apply the whole or any part of such income towards the permanent endowment of hospitals, schools, or other like general charities, either already existing or to be newly established.

4. That there be a general power of revision in the Commissioners (subject to appeal to the Court of Appeal in Chancery) of all charitable endowments whatever, on application by two-thirds of the governors or other persons having the government or control of the charity, and with the assent of the Attorney-General, for the purpose of enlarging the scope of the charitable trust, or varying the application of the funds to other charitable purposes.

These proposals are, as I have said, mere general suggestions for the purpose of eliciting discussion, and are no doubt capable of much improvement; but I trust that the Legislature will no longer permit mere vanity or caprice, on the one hand, to devote large resources to frivolous objects, nor, on the other, allow so much wealth as is at this moment frittered away by its useless, if not mischievous application, to be longer withheld from really great and permanent public objects.

DIVISION COURTS.

CORRESPONDENCE.

The removal of Judgments of Division Courts into the County Court—The certificates of County Court Judges to prevent the operation of the Exemption Law of 1860.

To the Editors of the Law Journal.

Gentlemen,—The caption of this letter points to two matters of practice, under the Division Court laws, not satisfactorily settled, and with which I have frequently had difficulty of late.

For instance, some Division Court and County Court Clerks think that the 142nd section of the Division Court Act (Con. Stat. U. C., p. 160) has reference to judgments of the Division Courts where the judgment for debt, exclusive of costs, is for $40. Viewing the law in this way, they think that they are not obliged to give certificates to file in the County Court to sell lands, unless the original judgment for debt amounts to or exceeds $40. That if the judgment for debt or damages was less than $40, although it may be more, including costs, or if the debt has been reduced to a sum below $40, they should not certify for the purpose of filing in the County Court. The Clerks of the County Court (at least one of them) seems to doubt whether in such a case as last referred to, he should file a certificate in order that it "may become" a judgment of the County Court.

The point is a very important one in many respects, and I would feel much obliged for your opinion in the *Law Journal*. The words of the section are, "In case an execution be returned *nulla bona*, and the *sum remaining unsatisfied on the judgment* under which the execution issued amounts to the sum of forty dollars, the *plaintiff* or *defendant* may obtain a transcript," &c.

The 143rd section then requires the County Court Clerk to file the transcript and to enter in four separate columns in his judgment book four different things.

The 2nd the amount of the judgment (which I think means the original amount), and the 3rd the amount remaining unsatisfied thereon.

Now, I understand the "amount remaining unsatisfied thereon" to mean the amount of *debt, interest and costs* remaining unsatisfied. If so, and they together exceed $40, lands can be sold on a judgment, grounded on a transcript from a Division Court.

For instance a judgment may have been given originally for $30 debt, $6 costs, and subsequently $5 interest may accrue on the judgment of $36 debt and costs.

Thus when the transcript is applied for there may be the sum of $41 remaining unsatisfied on the judgment.

Or the judgment may have been originally for $80 debt and $5 costs; $50 of this may have been paid, leaving $35 unpaid. Subsequent interest may have accrued until the amount due (when the transcript is applied for) is $42.

Can a party legally in either case file a transcript in the County Court, and sell lands by virtue of the judgment?

I would remark that the 135th section of the same Act clearly makes interest accruing a part of the judgment, because it allows it to be levied by execution. But the question is not confined to interest, for a judgment may be given for $20 debt and $21 costs, in all $41, and be, as I take it, within the meaning of the 142nd section.

The other question arises under chap. 27th, section 2 of the Act passed in 24th Victoria, relating to the power of County Court Judges to certify on executions, to prevent the operation of that Act on all contracts made prior to the 19th May, 1860. There is some diversity of opinion among County Court Judges as to the proof they should have before them before certifying. His Honor Judge Smart of the County of Hastings has had some correspondence with me in relation to the question, in which I think, with deference to his opinion, he has taken an extreme view of the law. If his view be correct the law should be altered otherwise there are cases where the law cannot be carried out.

The case in question is this: "A" in Toronto, during the time Judge Harrison was Judge of the Toronto Division Court, obtained a judgment against "B" for $80. "B" lived at the time in Hastings, having removed from Toronto.

The Clerk at Toronto in 1857 sent a transcript to Hastings, which on the face of it shews that the debt must have been contracted before 1860. It thus becomes a judgment of the Court in Hastings.

Now the Clerk in Hastings issues an execution upon this judgment, and lays it with the transcript before the Judge of Hastings, and asks him to certify under the last named Act. He refuses to do so for want of sufficient evidence that the contract accrued before May, 1860.

It so happens in this case that the only person who could certify on the original judgment is Judge Harrison, who does not now preside over the Division Court in Toronto.

Judge Duggan presides over that Court, and has no better knowledge of the grounds of the judgment than Judge Smart. He did not give the judgment, and has to look to the Clerk's

entry to see when it was given, and moreover the execution is not issued in his county. Thus if Judge Smart does not certify the plaintiff must lose his remedy.

Now one would think that these facts were quite sufficient to warrant a certificate.

1st. The transcript comes to the Judge in Hastings in regular course in 1857 under the seal of seal Court.

2nd. On the face of it he sees it is for a debt that must have accrued before May, 1860, or judgment would not have been given for it.

3rd. There is nothing in the Act which authorizes the Judge of an outer county to certify on a transcript in every case merely to satisfy the judgment of the Judge in whose county the execution issues. In this case the same evidence would be before Judge Duggan that is produced before Juge Smart—Judge Duggan not having given the original judgment.

In the superior Courts I have obtained certificates, and all the Judges there require is the production of the original judgment roll. In the case in Hastings the transcript is a certified copy of the judgment under the seal of a Court authorized to give it by law, evidence equally as good as that produced before the superior Court Judges—I say equally as good, because the law allows every proceeding to be taken on a transcript judgment that can be taken on an original judgment.

There is another case in which, under this Act, some difficulty occurs in certifying. Thus Judge Wilkes of Grey will not certify on an execution issued on a transcript from an outer county of proceedings had on a transcript sent from another outer county.

I mean a case like this: "A" obtains a judgment in Toronto—sends a transcript to Guelph, where it is partly collected, and costs in addition are made.

Thus there may be $20 costs made in Guelph. The defendant then moves to Grey, and a second transcript, or a transcript on a transcript, is sent from Guelph to Grey to collect the balance of the costs and debt there.

Judge Wilkes requires a transcript from the original county, and will not take as evidence the Guelph certificate.

I think in all these cases transcripts under the seals of the respective courts ought to be sufficient evidence for a Judge to certify, if on their face it appears that the contract arose prior to May, 1860.

Yours truly,

Charles Durand, *Barrister.*

Toronto, April 21st, 1862.

[The 143rd to the 146th sections of the Division Courts Act were obviously passed to enable a judgment creditor in the Division Courts to reach the lands of the defendant, which he could not do by the ordinary process of these Courts. The 143rd to the 145th sections enabled the judgment to be transferred by a simple process to the County Courts, which have the power to issue execution against lands, and the 146th section (now repealed by 24 Vic., cap. 41) enabled a registration of the judgment to bind the lands as in the Superior Courts.

In the first place we would observe upon our correspondent's letter, that no Clerk of a Division Court should take it upon himself to refuse a transcript of the judgment, or assume to himself the right of deciding the point against the plaintiff. If he certifies to the facts as they are he has done his duty. The question as to whether an execution against lands may issue upon the transcript he has nothing to do with. Under the 142nd section, if a Clerk finds that books and papers in his office answer in the affirmative the following questions he is, in our judgment, bound to grant the transcript:

1. Did A. B. recover a judgment in the Court against C. D.?

2. Was execution issued thereon and returned by the Bailiff nulla bona?

3. Does the sum remaining unsatisfied on the judgment exceed $40?

With reference to the words "remaining unsatisfied," &c., so far as the Clerk is concerned at all events, we think he must be guided in this way: Suppose I was called upon to issue an alias execution in my own Court, for what amount would it be? Why, for the sum or balance due to the plaintiff, in other words, for the sum left unpaid and unsatisfied, and that sum must be $40 at least to warrant the issue of a transcript.

Upon the question itself we never had any doubt that the sum for which the verdict is given by the Judge is not the criterion—his judgment is for debt and costs, and is so entered in the procedure book, and if these *together* come up to the required amount that will be sufficient under the clause and that for the purposes of the clause the costs are not distinguishable from the debt. The words remaining "*unsatisfied on the judgment*" can have no other meaning. The language of the 143rd section is more pointed in this particular than the repealed section 146, and the latter requires the amount to exceed $40, but even that section, we think, would bear the construction suggested, "a party who has *obtained judgment* in a Division Court exceeding $40." If it was intended to make the amount relate to the *debt* or *claim* alone it would have been so stated, as for instance in section 12 of cap. 24 Con. Stat. U. C., relating to arrests—"recovered judgment against defendant for $100 or upwards *exclusive of costs.*"

As to whether the interest may be brought into account in making up the $40, it is more questionable, as the interest, strictly speaking, is not part of the judgment, but the payment of it may be claimed and, under the execution, enforced.

The case of *Farr* v. *Robins* reported elsewhere, will be read with interest as having some bearing upon the subject of our correspondent's communication.

As to certifying an execution, probably the Judge might with propriety be satisfied with less evidence than suggested, but the simplest thing possible is to send with the transcript an affidavit from the plaintiff or his agent that the debt was contracted before May, 1860. No Judge, we think, would make any difficulty in certifying in such case when it appeared to accord with the transcript of judgment.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—You are wrong, in your last issue, in assuming that the Division Court at Sarnia is the only one shabbily treated by the County Councils, about getting accommodation in the Court House. In this town, the Court Room can only be had for Division Court uses by the payment by the Clerk of $3 per day—$1 50 to the County Treasury, and $1 50 to Court House Keeper. In 1857 I paid $14 to the Court House Keeper; this was before the price was *raised.* As $3 a day would involve an outlay of at least $25 a year, I have for the last four years hired other places for the Court. It generally costs one dollar each Court—for the last two Courts, $2 each time. I quite sympathize with my brother Clerk at Sarnia. Hope he has got a good long purse to pay these "extras" out of! But really it is a strange state of affairs, that a *Court* House, built by the people's money, cannot be got for *Court purposes,* unless somebody pays for it out of his own private means.

Yours respectfully,

The Clerk of the First District Court, Grey.

Owen Sound, 15th April, 1862.

[We really do not understand on what principle accomodation is denied to division court offices in any court house, unless upon payment, as if the rooms were let for a concert or ball. The law in this respect needs some amendment.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* Christopher Robinson, Esq., *Barrister-at-Law, Reporter to the Court.*)

In the matter of Joseph Thompson and the Corporation of the United Townships of Bedford, Olden, Oso, and Palmerston.

By-law—Uncertainty—Mistake in name of applicant—Costs.

A by-law described a new road to be opened as follows:—"Commencing on the Green Bay line of road on lot 22, and crossing part of lot 22, and lots 23, 24, and 25, in the sixth concession of Bedford, until it intersects the old travelled road, and continuing on to Bob's lake in the said township of Bedford; the said road to be thirty feet wide."

Held, bad for uncertainty.

In the copy of the rule *nisi* first served, the applicant's name was by mistake written *James* instead of *Joseph* Thompson. The road in question also passed through the land of one James Thompson, with whom an arbitration had taken place; and the corporation supposing him to be the applicant, prepared affidavits in answer. Afterwards the mistake was discovered, and a correct copy of the rule served. The court, in making it absolute with costs, directed the costs incurred by the corporation in consequence of the error to be deducted.

(H. T., 25 Vic.)

R. A. Harrison obtained a rule in Michaelmas Term last on the corporation, to shew cause why their by-law No. 60 should not be quashed, with costs.

1st. Because the by-law (which was for the establishing of a new road) did not with sufficient certainty define the line and limits of such road. 2nd. Because the road, so far as it could be said to be defined, encroached upon the dwelling-house, barn, stable, out-house, orchard, garden, and pleasure grounds of Thompson, the applicant, whose consent had not been obtained.

The by-law moved against was passed on the 2nd of September, 1861, and described the new road as follows:—"Commencing on the Green Bay line of road on lot 22, and crossing part of lot 22, and lots 23, 24, and 25, in the sixth concession of Bedford, until it intersects the old travelled road, and continuing on to Bob's lake in the said township of Bedford." And it enacted that the said line of road be established and remain open for the use of the public; the said road to be thirty feet wide.

It appeared by the affidavits filed that the rule *nisi* for quashing the by-law being itself properly intitled, as above, a mistake was made in the copy served, the name of *James* Thompson being inserted as the name of the applicant instead of *Joseph*.

The new road also passed through land belonging to one James Thompson, in the same township, and the corporation, supposing that he really was the mover in the application, had affidavits drawn and sworn to, and were put to considerable expense in preparing themselves to shew cause last term against the application believed to have been made by him. There had been an arbitration between the corporation and James Thompson respecting the compensation to be paid to him for taking the road through his lot, and he had accepted the money, so that there were special grounds to be urged in answer to an application in his name to quash the by-law.

The counsel for the applicant afterwards, at the end of Michaelmas Term, discovered the mistake, and obtained leave to amend his rule by making it returnable in this term, in order to serve a correct copy of it.

Britton shewed cause, and urged that the applicant should be made to pay the costs occasioned by the mistake. He cited *Smith* v. *The City of Toronto*, 10 U. C. C. P. 225; *Ianson* v. *The Corporation of Reach*, 19 U. C. Q. B. 591.

R. A. Harrison, contra, cited *Dennis* v. *Hughes et al.*, 8 U. C. Q. B. 444; *Smith* v. *The Municipal Council of Euphrasia*, Ib., 222; *Brown* v. *The Municipal Council of York*, Ib., 596.

Robinson, C. J., delivered the judgment of the court.

As regards the quashing of the by-law, we think it cannot be allowed to stand, for it does not sufficiently define the line of road as it ought to do. The width is specified, but not the course of the road, so that no one can tell where it begins, nor through what parts of the lots named it was intended to cross. No one can tell from the description in the by-law when he is on the public highway, and in case of any contention about it there would be no means of determining the point. For the reasons that we have given in several former cases, we think we must make absolute the rule for quashing this by-law, which is so clearly bad upon the face of it; and we quash it with costs, but with a direction that the master shall tax the costs incurred by the corporation in preparing to answer the supposed application in the name of James Thompson, and deduct them from the costs of this application. Rule absolute.

Row v. Quinlan et al.

Ejectment—Plea of confession—Verdict taken after—Laches.

Plaintiff brought ejectment upon mortgage. Defendant appeared, and notice of trial was served on the 18th September for the 30th October. On the evening of the 29th October the defendant served a notice of confession on the plaintiff at his residence, thirty miles from the assize town, where his attorney had gone; and on the 30th a verdict was taken, defendant not appearing, and the attorney being ignorant of the confession.

The court under these circumstances refused to set aside the verdict.

[H. T. 25 Vic. 1862.]

Ejectment for part of lot No. 9, on the south-east side of the Carrying-place road, at the head of the bay of Quinté, in the township of Ameliasburg.

The action was brought upon a mortgage executed by the defendant Quinlan to the plaintiff, the defendant Shears being the mortgagor's tenant.

The defendants both appeared, and defended for the whole premises; but being called at the trial, which took place at Picton, before Richards, J., they did not answer, and judgment was entered for the plaintiff under the Ejectment Act.

Hector Cameron moved, on the part of the defendants, to have the entry of the record and the verdict, and all proceedings subsequent to the service upon the plaintiff of a notice of confession of the plaintiff's title, set aside for irregularity, on the ground that the plaintiff could not legally proceed in his action after such notice. He cited Consol. Stats. U.C. cap. 27, sec. 45.

Richards, Q. C., showed cause, and cited Ch. Arch. Prac. 212; Lofft, 232; Rule of Court 135.

The facts of the case sufficiently appear in the judgment of the court, delivered by

Robinson, C. J.—The case was called on, and a verdict taken, on the 30th of October last. The defendant Quinlan took, as he swears, a notice of confession to the plaintiff, not to his attorney, on the evening of the 29th, and the plaintiff's residence was about thirty miles from Picton, where the assizes were to be held.

The plaintiff's attorney had left on the 29th October for Picton, and he swore that he knew nothing of the confession being given till after the verdict had been taken.

After reading the affidavits on both sides, we do not think we should be justified in determining that the plaintiff's attorney had acted unfairly in the case. The attorney for the defendant Quinlan had refused to admit the mortgage upon notice. So long before the trial as the 18th of September, the notice of trial had been served, and the defendants had, therefore, ample time to have given the confession long enough before the assizes, which opened on the 30th of October, to have rendered unnecessary these proceedings of which they complain. If their object was to save costs by allowing the plaintiff to get judgment without the necessity of going to trial, the defendants should have served the notice of confession not on the plaintiff, but on his attorney, who was conducting the suit, and it should have been served in time to stop the proceeding to trial.

The 45th clause of the Ejectment Act (Consol. Stats. U. C. cap. 27) contains nothing that should deprive the plaintiff in this case of his costs, but the contrary; and upon the facts appearing in the affidavits, it would be unreasonable that the plaintiff should lose the costs of preparing for trial, or of the trial, or entering judgment on the confession, because a notice of the confession had been served on the evening of the 29th October, at Picton, thirty miles from the town where the assizes were to be opened the next day, and served not upon the attorney but upon the client, who would probably know nothing of the meaning of such a proceeding. It was sworn that the verdict was taken on the next day for the plaintiff, without knowledge on the part of the attorney that such a notice had been served, or that a confession had been given.

Rule discharged with costs.

IN RE KEENAHAN AND PRESTON.

Appeal from county court—Mandamus.

A county court judge refused to certify the papers for appeal, because the bond was not conditioned to abide by the decision of the court above, as the statute requires. The plaintiff, who desired to appeal, then applied for a mandamus, contending that this part of the condition was unnecessary, as only costs could be in question; but the court refused to interfere.

A. McNab obtained a rule *nisi* for a mandamus to the judge of the county court of Ottawa, to certify an appeal. Cause was not shown.

The action was brought for not returning a conviction made by the defendant as a magistrate. On demurrer to the declaration, judgment was given for the defendant, from which the plaintiff desired to appeal.

The objection which induced the learned judge to decline certifying was, that the bond, which had been executed for the purpose of the appeal, according to the 68th section of the County Courts Act, Consol. Stats. U.C. cap. 15, did not make it one of the terms of the condition that the appellant would abide by the decision of the court appealed to.

The party desirous of appealing contended that that was not necessary in this case, because the appeal only regarded costs.

ROBINSON, C. J., delivered the judgment of the court.

We have considered the affidavits filed in support of this application for a mandamus, and have determined to discharge the rule.

The County Courts Act, sec. 68, requires that the bond given by the party desirous of appealing shall contain as one of the terms in the condition, that the party appealing shall "abide by the decision of the cause by the court to be appealed to," and this without making any distinction between the cases of a plaintiff or defendant appealing. This bond contains no such words, though the legislature has required them to be inserted.

It is argued that they are unnecessary in this case, because it is the plaintiff who appeals; but that is not alone a good reason for omitting that part of the condition, for a defendant in actions for money demands may on a plea of set-off have a verdict in his favour for a considerable amount. This, it is true, is not such a case. It is not necessary for us to say whether such a bond might or might not with propriety have been accepted.

The learned judge, finding it deficient in what the statute positively requires, thought he ought not to receive it, and we shall not command him to disregard or dispense with the act. We should be encouraging unnecessary deviations from prescribed forms by doing so, and should be interfering improperly with the discretion of the judge. The writ of mandamus is a remedy for compelling parties to carry a provision of a statute into effect, not for compelling him to violate a statute, even in point of form.

We discharge the rule, but not with costs, as no cause has been shown and no costs incurred.

Rule discharged.

EVANS ET AL. V. MORLEY.

Promissory note—Consideration—Pre-existing debt—Lottery—12 Geo. II., ch. 28—New trial refused.

Semble, that there is no distinction, as regards consideration, between a promissory note given for a pre existing debt and for a new consideration.

Held, affirming *Evans* v. *Morley*, 20 U. C. Q. B. 236, that under 12 Geo. II., ch. 28, securities given for the price of lottery tickets are not void in the hands of a *bonâ fide* holder for value.

Where the jury found that the plaintiffs had not notice of the illegality, the court refused a new trial, holding that the defence was not one to be favoured

(H. T., 25 Vic.)

Action on a note for £15, made by the defendant, on the 2nd of July, 1856, payable to one Gillespie or bearer, 12 months after date.

Pleas—1. That the note was given to Gillespie for an illegal consideration, namely, for a ticket in a lottery set up for sale of land: that the plaintiffs knew that when they took the note as bearer, that they took it after it became due, "and without any value or consideration for it, and always held and now hold the same without value or consideration."

2. That the defendant was induced to make the note by the fraud, covin, and mi-representation of Gillespie and others: that the plaintiffs took the note when it was over-due, without value or consideration, and with notice of the premises.

The plaintiffs replied to the first plea that they took the note before it was due, for a good and valuable consideration, and without notice of illegality, and had always held and now hold the same for such consideration.

And they took issue on the defendant's second plea.

At the trial, at Kingston, before Richards, J., the learned judge left it to the jury to find upon the evidence, which it is not material to report, whether the plaintiffs' agent (that is, their attorney at Belleville) had knowledge of the illegality of the consideration. They found for the plaintiffs, for the note and interest $75 78.

O'Hare, for the defendant, moved for a new trial on the law and evidence, and for misdirection, contending that the plaintiffs should have shewn that they gave value for the note, which was not done by proving that their agent or attorney received it on account of a pre-existing debt, and that the evidence shewed that the plaintiffs had through their agent (the attorney's clerk) notice of the illegality, and that it was not material at what time the clerk first had notice. He moved also in arrest of judgment, on the ground that on the pleadings it was admitted that the note was given for an illegal consideration, and therefore there could be no recovery on it.

MacLennan shewed cause, and cited *Evans et al.* v. *Morley*, 20 U. C. Q. B. 236: *Gooderham et al.* v. *Hutchinson*, 5 U. C. C. P. 248, 258; *Goodman* v. *Harvey*, 4 A. & E. 870; *Wallbridge* v. *Beckett*, 12 U. C. Q. B. 395; *Swift* v. *Tyson*, 16 Peters 1.

Richards, Q. C., contra, cited *Harvey* v. *Towers*, 6 Ex. 656; Byles on Bills, 28; *De la Chaumette* v. *The Bank of England*, 9 B. & C. 208.

ROBINSON, C. J., delivered the judgment of the court.

The motion in arrest of judgment is disposed of by the judgment already given to the same case on demurrer (20 U. C. Q. B. 236), where we held that the English Act against such lotteries (12 Geo. II., ch. 28) does not make void the securities given for the price of lottery tickets, and does not therefore render such negotiable securities void in the hands of a *bonâ fide* holder for value, without notice of the illegality.

It does not appear that any objections were taken at the trial to the judge's charge, on the point that the pre-existing debt from Elmore to the plaintiffs, who took the note from him, was not a valuable consideration, and that they do not stand in that respect on as favourable ground as they would have done if they had advanced money or given any other new consideration relying upon the note. That is a point upon which the courts have differed, but there is much authority at the present day in favour of holding that there is in general no such distinction. The learned judgment given in the Court of Common Pleas in *Gooderham* v. *Hutchinson* (5 U. C. C. P. 248) is strongly in the plaintiff's favour. I refer also to the cases collected in Byles on Bills, 3rd Am. Ed., p. 28 and 95, note (*l*).

Then as regards the plaintiffs having notice of the illegality when they took the note, that cannot be said to have been proved. There was evidence to the contrary, and the question whether they had notice or not was left to the jury, and they found that the plaintiffs had not notice. The defence is one of that description that the law should not be at all strained in the defendant's favour, and fortunately the amount is not large. We should not, we think, give him a second chance of setting up such a defence against a transferee of the note by any exercise of our discretion in his favour.

Rule discharged.

COTTON V. MCCULLY.

Ejectment—Description of land.

In ejectment for twenty acres of land, the plaintiff claimed under a patent from the crown. Defendant endeavoured to defeat his recovery by putting in a mortgage from the plaintiff to one P. of 1300 acres, described as "being comprised in the schedule and map attached." The land in the plaintiff's patent was not mentioned in the schedule, though it was laid down on the map, but it was proved that the map contained other lands belonging to other parties, and was not made with reference to the mortgage, and that the schedule embraced lands not appearing on the map.

Held, clearly insufficient to disprove the plaintiff's claim.

(H. T., 25 Vic.)

Ejectment for water lot No. 1, on the east side of the river Credit, in the village of Port Credit, in the county of Peel, being the corner lot at the intersection of Toronto and Brock Streets in

the village of Port Credit, as shewn on a plan of the village made by J. S. Dennis, Esq., being composed of that parcel of land and marsh, containing twenty acres, situate on the north-east side of the river Credit, and bounded on the west and north-west by the north-western boundary of the town-plot; on the north and north-east by Lot and Brock streets, and on the south-east by Toronto street.

The plaintiff claimed under a patent, dated the 11th of November, 1854.

At the trial, at Toronto, before Draper, C. J., the defendant put in and proved a mortgage, dated the 20th of April, 1854, from the plaintiff to William Proudfoot, Esq., of 1300 acres of land at Port Credit, in which mortgage the land was described as "being comprised in the schedule and map attached to the deed." The land mentioned in the patent (the twenty acres) was not mentioned in the schedule. It was laid down on the map, along with other lands belonging to other parties, but there was nothing in the map to distinguish the twenty acres intended to be conveyed from the other lands which it comprised, either by difference of colour or otherwise; and it was sworn by the surveyor who made the map, that it was not made in order to shew what was the land mortgaged, nor with any reference to the mortgage, but for a wholly different purpose, and that there were parcels of land in the schedule which were not embraced within the map.

Harman obtained a rule *nisi* accordingly.

A verdict was entered for plaintiff, with leave to defendant to move to have a verdict entered for him upon the evidence.

R. A. Harrison shewed cause, citing *Kingston* v. *Chapman*, 9 U. C. C. P. 130.

Cameron, Q. C., supported the rule.

ROBINSON, C. J., delivered the judgment of the court.

The defendant shews no right in himself to the property in question, but is only endeavouring to defeat the plaintiff's recovery by setting up a mortgage to a third party, in which it was not shewn that he has any interest. It need hardly be said that the evidence ought to be perfectly clear to prove that this particular lot is included in the mortgage before the defendant should be allowed to have a verdict entered in his favour. So far from that, it seems clear the other way, even without taking into consideration what seems to be the case, that the mortgage was made before the patent had been issued to the plaintiff, and could not therefore convey a legal interest in the land unless under certain circumstances.

But as it was conceded that the lot, though embraced in the map, is not included in the schedule referred to in the mortgage and annexed to it, and as moreover it was not shewn that the premises in question formed any part of the mill lot, or of the three other town lots specially named in the mortgage, we have no hesitation in discharging the rule.

Rule discharged.

REGINA V. THE GREAT WESTERN RAILWAY COMPANY.

Highways—Indictment for obstructing—22 Vic., ch. 116, sec. 15; Consol. Stats. U C., ch. 54, secs. 313, 333; 16 Vic., ch. 99, sec. 4; 16 Vic., ch. 101; 4 W. IV., ch. 29 sec. 9; 12 Vic., ch. 35, sec. 41.

In September, 1852, a tract of land upon the river St. Clair, adjoining the town plot of Sarnia to the south, was ceded by the Indians to the Crown, to be disposed of for their benefit. In the same year this tract was surveyed under instructions from the government, and three streets laid out upon the plan, one called Front street, running north and south, parallel with the river, and the others, Wellington and Nelson streets, running westerly through the tract, crossing Front street at right angles, and continuing to the river bank, which was distant only 1 chain 50 links from Front street along Nelson, and 50 links along Wellington street. This plan was reported to the government, with the surveyor's field notes, but Nelson and Wellington streets were not laid out upon the ground west of Front street, and that portion of them had never been opened or used so as to give access to the water—the river bank there being abrupt. A sale was held in 1853, at which some lots were sold with reference to this plan, one on Nelson street, but none west of Front street.

In 1854 the Great Western Railway Company purchased from the government the tract west of Front street along the river between Wellington and Nelson streets and beyond them to the north and south, including the water lots in front, for which they paid the sum awarded by arbitration. Afterwards a public sale of lots in the tract ceded by the Indians was held by government, at which a plan was referred to, made for the company by the same surveyor who first laid out the tract, shewing the ground which the railway and its termians would occupy, but exhibiting no streets leading through it to the river; and this was the plan used before the arbitrators, and upon which their award was made.

The company, without objection on the part of the municipality, entered upon the land bought by them, made new ground in front by filling up the river, and completed their buildings and other works, which obstructed Wellington and Nelson streets running through the land purchased to the river, according to the first plan mentioned. After this the municipality by letters applied to them for compensation for the injury caused to the town in consequence of the access to the water by these streets being cut off, claiming that they should be paid a fair value for the streets thus taken, and remunerated for a purchase of land which it was proved they had made higher up at a cost of $3,200 in order to obtain access to the river. They made no complaint, however, that the defendants had acted illegally.

Defendants being afterwards indicted for obstructing these streets, it was left to the jury to say, with reference to the 15th clause of 22 Vic., ch. 116, whether the municipality or the government had permitted defendants to occupy the streets before that act, and if so, to find for defendants. The jury gave a general verdict of guilty, and being asked how they found as to the permission, said only that they thought the municipality ought to be compensated for the land.

By 22 Vic., ch. 116, sec. 15, it is enacted, in substance, that all highways occupied by this railway with the written assent of the municipality within which they are situated, shall be declared vested in them to the extent of the user permitted or enforced by the municipality; and all proposed or contemplated streets occupied by the company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be lawful.

Held, that defendants were clearly entitled to an acquittal under this clause, for 1st, as to the first part of the clause, a written assent given afterwards by the municipality would suffice, and might be inferred from their letters, in which they asked only for pecuniary compensation; and 2ndly, these were proposed or contemplated streets occupied by the company, and not leading to any place beyond the railway, in which case no assent was required.

Held, also, that the Consol. Stat. U. C., ch. 54, sec. 333, had no application, for it could not be said that these streets had not been opened by reason of any other road being used in lieu thereof.

That under 16 Vic., ch. 99, sec. 4, and 16 Vic., ch. 101, defendants had clearly a right to take possession of this land for their railway, with any easement thereto.

Quære, whether the 4 W. IV., ch. 29, sec. 9, which requires this railway company on intersecting any highway to restore it to its former state, or in a sufficient manner not to impair its usefulness, could have been applied in this case; the streets in question never having been opened or used, being covered by the works of defendants, so that they could not be restored without dispossessing them, and leading to no place beyond. *Semble*, that at all events a mandamus would not, under the circumstances, have been granted at the instance of the municipality.

Under Consol. Stats. U. C., ch. 54, sec. 313, these streets being laid out on the original plan made by the Crown surveyor, would be public highways, though not staked out upon the ground, and never opened or used.

Semble, that under 12 Vic., ch. 35, sec. 41, the Indians, or the government acting for them, had power to alter and amend the survey by striking out these streets where they ran through the land sold to defendants.

(H. T., 25 Vic.)

This was a prosecution for nuisance, in obstructing two common and public highways. The indictment was preferred at the assizes for the County of Lambton, and was removed into the Court of Queen's Bench by *certiorari*, at the instance of the defendants, and was tried before Robinson, C. J., at Sarnia, in October last.

The indictment charged that on the 1st of January, 1857, and thereafter continually until the committing of the grievance complained of, there were certain common and public highways, to-wit, Wellington street and Nelson street, in the town of Sarnia, in the county of Lambton, terminating on the river St Clair, in front of the said town of Sarnia, which were used by Her Majesty's subjects residing in the said town, and by others, to pass and re-pass over, for the purpose of procuring from the waters of the said river a supply of water for their use and that of their families, and to water their cattle, horses and stock; and that the waters of the said river were at the terminations of the said streets open and accessible for the purposes aforesaid, for all the said subjects, and others, and the same had for many years past been constantly used by the said subjects and others for such purposes. And that the defendants, on, &c., unlawfully and injuriously cut down and carried away the earth and soil of the said streets, and made divers erections and buildings thereon, and at the termination thereof, and constructed portions of their depot, grounds, platforms, and wharves thereon, and in front thereof, and piled large portions of earth and soil upon Nelson street, and thereby then obstructed the said streets, and prevented their continual use by the said subjects as aforesaid, and also obstructed the said access by the said subjects to the said waters of the river, and prevented their obtaining and using the said waters, as they had been accustomed to do as aforesaid, to the common nuisance of Her Majesty's subjects and others using the said streets and waters.

The defendants pleaded not guilty, referring in the margin of their plea to the statutes 4 Wm. IV., ch. 29, sec. 26; 16 Vic.,

ch. 99, sec. 10; 18 Vic., ch. 176, sec. 26, and 22 Vic., ch. 116, sec. 5.

The first witness for the Crown was Henry Glass, Esquire, the registrar of the county of Lambton. He produced a copy of a plan, certified by the Commissioner of Crown Lands on the 29th of September, 1854, of an addition to the plot of Sarnia, consisting of certain land ceded by the Indians to her Majesty in Sept., 1852, and adjoining the former town plot of Sarnia on the south. The river St. Clair formed the front of that tract (the addition) running in direction nearly north and south. A little way back (that is, easterly) from the river a street was exhibited on this plan called Front street, parallel nearly with the river.

On the south side of this lately ceded tract, as laid down on this plan, and near but not exactly at the southern limit, there was exhibited a street or allowance for a street called Nelson street, which touched the southerly limit of the tract several chains back from the river, and ran westerly towards the river, diverging in its course from the southerly limit of the ceded tract a little to the north, so as to leave a small gore between that limit and Nelson street. On this plan Nelson street was represented as crossing Front street at right angles, and continuing from the west side of Front street to the river.

Then on the northern side of the ceded tract, as laid down on this plan, and near the northern limit, but separated from it by a small gore, there was laid down a street called Wellington street, running from the east through several blocks of village lots as laid out on this plan to Front street near the river, crossing Front street at right angles, and continuing westerly from Front street to the river. Front street on this plan was laid out of the width of 70 feet, and Nelson street and Wellington street of the width of one chain.

The whole width of this tract ceded by the Indians to the Crown in 1852 was about 900 feet, and the space along the bank of the river between the two streets was about 750 feet. The distance from the west side of Front street to the river, along Nelson street, as laid down on the plan, was one chain and fifty links, and the distance from Front street to the river along Wellington street was only fifty-seven links.

This plan, the registrar stated, was received by him from the Commissioner of Crown lands in the autumn of 1854, but was not filed by him as it would have been if it had been a plan deposited by a private proprietor according to the statute.

A copy of this plan, recently certified by the assistant Commissioner of Crown lands, was also produced on the trial.

Mr. Glass further stated that before the Indians made the surrender spoken of to the Crown this tract formed no part of the town, but it was afterwards laid out into town lots, as this plan shewed: that since the cession and survey all the land between Nelson and Wellington streets, and lying between Front street and the river, having been purchased and occupied by the defendants, the Great Western Railway Company, they had made a considerable quantity of land by filling up from the bank of the river as it was formerly, out towards the deep channel, so that at this time there was a wide space of firm land in a continued tract along the whole space between the two streets, and in front of the two streets themselves. This was land made by the company at their own expense, and entirely occupied by them for purposes connected with their railway, and interposing between the termination of the streets respectively, as laid down in the plan spoken of, and the waters of the river as seen at present.

The natural bank of the river at the terminus of Wellington street was about twenty feet above the water, being an abrupt bank, at the time of the survey. At the end of Nelson street the bank of the river was not so high, and not so inaccessible. But they had neither of them, as Mr. Glass (the registrar) stated, been used as streets, nor so shapened as to give access by them from Front street to the water of the river, before the defendants took possession of the ground.

There had, however, been a ditch made from that part of Wellington street which was east from Front street to the river, for the purpose of draining Front street and the streets back of it. This was done after the cession of the tract by the Indians. Front street was at that time a travelled highway.

Mr. Alexander Vidal, the Provincial land surveyor who laid out the ceded tract by order of the government, was next examined. He stated that the town of Sarnia was incorporated in 1856, and that it then included these two streets: that under instructions by letter from the superintendent of the Indian Department, dated 15th September, 1852, which he produced, he made the survey and plan referred to by the first witness; and he produced his field notes, shewing that he had laid out the two streets in question as extending from Front street westerly to the river, and reported such survey with his plan to the government, Mr. Young being at that time Reeve of Sarnia: that there was no street laid out between Wellington and Nelson streets leading from Front street to the river, but that twelve or fourteen chains up the river, that is, north of Wellington street, there was now a street leading down to the river. South of Nelson street the land yet belonging to the Indians came up to the southern limit of the ceded tract. Both these streets in question, Mr. Vidal stated, were now closed west of Front street, the whole tract in front, including the two short streets, being fenced off and occupied by a freight house and the railway track, and by a dock which extended along the whole front on the river between the two streets, and beyond them north and south.

Mr. Vidal on cross-examination stated, that he had made out a map for the defendants of the defendants' land along the river and up to Front street, in which no such streets as Wellington and Nelson streets were laid down from Front street to the river. He did this, he said, at the desire of the company; that is, he made the plan at their request. He was asked to produce the letter of their secretary, Mr. Hatt. but it was not produced. He supposed, he said, that when he made out that plan the streets never entered into his mind, adding that he had recommended to the government not to sell any lots between Front street and the river, and that his intention in continuing these two streets to the river in his survey was to give access to the water.

Dr. Thomas W. Johnson, the Mayor of Sarnia, swore that the public were cut off from access to the river by the defendants' fences, freight-houses, and other works. In 1853 or '54, he said, and as he thought after the tract was laid out, it was talked of generally that the defendants would require to have their western station and terminus upon the ceded tract in question: that on the first day of the public sale no lots were sold between Front street and the river: that the company had cut away the bank, and built out wharves in front, which obstructed the two streets and filled up the space between and in front of them: that the corporation of Sarnia had since bought from a private proprietor, for $3,200, a piece of land about six hundred feet north of Wellington street; that is, above the lately ceded tract, over which they had made a street leading from Front street to the river, and they had called it North Wellington street: that the land south of Nelson street was private property.

On cross-examination, he said that the Great Western Railway was finished and opened to Sarnia about four years ago, and that he did not know that any objection was made to the works going on while they were in progress.

A letter was shewn to him, and admitted, which was written on the 31st of July, 1858, by the town clerk to the company, calling to their attention that a portion of Front street, Wellington and Nelson streets "had been obstructed by the engineer and contractors," and stating that the damage to the inhabitants from their being cut off from access to the river, on which they depended for water for their daily use, was serious. This was not, however, complained of in the letter as an illegal act on the part of the company, and the letter concluded thus, "I am now therefore directed, on the part of the corporation, to demand an adequate compensation for the damage thus suffered by the town, and I am to request that you will be pleased to inform the town council what amount the company will be willing to pay for this damage."

William McIlwhain was next called, and he stated that at the first government sale of town lots laid out on the new tract, held in 1853, he bought a lot on Nelson street east of Front street, supposing that he would have access by Nelson street to the river: that he built on his lot: that he and others had used Nelson street, passing along it to the water's edge: that he did not know

of any statute labour having been done on it (west of Front street): that part of the Company's engine-house for their elevators now covered Nelson street, and there were fences across it, and a dock built rut in front of it, covering part of the river, so that there was no access to the water for the public at that part of the river.

This was the testimony on the part of the Crown.

Becher, Q. C., counsel for the defendants, referred to sec. 333 of the present Municipal Council Act, as bearing on this case. He contended, also, that a by-law of the municipality was necessary, if it was intended to open these streets for public use: that the only proper proceeding open to the corporation of Sarnia to adopt, if they had any ground of complaint, was by applying for a mandamus to the company "to restore the alleged streets to their former state of usefulness" as provided by statute: if this should appear to be a case in which that provision should, in the nature of things, be carried out. And he referred to 22 Vic., ch. 116, sec. 15, which was passed on the 16th of August, 1858, and to 16 Vic., ch. 101, secs. 8, 9 and 21; and then he proceeded to call the following witnesses:—

Peter T. Poussett, who stated that he was clerk of the town council of Sarnia in 1858, and wrote the letter dated 31st of July of that year, and also one dated 16th November, 1858, to the defendant's solicitor, both by direction of the council. Both were written after the railway had been opened and in use, which it was in January, 1858. The latter merely pressed for an answer to their former letters. He proved also other letters from the Mayor of Sarnia to the company, of the 15th of March, 1859, and 14th of July, 1859, the former enclosing a resolution from the town council, and the latter another resolution pressing for a definite answer from the company (these defendants).

It appeared from these documents that the council were pressing upon the company the reasonableness of their making compensation to the town for closing up the two streets, has the town council had in consequence to make the purchase of land higher up the river, at a cost of $3,200, in order to give the inhabitants access to the water. They intimated that they were not disposed to insist upon the company removing the obstruction from the streets, but that they trusted "they will not hesitate to allow fair value for the continuation of the streets referred to, which have been used by them" (that is, the continuation of them from Front street to the river.

John O. Hatt, Esquire, stated that he was solicitor for the railway company (defendants) in 1851-2 and 3: that under instructions from them he applied to the Indian Department for a right of way over the Indian lands, and for lands for their station and depot, &c., at their intended terminus on the river: that he saw Colonel Clench, the Indian agent, and made an agreement with him for the price of all the land that they would require between Front street and the river. This he thought was sometime in 1854. He learned from Colonel Clench the upset price that had been fixed by the government for the land, and told him that the company were willing to pay that, but that it would be proper to have a reference to arbitration and an award fixing the amount.

A reference was accordingly made to three arbitrators under the statute, and it was stated to the arbitrators that the company and the Indian Department had agreed upon the sum of £1500 to be paid for the 900 feet along the river, being the front of the ceded tract (which government were to dispose of for the benefit of the Indians). The arbitrators being Mr. Burritt, the judge of the county court, Mr. Vidal, the witness in this case, and Mr. George Durand, accordingly made a formal award under their hands and seals on the 10th of May, 1854, as upon a submission between the railway company and the Indian Department, for the purpose of settling the compensation to be paid to the Indian Department by the company for the location or right of way of the Sarnia branch of the Great Western Railway Company through the Indian reserve in the township of Sarnia, including station-ground and water lots, as laid down in a certain plan thereof made by the company marked A.; and they awarded for the right of way and station-grounds, comprising twenty-four and one-half acres, £900; and for the water lots aforesaid, comprising a frontage on the river St. Clair of 900 feet, more or less, the further sum of £1500.

On the same day (10th of May, 1854,) the principal chiefs of the Chippewa Indians, occupying and claiming to be sole proprietors of the upper reserve on the river St. Clair, executed a deed of surrender to her Majesty of all the claim and right in and to the several pieces of land described on the map annexed, containing 24½ acres, "including the ten water lots fronting the river St. Clair," the same being a portion of the said Chippewa reserve, and required for railway purposes, "to the end and purpose that her Majesty may be graciously pleased to order and direct that the said land and water lots be sold to the Great Western Railway of Canada, their heirs and assigns for ever."

Mr. Hatt proved that he had furnished Colonel Clench with a plan of the land which the company would require, which plan the arbitrators had before them. It did not lay down any streets leading from Front street to the river. He was at the public sale of town lots made afterwards. That plan was exhibited and put up in the room in which the sale took place, that all might see what ground the railway terminus would occupy; and the witness swore that there was no doubt the lots sold higher from its being thus shewn to all present where the railway and works were to be —that is, on the same ground which they now occupy. He heard nothing said about any streets through the front tract till long after, when he was told that the town council were making some difficulty about these alleged streets. At that time all the price of the land had been paid to the Indian Department.

It was stated at the public sale that the land sold by Colonel Clench on behalf of the Indians was 900 feet along the river, as shewn upon the map hung up in the room (and of which a copy was produced at the trial), on which no streets were shewn leading through that tract to the river. This plan was made by Mr. Vidal. It was in 1856 or 7 that the witness first heard any thing said of the two streets. He produced receipts for that $2400 paid to the Indian Department according to the award, and he swore that what he agreed to buy from the Indian Department was all the land west of Front street, which included the two streets in question.

Judge Burritt, one of the arbitrators, was also called, and proved that he was judge of the county court and living at Sarnia in 1854, when this land was sold to the railway company: that he was at the sale of town lots spoken of by the other witnesses, when Colonel Clench and Mr. Hatt were also present. He heard nothing said then about streets. He heard afterwards some regret expressed that the town had not secured a passage to the river; and that the town council were endeavouring to acquire some land from one Wood, in order by that means to continue Cromwell street down to the river some distance north of Wellington street. At the arbitration Colonel Clench and Mr. Hatt stated to the arbitrators that they had agreed upon a certain sum to be paid for the land taken, and the award was then made adopting the sum agreed upon. The witness understood that all the land west of Front street (that is, between it and the river) was sold.

Mr. T. S. Bell, an assistant engineer of the defendants, proved that he measured the whole front possessed by the company along the river, and found it to be 914 feet: that it was all absolutely necessary for the purposes of the company at their station on the river, and was in fact too little. The company had made much land west of what used to be the margin of the river. Wellington street, he stated, was obstructed by fences of the company, and partly by their freight house. He put in a plan of the ground, shewing the works, &c.

Mr. Vidal, being re-called for the Crown, stated that the distance along the river mentioned in the award was taken by him from the plan: that when he made his survey he did not plant any stakes at the water's edge: that he knew that the government claimed the right to sell water lots extending into the river to the deep channel, but that such land covered with water had never been owned by the Indians.

The evidence of R. T. Pennefather, Esq., Superintendent General of Indian affairs, being taken in Lower Canada under a commission, was read at the trial.

He swore that the management of Indian affairs was under the control of the Governor-General: that he had held his office since

February, 1856: that the tract of which what were called Nelson street and Wellington street formed parts had never till lately been surrendered by the Indians to the Crown, and was in the occupation of the Indians of Sarnia: that it was surrendered in July, 1852, to her Majesty and Her successors, by an instrument of which he produced a copy: that it was ceded on condition that it should be laid out in town lots, and sold to the best advantage for the benefit of the Indians: that the department acted in the case of the sale to the railway company as it would for the Indians in any other case of sale of lands surrendered by them: that the company on the 22nd of November, 1851, first applied for a right of way, by a letter produced. That there were public sales of parts of the tract surrendered in 1852 on the 2nd of May, 1853, and on the 8th of May, 1854: that the original award spoken of by the other witnesses had never been in his possession, and he knew nothing of the map referred to in it as annexed: that it appeared from documents in his office that the Indian Department laid out a portion of the Indian Reserve in 1852 into town lots for sale and settlement: that Colonel Clench was instructed to cause a survey to be made, and that Mr. Vidal was proposed as the surveyor.

In the letter of the 22nd of November, 1852, produced by this witness, the Great Western Railway Company wrote to Colonel Bruce, the witness' predecessor in office, that they had completed the survey of the lands on the St. Clair river that would be required for their track, depot, and station: that they were anxious to procure the right of way through and in front of the Indian Reserve, and requested to know on what terms the Indian Department would grant it, and also the frontage on the river.

The copy of the deed of cession from the Indian chiefs, dated the 28th of July, 1852, shewed that what was then surrendered to the Crown was about eighty acres, described as follows:—bounded on the west by the river St. Clair, on the north by the present (that is, the first or old) town plot of Sarnia, on the east by a line produced by a continuation of the rear or easterly boundary of the (old) town plot of Sarnia, and on the south by the possessions of an Indian chief named in the deed; and it was expressed that the land was surrendered for the purpose of being laid out into town lots and sold to the best advantage for the benefit of the said Chippewa Indians and their posterity.

There was produced upon the trial a plan of the location of the Sarnia branch of the Great Western Railway through the Indian Reserve and town of Sarnia, certified on the 12th of October, 1860, under the statute, chapter 80, Consol. Stats. U. C., under the seal of the company, to be a true copy of the original map. This exhibited Nelson street and Wellington street as carried no further west than the east side of Front street, and the whole 900 feet frontage upon the river, forming the whole front of the tract surrendered by the Indians in July, 1852, as taken by the company for their railway.

At the conclusion of the case, the learned Chief Justice desired the jury to consider whether they were satisfied by the evidence that either the corporation of the town of Sarnia, or the government. or the Indian Department, licensed,—or, in other words, permitted—the defendants to construct their road and put up their buildings and works where they were, and to occupy the ground in front on Front street on the river, including the two small pieces claimed as streets; and whether this license or permission had been given before the passing of the statute, 22 Vic., ch. 116. He left that to the jury to find in reference to the 15th clause of that statute, telling them that if they found such permission he thought their verdict should be given for the defendants.

But if they did not find that there was any such permission, and that what had been called Nelson street and Wellington street had been obstructed, of which there could be no doubt, then he recommended them to find the defendants guilty, which should be subject to the opinion of the court on the points, whether these ever were in law public highways, or either of them a public highway; and if they were, then whether the defendants had and have a right to occupy the ground on which they were by virtue of authority given by the legislature, and by reason of the facts proved.

He observed upon the fact that Mr. Vidal, the surveyor, had stated that he never posted the lines of these streets beyond Front street: that he had returned a map to the government with such streets marked upon it, while in his plan made for the defendants he had laid down no streets through the tract west of Front street, which he explained only by saying, that he supposed they never entered into his mind when he was making out that plan,

He remarked also. that if the town council really meant to object to the company occupying the small pieces of the land in question, which he could hardly suppose possible, if they acquiesced in the station and track being there at all, that they should not have suffered the company without objection or remonstrance to take and retain exclusive possession of the lands as they had done, and to construct the railway and erect their buildings and dock upon and in front of them; and then after that to institute this criminal prosecution, with a view to compel the Company to give up the land and submit to have their works abated as a nuisance, after the railway, which had probably cost some hundreds of thousands of pounds, had been completed and had been for a long time in daily use.

The jury brought in a general verdict of "guilty," which was understood to be subject, as mentioned, to the opinion of the court.

The learned Chief Justice asked them whether he was to understand from the verdict that neither the corporation of Sarnia, nor the government, nor the Indian Department, had in their opinion consented that the defendants should occupy these streets spoken of. The foreman answered that they all thought that the corporation should be compensated for the land: that is, for the small pieces exhibited on the plan as streets between Front street and the bank; and the learned Chief Justice did not press for any further examination.

Becher, Q. C., for the defendants, obtained a rule last term on the Attorney-General to shew cause why the verdict should not be set aside and a verdict of not guilty entered, on the grounds, that until a by-law had been passed to open the alleged highways the defendants were entitled to occupy the ground: that upon the evidence the only course open was, not to prosecute by indictment for nuisance, but to apply for a mandamus to restore the alleged streets to their former state, or so as not to impair their usefulness: that what were called streets were not shewn in evidence to be actual legal highways: that if they were such, they were and are no longer of use as highways; and that the defendants were by statute entitled to take the grounds for their railway; or why a new trial should not be granted on the law and evidence.

Robert A. Harrison shewed cause, and cited *Aspindall* v. *Brown*, 3 T. R. 265; *Rouse* v. *Bardin*, 1 H. Bl. 351; *Rex* v. *Hammond*, Str. 44; *Rex* v. *Allan et al.* 1 O. S. 90.

Becher, Q. C., and *Irving*, contra, cited *Brewster* v. *The Canada Company*, 4 Grant Rep. 443; *Regina* v. *Brewster*, 8 U. C. C. P. 208.

Consol. Stats. U. C., ch. 54, secs. 313, 333, 424, sub-sec. 6; 4 Wm. IV., ch. 29; 16 Vic., ch. 99, sec. 4; 16 Vic., ch. 101, secs. 8, 9, 12, 14; 22 Vic., ch. 116, sec. 15, were referred to on the argument.

Robinson, C. J., delivered the judgment of the court.

The defendants in this case, among other grounds of defence, relied upon the 333rd section of the Municipal Institutions Act, Consol. Stats. U. C., ch. 54, which provides that, "In case a person be in possession of any part of a government allowance for road laid out adjoining his lot, and enclosed by a lawful fence, and which has not been opened for public use by reason of another road being used in lieu thereof, or in case a person be in possession of any government allowance for road parallel or near to which a road has been established by law in lieu thereof, such person shall be deemed legally possessed thereof as against any private person, until a by-law has been passed for opening such allowance for road by the council having jurisdiction over the same," and sec. 334, that, "No such by-law shall be passed until notice in writing has been given to the person in possession eight days before the meeting of the council, that an application will be made for opening such allowance."

This clause, however, it is clear, does not apply to the case before us, for it cannot be said that these two small pieces of land marked on a plan as streets leading from Front street to the river had not been opened "by reason of another road being used in lieu thereof." They were not opened, so far as we can see, only because the company had occupied them with their railway track and other works, claiming a right to do so under certain statutes, and also under their purchase from the government or from the Indian department; and because the municipality had, as the company contends, suffered them to occupy these pieces of land for their railway and station without opposition or remonstrance, making no complaint that by occupying the land the company were unlawfully creating a public nuisance, until they had at an immense expense erected works upon and in front of these alleged streets, which works they could not now abandon without ruinous expense and inconvenience.

The defendants also relied upon the several statutes of this Province which gave authority to them to occupy the ground which they have occupied for their railway and station, on such conditions as to compensation, where compensation can be claimed, as the legislature have thought proper to impose. Among these provisions is the 5th section of 22 Vic., ch. 116, which enacts that the words "railway," "roadway," and "railroad," used in any statute, shall, as far as regards the Great Western Railway Company, include and be construed to cover all viaducts, bridges, stations, freight and station houses, depots, and other works, machinery, and the land covered by the same, &c., which may be necessary or convenient to the making or using of any railway, from whence it may be argued, though that clause was passed probably with another object in view, that the powers given by these acts to occupy land for the railway allow of the occupation equally for any purpose immediately connected with the construction or use of the railway.

We have no doubt that such is the law, either under that clause or without the aid of it, under the general powers given by the act.

The 4th section of 16 Vic., ch. 99, was also relied upon by Mr. Becher on the part of the defendants, as being material to be considered, and that enactment does appear to me to be most material, for it authorises this company "to take, hold, use and occupy all such land or ground, with the privileges which appertain thereto, and which may be found necessary for the same, in, along, upon, and across any navigable stream, lake, river, or waters whatsoever, and for the uses of such railway to use, occupy and take possession of the shores or banks thereof, and any easement thereto, being of a public or private nature or character: provided always, that the free and uninterrupted navigation of the said streams, lakes, rivers, or other waters so used, for all boats, ships, and vessels passing and repassing the same, shall not be interfered with by the said railway, and also that the owner or owners, occupier or occupiers of any lands, grounds or private, privileges so taken, shall be compensated therefor as is provided by this act and the several acts incorporating said company and amendments thereto."

This statute was passed in 1853, in the same year that by another statute, 16 Vic., ch. 101, these defendants, the Great Western Railway Company were authorised, to construct a railway from the foot of Lake Huron at or near Port Sarnia to intersect the Great Western Railway at or near the town of London, by which act all the powers were given to them to occupy any lands of the Crown, or of any corporation or individual, which were given to them by the statutes that had already been passed respecting the Great Western Railway Company.

It seems to us to be quite clear, therefore, that the defendants had a right, under this 4th section of 16 Vic., ch. 99, to occupy as they have done the 900 feet along the river St. Clair, with the privileges which appertain thereto, and to take possession for the use of the railway of the shore or banks thereof, and any easement thereto being of a public or private nature or character.

If there had been no enlargement of this authority given to them by any statute of a later date, it still could not, we think, be denied that they had power under the above act, if not under the earlier statutes, to occupy the bank of the St. Clair with their railway and works to whatever extent might be required for providing all the accommodations and conveniences necessary for conducting their proper business at this termination of the road, on the bank of the river St. Clair.

It must be assumed, we think, that if on the shore or bank of the river there were at the time of their taking possession the two short allowances for road in question legally established, which if they should be afterwards actually made into streets would lead from Front street through the defendants' station and over the railway to the water's edge, it would be quite incompatible with the public safety and convenience that such allowances should be actually opened and used as highways, at the same time that the defendants were on the same spot carrying on the business of the railway.

Either the use of the lands for one purpose must be abandoned or its use for the other, and there can be no question which ought to give way; for these short pieces of streets, proposed but never formed, one of them 57 links in length only, the other a chain and a half, led to no place beyond the bank of the river as it flowed in its natural state, and could not, in order to reach the water, be carried through the artificial works which the defendants were authorised to construct along and over the waters of the river. They could not, therefore, be made of right to serve the purpose of giving to the people of Sarnia access to the river for obtaining water for household purposes, or for watering their cattle. It is, however, the loss of this convenience which is principally complained of in the indictment. As to any other use that could be made of them as highways, it is evident, when all the circumstances are looked at, that they could serve no purpose but to lead people into the way of danger.

If these intended streets had been parts of highways that had been travelled and were in use at the time the defendants took possession, and if there had been no legislative provision to meet the peculiar case of their leading through and over the works of the company, but to no place beyond them, then the 9th section of the act of incorporation, 4 W. IV., ch. 29, which was referred to in the argument, would have required to be considered. It is that clause which provides that when it shall be necessary to intersect or cross any road or highway "the company shall restore the road or highway thus intersected to its former state, or in a sufficient manner not to impair its usefulness."

Whether that clause could in reason have been applied to these pieces of land, which had never been actually opened and in use as highways, would then have been the question; and another question would have been, whether that provision could be held to apply not only to an actual highway intersected by the railway, but to land that had been merely marked out as an intended road over a piece of ground wholly covered by the station and works of the company, and through which the public could have no right to go to any place beyond; and which could not in the nature of things be restored to its former state, otherwise than by dispossessing the defendants of that which the law allowed them to occupy.

To any one looking at the plans on which the situation of the streets in question is represented with reference to the works by which they are surrounded, it need hardly be said that if an application were made to a court to compel the defendants by writ of mandamus to restore these allowances for streets to their former state, or in a sufficient manner not to impair their usefulness as highways, the court could not fail to look upon the application as most unreasonable, and one which they could with no propriety grant, especially at the instance of any party who had without remonstrance or objection seen the defendants constructing the railway, and erecting their buildings, and forming their quays along the river as they have done, and who had only complained of the occupation as illegal after the railway had been completed and in use. The judgment of the Court of Chancery in this Province, in the case cited on the argument of *Brewster* v. *The Canada Company* (4 Grant Rep. 452), and the language of English judges in the cases there referred to, would have applied strongly against such an application.

But it is not left to us to deal with this case upon the clause to which we have last referred, or with a view only to the statutes which we have cited, for there is besides them the statute 22 Vic., ch. 116, sec. 15, on which the defendants mainly rely,

and by which, after all, it seems to us the case must be governed. That act was passed in August, 1857, and the 15th clause is as follows:

"And whereas the Great Western Railway Co. have, in the construction of their railway, encroached upon certain proposed streets or allowances for streets, or highways, or roads, and not only such as known as original allowances, but which encroachments have been licensed by the respective parties in whom the title to the said streets was vested, and by the municipality within whose boundaries the said original allowances are situated. Therefore, all highways, roads, or streets which have been occupied by the Great Western Railway Company with the written consent of the municipality within which the same are situated, shall be hereby declared vested in them to the extent of the user permitted or enforced by the said municipality; and all proposed and contemplated streets occupied by the said company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful; saving, nevertheless, the civil rights and remedies of all parties who may have sustained or shall sustain any damage or injury by reason of obstruction or injury to any such highway; and nothing herein contained shall be construed to bar or prejudice any party or parties, in or from any remedy at law or in equity in the nature of a civil action or proceeding against said company or other parties for obstructing or injuring any such highway, but such civil action and proceedings may be had, taken, and prosecuted in the same manner and to the same extent as if this act had not been passed, but not hereby giving any right which does not now exist."

With a view to this clause, to which my attention was called upon the trial, I requested the jury to find upon the evidence whether the pieces of land called in the indictment Nelson street and Wellington street had or had not been occupied by the defendants with the written assent of the municipality, or by the license, written or otherwise, of the Provincial government or of the Indian Department, representing the interests of the Indians. But the jury bringing in no other verdict than the general verdict of guilty, I asked them whether they had or had not made up their minds upon the questions of fact regarding the permission to occupy, to which the answer was that the company ought to compensate the municipality for the land.

That was a point on which opinions might differ. It may be thought by the municipality that the company ought to pay the whole or some part of the price which the municipality has paid to Mr. Wood for the ground for the new street spoken of, which now affords the inhabitants access to the river, while the defendants may think that the municipality had no just claim upon them for any contribution of the kind, as they have paid for all the land taken at the price which was awarded.

But in truth that question of right to compensation is something altogether distinct from the question whether the defendants should be found guilty of nuisance in obstructing a highway; for if the defendants gave and the municipality of Sarnia had accepted the fullest compensation for the ground in question, that would not have settled the legal question, whether her Majesty's subjects, and not only the inhabitants of Sarnia, could or could not rightly complain of the occupation by the defendants of the land in question as constituting a public nuisance.

The first question is, were these streets as they are called, ever in law public highways.

And the second is, have they been and are they unlawfully obstructed by the defendants.

On the first point, we see that in July, 1852, the Indians ceded to the Crown the tract which includes these streets, to be disposed of by the government to the best advantage for the benefit of the Indians. Very soon after, at the suggestion of the Indian Superintendent, Colonel Clench, Mr. Vidal was employed by the Government to lay out the tract so ceded, or at least that part of it east of Front Street, into blocks and lots, with a view to sale for the benefit of the Indians, for whom the Government held the tract, as it were, in trust; and Mr. Vidal, in making the survey, marked upon the plan, which he sent to the Government with his report, two short streets intended to lead from Front Street to the water; but he did not actually lay them out upon the ground; that is, he planted no stakes west of Front Street to mark such streets.

About the time he was making the survey, if not before, the Great Western Railway Company were making their arrangements for laying out their track, and fixing upon the station at the river, and they were communicating with Colonel Clench and the Government upon the subject of the ground which they wished to acquire. Before their negociation was closed a sale was publicly made of some village lots in the new plot that Mr. Vidal had surveyed, and some were sold, in view, as we infer, and with reference to the plan made by Mr. Vidal. Soon after that the bargain between the Railway Company and the Government was concluded, so far that it was settled that the Company would purchase a tract of 900 feet along the river and between it and Front Street, which embraced these two short streets. Mr. Vidal, at the request of the Company, made out a plan of the tract, and the plan which he so made out exhibited no such streets. Mr. Vidal did not assert that he omitted them in consequence of any instructions to do so. Then another sale took place of town lots, which brought high prices, in consequence of its being known that the railway station and depots would occupy the position which they now do, and Mr. Vidal's plan last mentioned was publicly exhibited for the information of the public, shewing the whole 900 feet between the river and Front Street as one tract, not broken by any streets leading down to the river.

Soon after that the Company paid for the land the price awarded by three arbitrators, being the sum which had been agreed upon between them and the agent for the Indians, and they took possession as soon as they had occasion to do so, and constructed their railway upon it, and erected large buildings and works, and made a dock along the river occupying the front, and extending some distance into the river, upon land which they have made at a great expense by filling up the water.

What are called Wellington Street and Nelson Street had not been opened—that is, not shaped or graded—and no statute labor had been done or money expended on them. They had not been used as highways, for they led to no accessible place beyond, the bank of the river being high and steep, though less so at the end of one street than of the other.

It is plain from these facts that the claim to have these two pieces of land between Front Street and the bank of the river regarded as public highways, as things stood in 1852 and 1858, or at any time afterwards, stands on the most slender grounds possible. It has only the single fact to rest upon, that the surveyor, Mr. Vidal, marked them out as streets upon the plan returned to the government, and that those who bought town lots at the first sale (in 1858) bought with the knowledge that he had done so.

But under the 318th clause of the present Municipal Institutions Act (Consol. Stats. U. C. ch. 54), the fact of a Government surveyor laying out certain allowances for roads or streets in the plan of the original survey of Crown lands would be sufficient, we think, to give such roads or streets the legal character of highways, though there may have been no stakes planted on the ground to mark them out, and they would be deemed in law highways before they were actually opened and used, and before statute labour or public money had been expended upon them.

If there be any room for doubt whether these small streets marked on the surveyor's plan, in 1858, were to be regarded as being still common and public highways at the time these defendants took possession of land along the river for their railway, it could only be, we think, in consequence of the statute 12 Vic. ch. 85, sec. 41, and under the railway acts which we have referred to.

The statute 12 Vic. ch. 85, sec. 41, makes this provision respecting allowances for streets laid down by private proprietors, namely, that they "shall have lawful right to amend or alter the first survey and plan made by them of any such town or village, or any original particular division thereof, provided no lots of land have been sold fronting on or adjoining any street or streets, common or commons, where such alteration is required to be made."

The Indians, though they had ceded this land to the Government, did so upon the trust or condition expressed in their deed, that it was to be disposed of for their benefit; and the Indians

agent, we see, was allowed to negotiate and settle with the Company for the sale and the price to be paid; and it must have been quite well understood by all parties that the tract which the Company acquired along the river was required for the purposes altogether incompatible with the opening and use of the two streets by the public, and inconsistent with the only object which could have led to their being originally laid out, for when the docks and other works of the Company should come to occupy the ground in front of the streets they could no longer afford access to the water.

And as there had been no lots sold fronting on or adjoining these streets, it would have been within the spirit of this provision in 12 Vic. ch. 35, that the Indians, as the beneficial owners, or the Government acting for them, should have had the right to alter and amend the survey so as to prevent these allowances for streets interfering with the location of the railway terminus upon the river at that point.

In point of fact, it does not appear from any thing proved at the trial, that the obliteration of those streets, only existing upon paper, which it was clear must follow the occupation of the bank of the river by the Railway Company, met with any opposition at the time, nor during the construction of the railway, nor until after it had been for some time in operation, and then in no other sense and with no other object than to ground upon the fact of their occupation a claim to some pecuniary compensation.

But supposing it to be as free from doubt as in this criminal prosecution for a nuisance it ought to be, that up to the time when the defendants took possession of the ground, Nelson Street and Wellington Street were, in law, common and public highways, the next question is, whether they continued after that occupation to be public highways, and are still public highways, so that sentence of a criminal court can properly be passed for abating as a public nuisance the railway and all belonging to it which interferes with the free use of those streets by the public.

Upon that point we do not think it necessary to go into any further consideration than we have done of those provisions of the Great Western Railway Acts which authorised the Company to take possession of lands, public or private, but shall only refer again to the 15th section of 22 Vic. ch. 116, which, in our opinion, is conclusive on this question. The first part of that clause cannot apply unless there be proof of the written assent of the municipality to the occupation of these streets by the defendants.

There was no written assent shown to have been given beforehand by the municipality, but a written assent given afterwards would suffice, in our opinion; and in the correspondence produced on the trial there was, we think, such evidence as should have satisfied the jury that the municipality was not at any time desiring any thing so unreasonable as that the defendants should throw open these streets to the public, but were endeavoring (whether fairly or not it is not for us to judge) to found upon what had been done, a claim to pecuniary compensation; and the jury shewed at the trial that this was in fact the view which they took of the matter.

But in the latter part of the same section there is this distinct provision carrying the enactment further in favour of the Company, and as regards streets situated on this river. We refer to the words, "And all proposed or contemplated streets occupied by the said Company, or which they have been permitted to occupy by the license of the owner in fee, and which shall not lead to any place beyond the said railway, shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful."

We may read as in a parenthesis the words "or which they have been permitted to occupy by the license of the owner in fee," because that is one of the two classes of cases which are separated from each other by the disjunctive "or," and then the enactment reads thus: "And all proposed or contemplated streets occupied by the said Company, and which shall not lead to any place beyond the railway," which precisely describes the present case; and the words which follow, "shall be deemed closed, and the occupation by the said railway shall be and is hereby declared to be lawful," in our opinion clearly put an end to all doubt that could otherwise be entertained in this case, and entitle the defendants clearly to an acquittal.

The enactment is in itself reasonable, and seems intended to meet just such a case as this has been shewn to be.

COMMON PLEAS.

Reported by E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*

Kent v. Mercer.

Sheriff—Bond—Vacation of office—Sureties—Liability of for moneys received between vacation and discharge from office,

Defendant L. W. M. was appointed sheriff of the county of Norfolk on the 9th of March, 1858, and gave a bond with the other two defendants as sureties covenanting that L. W. M., as sheriff, should pay over all moneys received by virtue of his office as sheriff.

On the 19th of February, 1859, judgment was given for the Crown against L. W. M., whereby his office became vacated, but no writ of discharge issued. On the 15th of March, 1859, a writ of *fi. fa.* was placed in his hands at the suit of the now plaintiff against one G. W. K., and on the 29th of June, 1859, the said L. W. M. received the amount endorsed on the said writ, but has never paid the same to the plaintiff.

On special case, *held*, that the sureties of said L. W. M. were liable for all moneys received by him *colore officii*. The mere fact of the term and tenure of L. W. M.'s office as sheriff having expired is not sufficient to incapacitate him from doing acts of sheriff.

(H. T., 25 Vic.)

On the 9th of March, 1858, defendant, L. W. Mercer, was (except so far as the effect of the judgment on *sci. fa.* hereafter mentioned affected the same) duly appointed sheriff of Norfolk, and thereupon he and the other defendants executed a bond dated the 13th of February, 1858, as follows: "Know all men by these presents that we" (the defendants) "do hereby jointly and severally for ourselves and each of our heirs, executors and administrators, covenant that L. W. M. as sheriff of the said county shall well and truly pay over to the person or persons entitled to the same, all such moneys as he shall receive by virtue of his said office of sheriff from the date of the covenant, and that neither he nor his deputy shall, within that period, wilfully misconduct himself in his said office to the damage of any person being a party in any legal proceeding." The liability is limited, the sheriff to £1,000, and each surety to £500. And defendant Mercer thereupon and thenceforth, until the appointment of his successor, assumed the office, and performed the duties of sheriff. Afterwards, on the 31st of August, 1858, a *sci. fa.* at the instance of the Crown was brought to cancel the appointment of the defendant Mercer, and on the 12th January, 1859, judgment for the Crown was pronounced by the court of Queen's Bench, and on the 10th of February, 1859, judgment was entered for the Crown on the writ of *sci. fa.*, and on the 3rd of October, 1859, E. D. was duly appointed sheriff, and on the 29th of June, 1859, defendant Mercer, previous to the transfer by him to his successor of the prisoners, and writs which he held as such real or pretended sheriff, assuming to act, and (if under the circumstances he could) acting as sheriff, received for the plaintiff under a writ of *fi. fa.*, which had been delivered to him on the 18th of March, 1859, in a suit in which the now plaintiff was plaintiff and G. W. K. defendant, the sum of £80 10s., besides his fees as sheriff, which sum the defendant Mercer did not pay over to plaintiff. No writ of discharge was ever issued founded on the judgments on the *sci. fa.*

The question was, whether the two defendants, the sureties, were liable under the circumstances to the plaintiff upon their said covenant for Mercer's default in not paying over the money to the plaintiff.

J. B. Martin, for the defendant, cited 5 & 6 E. 6, ch. 16, sec. 5; Sewell on Sheriff 29; *Wesley* v. *Skinner*, Croke Eliz. 365.

Anderson, contra, referred to the Consol. Stats. U. C., ch. 88, sec. 10.

Draper, C. J.—By the statute 5 & 6 Ed. VI., ch. 16, if any person bargain or sell any office or deputation of it, or any part of it, or take any reward or profit directly or indirectly, or any bond, &c., for any office, &c., which concerns the administration or execution of justice, or the receipt, controlment or payment of the king's treasure, &c., account, auditorship, or surveying of any of the king's honours, manors, &c., or customs, or attendance in the custom house, or the keeping of any town, castle, &c., used as a place of strength or defence, or any clerkship in any court of record, &c., he shall forfeit his right, interest, &c., in such office, deputation, or gift, or nomination to it. And he that gives any money, reward, &c., or any bond, promise, &c., for such office, deputation, &c., shall thereupon immediately be a disabled person to have and enjoy it, and such bond, &c., shall be void. Sec. 5 provides that if any person do hereafter offend in any thing contrary to the tenor and effect of this act, yet, that notwithstanding

all judgments given, and all other act or acts executed or done by any such person or persons so offending by authority or colour of the office or deputation, which ought so be forfeited, &c., by the persons so offending as is aforesaid *after* the said offence so by such person committed or done, and *before* such person so offending for the same offence be removed from the exercise, &c., of the said office or deputation, shall be and remain good and sufficient in law to all intents, constructions, and purposes in such like manner and form as the same should or ought to have remained and been if this act had never been made. Extended to colonies and enlarged by 49 Geo. III., ch. 126.

By the terms of their covenant the sureties engaged that Mercer, as sheriff of the County of Norfolk, should well and truly pay over to the person entitled thereto any money which he should receive by virtue of his office. Now, the fact that a sheriff's term and tenure of office has expired is not of itself sufficient to incapacitate him from doing acts of office after that term, or to vacate the acts so done. Thus in *St. John's* case, Moore (Sir F.) 186, 332, 364, 496, an arrest by a sheriff before he had notice of his discharge was held legal, and that an action for false imprisonment would not lie against him. And in *Boucher* v. *Wiseman*, Cro. El. 597, the sheriff was held chargeable for money made by his deputy on a *fi. fa.* upon which he levied after a writ of discharge was actually issued, but before he had notice of it. And in *Reynell's* case 9, Co. 95, it is said, (p. 98,) "So when an office is found forfeited presently by the law the party is out of possession and the king is in possession, and yet the use is, and to good purpose, to have a writ of discharge, and the sheriff till he is actually removed shall answer for all escapes, for he who occupies or has the custody of a gaol by right or wrong shall be charged for escapes of prisoners." See also *Fleming* v. *Cheverley*, Dy. 355; *Palmer* v. *Potter*, Cro. El. 511, in which case a writ of discharge had issued.

And in this case it appears to me the defendant against whose goods and chattels the *fi. fa.* issued—a writ directed to the sheriff, not by his individual name, but to the person in office—would be discharged by levy, or payment without levy, though the person be found in apparent possession of the office, and holding the writ might no longer in law be the officer, at least so long as no successor had been actually appointed, and even after that if execution had been commenced before then. For if a sheriff commence execution he shall complete it after he goes out of office. See *Ayre* v. *Aden*, Cro. Jac. 78; *Doe* v. *Donston*, 1 B. & A. 230; Rolles Ab. 893, 4; *Clerk* v. *Withers*, 6 Mod. 295; *Doe Tiffany* v. *Miller*, 6 U. C. Q. B. 426.

I think, therefore, that although the writ in this case did not come into the hands of Mercer until after the judgment on the *sci. fa.* had been entered, yet, that he would not have been a trespasser in levying on this *fi. fa.*, that payment to him would have discharged the debt named in that writ; so that defendant Mercer was in possession of the office and of the writ, and he would have been responsible to the execution plaintiff for moneys received by virtue of the *fi. fa.*

The 5th section of the statute of Edw. VI., fully sustains this conclusion, unless the judgment of the court, *per se*, effected an actual removal of Mercer, and as it is admitted there never was a writ of discharge issued, and as Mercer's successor was not appointed until after this money was received, I am of opinion he continued *de facto* in the possession of the office of sheriff, and answerable for all the acts done by him in that character.

The question, however, still remains as to the liability of his sureties, and that must depend on the language and effect of the covenant. The words used, that Mercer "shall well and truly pay over to the person or persons entitled to the same all such moneys as he shall receive by virtue of his said office of sheriff," are by no means necessarily limited to moneys received by him during his tenure of office, and would certainly apply to a case where he had received a *fi. fa.*, and commenced execution while he was in office, and had completed the same and made the money after his removal and the appointment of his successor. In such a case I feel no doubt the sureties would be liable under the covenant, and I cannot satisfy myself that his removal in the manner stated in this case makes any difference.

The form of the covenant is prescribed by the legislature, and the intention is obvious that it should be a security for all suitors' moneys received *colore officii*. There is an apparent hardship on the sureties on the facts stated, and my first impression was in their favour, so much so that I have reluctantly adopted an opposite conclusion. The hardship arises out of the express words of the covenant, and it would be even greater if either the plaintiff were to lose the money collected for him, or the defendant on the *fi. fa.*, who has paid it once, had to pay it over again. I have carefully considered the authority referred to in the notes to *Lord Arlington* v. *Merrick*, 2 Wms. Saund. 403, as well as *Bamford* v. *Hes*, 3 Exch. 380; *Kitson* v. *Julian*, 4 E. & B. 854; *Oswald* v. *Mayor of Berwick*, 1 E. & B. 295, affirmed in 3 E. & B. 653, and 2 Jur. N. S. 743; *Mayor of Cambridge* v. *Dennis*, 5 Jur. N. S. 265; E. B. & E. 660. And on the whole I am of opinion that our judgment should be in favour of the plaintiff.

Per cur.—Judgment for plaintiff.

Farr v. Robins.

Division court—Transcript of judgment—Fi fa. lands.

A. having obtained a judgment in one of the division courts in the county of Welland, in order to issue a *fi. fa.* lands, caused a transcript thereof to be made by the clerk of the said court, and under his seal of office, which he caused to be filed in the county court in supposed compliance with the mode required by Consol. Stat., U. C., ch. 19, sec. 142, but the transcript not stating that a *fi. fa.* goods had issued and been returned.

Held, under the provisions of the statute, in order that a *fi. fa.* lands may issue, there must be a *record* of the judgment on which it is founded, and for this purpose it points out a mode by which a division court judgment for the sum of $40 or upwards can be made a *judgment of record*, and in this case the transcript being informal the record was a nullity, and therefore that a *fi. fa.* lands could not issue thereon.

(C. P. H. T. 25 Vic.)

Ejectment for part of the west half of lot No. 159, Thorold, described. Defence for the whole. The plaintiff claimed title under a deed made by Robert Hobson as sheriff of Welland, to James McCoppen, on an execution against the lands of the defendant, and by deed of James McCoppen to the plaintiff. Defendant claimed title by a deed made by one James Robins to him.

The trial took place in October, 1861, before *Hagarty*, J., at Welland. The plaintiff put in evidence a *fi. fa.* issued out of the county court of the county of Welland, against the lands of the defendant, at the suit of one Murray, received by the sheriff on the 1st of August, 1860; also a deed from the sheriff dated the 31st August, 1861, to James McCoppen, of these premises, and a deed from James McCoppen and wife to the plaintiff, dated 2nd September, 1861. On the defence it was proved that a transcript of a judgment given in the division court in favour of Andrew Murray against the defendant, for $76 10c., damages and costs, was filed in the office of the clerk of the county court on the 31st of July, 1860, and the execution against the land was issued on the same day, but no execution against goods was issued from the county court. The writ against lands was received by the sheriff's officer on the 1st August, 1860, and the sheriff's sale took place on the 31st of July, 1861.

The defendant's counsel then objected that the transcript filed in the clerk's office was not in proper form, not containing any statement that a *fi. fa.* against goods had issued, nor that it had been returned and how; that no *fi. fa* against goods ever issued from the county court, and that by law there must be an execution against goods before one against lands is issued. Also that the sheriff cannot legally sell lands upon an execution until after the expiration of twelve months from the time he has received the execution.

It was agreed that a verdict should be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit on these objections.

In Michaelmas Term, *W. Eccles* obtained a rule *nisi* to enter a nonsuit accordingly.

In Hilary Term *R. Miller* shewed cause. He cited *Doe Spafford* v. *Brown*, 3 O. S. 92; *Eades* v. *Maxwell*, 17 U. C. Q. B. 173; *Deliale* v. *Dewitt*, 18 U. C. Q. B. 155, to shew that the objection for want of a *fi. fa.* against goods was not maintainable. As to the latter objection he cited *Doe Boulton* v. *Ferguson*, 5 U. C. Q. B. 515.

W. Eccles in reply, said the transcript was not in accordance with the 142nd and 143rd sections of the division court act, and therefore the foundation for the sale was defective, for the transcript should shew that the *fi. fa.* against goods had been issued.

DRAPER, C. J.—The Consol. Stat. U. C., ch. 19, sec. 142, provides that in case an execution in the division court be returned *nulla bona*, and the sum remaining unsatisfied on the judgment on which the execution issued amounts to $40, the plaintiff or defendant may obtain a transcript of the judgment from the clerk under his hand and sealed with the seal of the court, which transcript shall set forth: 1. The proceedings in the cause. 2. The date of issuing execution against goods and chattels. 3. The bailiff's return of *nulla bona* thereon as to the whole or a part, and by the 148rd section, such transcript may be filed in the office of the clerk of the county court, and on such filing shall become a judgment of the county court, and (s. 145) on such filing and the entry thereof by the clerk of the county court as prescribed, the same remedy may be had to recover as if the judgment had been originally obtained in the county court.

The transcript before us is obviously made under the 139th section of the act, and contains what that section requires when the object is to obtain execution out of any other division court than that wherein the judgment was rendered.

The cases cited for that purpose by Mr. Miller establish that the want of proof of the issue and return of a *fi. fa.* against goods is not an answer to an action like the present, but the objection takes a more serious form when it strikes at the transcript for want of its containing that which the statute requires in order to make it such as that it may on being filed and entered "become a judgment of the county court." It is as if there were no judgment on which the *fi. fa.* against lands issued, not merely that there has been some irregularity or formal error in the entry, but an entry so defective as to be a nullity.

The legislature have apparently adopted the principle that an execution against lands must be founded on a record, and as the division court is not a court of record, they have provided a method by which its judgment may be made a record of the county court, and thereupon that an execution against lands may issue. But in order that the transcript may become a judgment of record they have required that it should among other things shew the date of issuing the execution against goods, and the return to that writ in order to avoid any conflict with or departure from the 252nd section of ch. 22 of the Consolidated Statutes, which enacts that no execution shall issue against lands and tenements until the return of an execution against goods and chattels.

I am unable to see that the general principles enunciated in *Doe Boulton* v. *Ferguson*, will help this case. The objection is not to irregularities in the proceedings anterior to the judgment, nor can I look upon this transcript as having become the judgment of the county court, because it is not such a transcript as upon filing and entry, the statute clothes with that character. To make that case applicable we must hold that the *fi. fa.* against lands rests upon a sufficient judgment of a court of record. There is no such judgment unless this transcript filed and entered be one, and it as appears to me is not such a judgment, because it does not contain what the statute requires.

The objection that the sale was too soon would appear also extremely formidable, but resting only on the one I have discussed I think the rule must be made absolute.

Per cur.—Rule absolute.

HAMILTON ET AL. v. HOLCOMB.

Bill of exchange—Action against parties thereto—Judgment recovered—Joint judgment—Merger of respective liabilities by joint judgment.

The defendant drew upon McP. & C., who accepted the draft for his accommodation, which at maturity was unpaid, and the holder thereof, the now plaintiff, sued all the parties thereto, and recovered a judgment against them. Subsequently he caused McP. to be taken in execution on a *ca. sa.*, and while he was a prisoner on the limits caused him to be discharged therefrom.

This action is brought on the above mentioned judgment against the now defendant, the declaration stating it to continue in full force unreversed and unsatisfied. To the declaration the defendant pleaded that the said judgment was recovered jointly with McP. & C. and the plaintiff having taken McP. (one of the defendants) in execution and caused him while a prisoner on the limits to be discharged therefrom, thereby released the other defendants from the effect of the said judgment, which was thereby satisfied and discharged. On demurrer, *held* good.

Replication on equitable grounds that the judgment was recovered on a bill of exchange drawn by the defendants upon and accepted by McP. & C. for the accommodation of the defendant without value to McP. & C. who were only sureties for the defendant. Replication held good.

Draper, C. J., dissentiente.

The plaintiffs declared upon a judgment recovered on the 12th January, 1858, against the defendant, and John McPherson and Samuel Crane for £525 19s. 2d., which judgment remains in full force unreversed and unsatisfied, and the plaintiffs have not obtained any execution or satisfaction thereof.

Pleas.—2nd. That the said judgment was recovered jointly against the defendant, and the other two persons named, and that after that recovery there was a deed dated 2nd January, 1858, but executed after the judgment was recovered, made between the said McPherson & Crane of the first part, their respective wives of the second part, Thomas Kirkpatrick of the third part, and those creditors of McPherson & Crane who should execute that deed, of the fourth part; that the plaintiffs became parties thereto of the fourth part, as creditors of McPherson & Crane, for and on account of the said judgment, by signing and sealing the same, and they did thereby release the said McPherson & Crane from all action, &c., in respect of the said judgment, and the demand thereby secured.

3rd. That before action this judgment was satisfied, for after the recovery of that judgment about the 1st of July, 1858, the plaintiffs issued a *ca. sa.*, directed, &c., whereby the sheriff was commanded to take the body of the said McPherson in satisfaction of the said judgment, by virtue of which writ McPherson was arrested and detained in close custody of the sheriff, or on the gaol limits, until he was by order and authority of the plaintiffs discharged, whereby the judgment was satisfied.

The plaintiffs replied to the second plea on equitable grounds, that the judgment was recovered on a bill of exchange drawn by the defendant upon and accepted by McPherson & Crane for the accommodation of the defendant without value to McP. & C., who were only sureties for the defendant; that the debt for which such judgment was recovered was the debt of the defendant; that since McPherson & Crane made the "assignment" in the second plea mentioned, the plaintiffs have received no dividend thereunder, nor any thing on account of the judgment, which is not in any way satisfied, &c.

And for a second replication to the third plea after stating that the judgment was recovered as in the first replication, and that the debt was the debt of the defendant as above; the plaintiffs say that after the arrest of McPherson he obtained the benefit of the limits, and that while he was on such limits the plaintiffs consented to his discharge from such limits, which is the discharge from custody referred to in the third plea, and the plaintiffs say that they received nothing on account of the judgment, which is in no way satisfied, &c.

The plaintiffs demurred to the third plea, because the arrest and discharge of one defendant on a *ca. sa.* is not such a satisfaction of the judgment as to discharge another defendant, and that it is not shewn that by the arrest and discharge of McPherson the defendant lost any remedy over, and that it did not appear the judgment was satisfied as against the now defendant.

The defendant demurred to the second replication to the second plea, because the action being on a joint judgment the plaintiffs cannot set up in reply the position in which McPherson & Crane and the defendant stood with regard to each other on the instrument on which the judgment was recovered, and they demurred on similar grounds to the 2nd replication to the third plea.

R. A. Harrison, for the plaintiff, cited *Hamilton* v. *Holcomb*, 11 U. C. C. P., 95; *Fox* v. *Soper*, 18 U. C. Q. B., 258; *Strong* v. *Foster*, 17 C. B. 201; *Pooley* v. *Harradine*, 7. E. & B. 431; *Rayner* v. *Fussey*, 28 Law J. 128.

Galt, Q. C., for the defendant.

DRAPER, C. J.—This case has already been before the court on motion, (11 U. C. C. P. 95,) and I then expressed the doubts I had on the disposition of the question arising; I have now considered the matter with the best attention in my power, and deliver the conclusion at which I have arrived with diffidence as to its correctness, as we are not unanimous.

The demurrer to the third plea brings up no other question than whether, if one defendant is arrested on a *ca. sa.* founded on a judgment against several defendants, and is afterwards discharged from custody by the plaintiff's consent and authority, such discharge operates as a satisfaction of the judgment, or at all events, prevents any proceeding by execution or otherwise against the

other defendants. I am of opinion that it has that effect. I refer to *Hayling* v. *Mullhall*, 2 W. Bl. 1235, merely for the purpose of observing that there the question was different. We are dealing with the case of a judgment recovered against three, and its effects, not looking at the position of the parties before the judgment was recovered. The legal authorities are collected in the case of *Kallin* v. *Kernot*, 3 C. B. N. S. 799, where Williams, J., after referring to several cases, says: "On that ground it is that if a plaintiff takes one of several joint debtors in execution and discharges him, he cannot afterwards take the others." *Thompson* v. *Parish*, goes no further than to decide, that taking a defendant in execution is not an absolute extinguishment of the debt, so as to prevent the plaintiff from applying to the equitable discretion of the court to set off interlocutory costs due to the defendant in the *same suit*. There the defendant is still in custody. I think the defendant is entitled to judgment on this demurrer.

As to the demurrer to the second replication to the 2nd plea. This replication seeks to avoid, on equitable grounds, the plea, that one of the judgment debtors was released, by averring that the judgment on which this action is brought was recovered against the defendant and McPherson and Crane, not on an ordinary joint cause of action, but in a suit brought under the Consol. Stat. U. C., ch. 42, on a bill of exchange, of which the defendant was the drawer, and McP. & Co., the acceptors, for his accommodation, and without value, and that plaintiff has obtained no benefit or satisfaction under the deed of release.

The argument for the plaintiffs is, that the release of the acceptors of an accommodation bill is no release of the drawer, who, as the pleadings admit, gave no value for the acceptance, and that the plaintiffs ought not in equity to be prevented from shewing such to be the case here; that the plaintiffs only sued the drawer and acceptors in one action, in compliance with the statute, and that the judgment should in equity be treated as a several judgment against the drawer and acceptors, according to their respective liabilities. But by the declaration it appears to be a *joint* recovery, nor does the replication state that it is otherwise in fact, and if the answer to the plea be sustainable, it must be on the ground that a court of equity would grant a perpetual injunction to prevent a defendant from setting up that the legal consequences of an act done by the plaintiffs, after this judgment was recovered by them at law, operate to bar an action at law brought by the plaintiffs on that very judgment. Against the act itself, *i. e.*, the release, nothing is urged, its force and validity as regards McPherson & Crane are not impugned, nor is it denied that the effect of it at law is to destroy the plaintiff's claim against this defendant on the judgment, but it is submitted that this joint judgment should in equity be viewed as a several judgment, according to the position of the three defendants before judgment. As at present advised, it appears to me, that unless the replication contains a good answer at law, it does not contain any upon equitable grounds.

It cannot be said that the plaintiffs *could* not have brought separate actions against the acceptor and the drawer, though it presses strongly upon them to take the course they did take to bring a joint action, in which they have recovered judgment and issued execution as the statute says—"as though all the defendants were joint contractors." Having done this they have released two of the defendants, by an instrument under seal, which they do not pretend is avoidable or void through fraud, error, or mistake. I do not mean to assert that the legislature foresaw such a result, but I cannot say that I have found any sufficient ground for holding that these distinct liabilities are not by the judgment merged and blended into one, and that the plaintiffs having got the judgment, were bound to treat it as a joint judgment, recovered upon an ordinary joint liability. It appears to me that it concludes all parties from going behind it to ascertain in what way or on what grounds it was obtained. In *Hopkins* v. *Francis*, 13 M. & W. 670, Park, B., upon a question of alleged variance in the statement of a judgment says, it is only necessary to shew a recovery by a judgment; whether that is obtained by default or in any other way, is quite immaterial, and Alderson, B., adds: "The statement of the mode in which the judgment was obtained has no more to do with the judgment itself, than the reasons of a judge for giving his judgment."

The 25th and 32nd sections of the statute contemplate several judgments being entered in the one suit according as the various liabilities of the defendants are established or not in the course thereof. The plaintiff does not fail against all because he may fail against one, and the discharge of a person liable on a bill or note in one character does not necessarily discharge another person liable on the same instrument in another character. There is before judgment no room for applying the consequences which would arise in a suit against joint contractors. The statute authorises the several parties to be sued as being jointly and severally liable, and the 25th section is in furtherance of that course, and directs that the judgment shall be entered "according as the rights and liabilities of the respective parties may appear." I do not see that the plaintiffs were prevented from obtaining a verdict severing the damages, and thereupon entering separate judgments against the drawer and against the acceptors in the original cause here. As against the drawer and the subsequent endorser of a bill, it might be right to do so, for the latter would not be liable for the costs of protest and notice of dishonour given to the drawer. A similar practice obtains in trespass, where there are several defendants, 11 Co. 56. *Austen* v. *Willward*, Cro. El. 860. It is easy to put a case in which it would appear just to some of the defendants that a plaintiff should be compelled to do so, as where endorsers or drawers seek to defend themselves on grounds not available to makers or acceptors, or *vice versa*, or where an expensive litigation follows the pleadings of one defendant while the others let judgment go by default. It could never be the intention of the statute that a plaintiff should recover the costs of such a defence which failed, against a party who made no defence at all.

The 26th section of the act must also be considered. It is in these words: "The rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though this act had not been passed, *saving* only the rights of the plaintiff so far as they have been determined by the judgment," that is, as I understand the meaning, so far as the rights and responsibilities of the plaintiff, as between him and any other party to the bill are concerned, the judgment determines *them* and they are not to be brought into question again. As to all other parties, their rights and responsibilities as between one another are unaffected. I do not perceive how that strengthens the plaintiffs' contention in this case. He has obtained a judgment against this defendant jointly with McPherson & Crane, founded on two several simple contract demands; those demands, at least as I understand the law, are merged in the judgment, (see *Drake* v. *Mitchell*, 3 Ea. 251, per Lord Ellenborough, C. J.,) and thus his prior rights are determined by the judgment, while any rights and responsibilities as between the defendant and McPherson & Crane, arising from the latter having accepted for the accommodation of the former, remain unchanged.

Suppose the defendant, and McPherson & Crane, had, at the plaintiff's request, after this same bill was dishonoured, accepted a bill drawn by the plaintiff on the three, in satisfaction of the dishonoured bill, and that the last accepted bill being also dishonoured, the plaintiff sued and recovered judgment thereon against the three. Then if the same facts happened, as this plea sets up, I presume it would not be contended that the defence could be rebutted. It must, I apprehend, be held that whatever the nature of the dealing was originally, the plaintiffs by taking the joint acceptance had altered it and must abide the consequences. What real difference is there between taking a new joint bill or entering a joint judgment against the three parties to the old one? If there be any it is rather against than in favour of the plaintiffs. In each case the plaintiffs would have by their own act changed their position and the character of their demand, and as much voluntarily in the actual as in the supposed case, if, as I have already endeavoured to shew, the plaintiffs might have entered several judgments against the drawer and the acceptors, and, if they could not, I have as yet heard no satisfactory argument against, or answer to the proposition that the simple contract several claims became merged in the joint judgment; wherefore I conclude that the defendant is entitled to judgment on the demurrer to this replication.

Then comes the demurrer to the replication to the third plea.

The following facts are admitted on these pleadings. That the judgment on which this action is founded was recovered on a bill of exchange drawn by the defendant on McPherson & Crane, and accepted by them for the defendant's accommodation, against those three parties. That a *ca. sa.* was sued out upon that judgment on which writ McPherson was arrested, and after McPherson was admitted to, and while he was a prisoner upon, the gaol limits, the plaintiffs discharged him from custody, and that the plaintiffs have not received any money or other thing in payment or satisfaction of their judgment.

I have already given my reasons for concluding that the plaintiffs cannot go behind their judgment, or escape its legal consequences as a merger of these prior rights. If that be so, then the simple fact is that the plaintiffs have discharged one defendant out of three against whom they had recovered a joint judgment out of custody on a *ca. sa.* issued in that cause. Without referring to other authorities, the case of *Clarke* v. *Clement*, 6 T. R. 526, appears to me conclusive in the defendant's favour, unless the fact that McPherson was only a prisoner on the limits makes any difference. The statute certainly enables a plaintiff at whose suit a debtor is in execution, when such debtor obtains the benefit of the limits, to issue execution against his lands or goods, and if the debtor shall afterwards be re-committed to close custody, such execution is not to be stayed. This, so far differs from the law of England, where the arrest and committal of a debtor to close custody on a *ca. sa.* if not an absolute satisfaction, at least is a suspension of all other remedy, and if the debtor be discharged from such custody by the plaintiff's consent or authority is a complete satisfaction. *Tanner* v. *Hague*, 7 T. R. 420, and *Cattlin* v. *Kernot*, already cited.

If while McPherson was confined on the limits, the plaintiffs had issued an execution against his lands, upon which lands sufficient to pay the debt had been seized, I cannot think that he (McP.) must have been kept a prisoner until the lands were sold, lest by consenting to his discharge the plaintiffs should be deemed to have obtained a satisfaction in law, which would prevent their realising an actual payment of the debt due to them. I think, rather, that the legislature in permitting an execution against the debtor's lands and goods while he is confined to the limits on a *ca. sa.* must be considered as creating an exception to, and not as abrogating, the previous rule, and that subject to that exception, confinement in execution on the gaol limits is to be deemed equivalent to close custody within the walls of the gaol. If so the defendant is in my opinion entitled to judgment on this demurrer also.

Richards, J.—Plaintiff's demurrer to the third plea seems to be bad, for whatever doubt there may be as to how far the mere taking a defendant in execution is a satisfaction of a judgment whilst he is in custody or when he dies in custody (*Thompson et al.* v. *Parish*, 5 C. B. N. S. 685) it seems clear if he is discharged from custody by the consent of the creditor the debt is extinguished *Catlin* v. *Kernot*, 8 C. B. N. S. 799, fully sustains this doctrine, which is also affirmed by Willes, J., in the case 5 C. B., where the former cases are referred to and commented on.

It does not seem to be disputed that if McPherson & Crane were mere accommodation acceptors for the benefit of the defendant of the bill on which the original action was brought, that a discharge of them by the plaintiffs would not release the defendant; but it is urged that the plaintiffs having brought an action under our statute against all the parties to the bill, and having recovered a judgment against them, the judgment is in its nature joint, and that a satisfaction or discharge of the judgment as to one defendant is satisfaction as to all, though such satisfaction arises merely as a legal result from discharging a defendant from custody without in any way receiving compensation for the debt.

If the action had been a separate one against the several parties to the bill, merely signing a composition deed and discharging McPherson & Crane in the suit against them, would not destroy the plaintiff's right to collect the amount from the defendant in this action brought against him. The case then turns upon the effect of our statute (Consol. Stat. U. C., ch. 42, sec. 23, 24, 25, 26, 31, 32, and 35), under which the plaintiffs must include all the parties to the note or bill in any action to be brought to recover the same under the penalty of recovering full costs in only one of the suits and disbursements in the others.

This mode of joining the makers and endorsers of bills and promissory notes in this province was first permitted as to bills and notes under £100 by provincial statute, 5 Wm. 4, c. 1. The mode of declaring under that statute was on the money counts and attaching to the declaration a copy of the note or bill sued on. This section was repealed by prov. stat., 8 Vic., ch. 8, when the form now in use was established by that Act. The sections referring to set-off in the stat. of 5 Wm. 4, were as follows:—Sec. 6: "That in any such action any person or persons sued shall be entitled to set off his or their demands against the plaintiff in the same manner as though such defendant or defendants had been sued in the form heretofore used. Section 7 provides that if upon the trial of any such action the whole amount of the demand set off by any or all of the defendants and allowed by the jury shall be equal to or shall exceed the amount of the plaintiff's demand as proved on the trial, the jury shall find a verdict in favour of the defendants generally, but if the jury shall allow any demand as a set-off, and still find a balance in favour of the plaintiff, they shall state in their verdict the amount which they allow to each defendant as a set-off against the plaintiff's demand." The title of the Act 5 Wm. 4, is: "An Act to prevent the unnecessary multiplication of law suits and *increase of costs* in actions on notes, bonds, bills of exchange, and other instruments," and the preamble recites that it is expedient to make such alteration in the law as will prevent the necessity of bringing separate actions for sums not large in amount, against the several makers of a bond or other instrument, or against several persons liable to be sued upon a bill of exchange or promissory note, as maker, endorser, and acceptor. The 5th and 6th sections above quoted were also repealed by statute 8 Vic., ch. 8 and sec. 8 of that statute was substituted for them. This is section 32 of the Consol. Stat. It provides that in such action any person sued may set off against the plaintiff any payment, claim, or demand, whether joint or several, which in its nature and circumstances arises out of or is connected with the bill or promissory note that forms the subject of such joint action, or the consideration thereof, in the same manner and to the same extent as though such defendant had been separately sued; and if the jury, after allowing any demand as a set-off, shall find a balance in favour of the plaintiff, they shall state in the verdict the amount which they allow to each defendant as a set-off against the plaintiff's demand.

The effect of the enactment, as I understand it, is to confine the set-off of the defendants, or any of them, to any payment, claim, or demand, which in its nature or circumstances arises out of or is connected with the bill sued on. Whereas under the former Act any of the defendants were allowed to set off any of their demands in the same way as if they had been sued alone. Under both Acts if the set-off of all the defendants was less than the note the plaintiff had a verdict for the balance. If the set-off of the defendants equalled the note the verdict would be for all the defendants.

By sec. 26, Con. Act (the sections being the same in both Acts) the rights and responsibilities of the several parties to any such bill or note as between each other are to remain the same as if the Act had not been passed, save only the rights of the plaintiff so far as they may have been determined by the judgment.

The object the legislature had in view was undoubtedly the saving of costs, and the most convenient mode of doing so seemed to be by allowing all the parties to be sued in the same action, and in the form of the declaration they are stated to be jointly and severally liable, the joint liability being created by the statute, the several liabilities arising from the legal effect of the instrument.

The proposition that the rights of the plaintiffs merged in the judgment when that was perfected, as a general one, would hardly be disputed, and if the legislature had merely declared that the liability of the maker and endorsers of a promissory note should be that of joint and several makers, and had made no further provision indicating an intention of preserving their individual rights, then if a plaintiff sued defendants jointly it might well be held that he treated them as only jointly liable, and that a discharge

of one was a discharge of the whole, no matter if the person so discharged was primarily liable to pay the debt or not. But the legislature have unmistakably declared their intention of preserving the right to the defendants to call each other as witnesses, and to allow to each any set off that arose out of the note transaction (and as the first statute stood, any set-off whatever) which could not be done if they were to be viewed merely as joint contractors; and then as if to put the matter beyond doubt the 26th section already quoted declares that the rights of the parties to the note or bill between themselves are not to be affected.

This section, in my judgment, may be fairly read as applying to the preservation of the plaintiff's rights as well as to those of any other of the parties to the bill or note. If the exception had not been introduced it might be contended that the words "several parties" to the bill or note in the way they are inserted in the statute mean parties other than the plaintiff in the action. The exception being introduced, it is then manifest the plaintiff is one of the parties referred to in the section, for it says—"Saving only the rights of the plaintiff so far as they may have been determined by the judgment." Then are there are any rights of the plaintiff undetermined by the judgment which exist and which are to remain the same as though the Act had not been passed? The wording of the section seems to imply that such rights do exist, and that only such of them as have been determined by the judgment are taken away. Were it otherwise intended the section would have simply declared that the rights of all the other parties to the bill except the plaintiff should remain the same as if the Act had not passed. The amount the plaintiff is entitled to recover from the defendant and the right to recover against each is determined by the judgment, and under the statute as between the plaintiff and the other parties to the bill or note that is so far determined that the right to bring them into discussion again does not "*remain*." But the right to release a drawer or endorser without thereby releasing the maker or acceptor, still in my judgment remains. That was a right which existed before the Act was passed, and which ought to remain. There is no justice in the ground taken by the defendant—it is purely technical—and if we can, without doing violence to any principle of law, preserve to the plaintiffs their right to recover money undoubtedly due them—we ought to do so. I do not think the legislature ever intended to place a plaintiff in any worse position than he would have been in if he had sued separately when they compelled him under the penalty of losing costs to sue all the parties to the bill in one action, and if the effect of the enactment is that the plaintiff cannot compound with an insolvent endorser on a bill without discharging the maker his rights are prejudicial, without any corresponding advantage to himself, and without any apparent reason therefor.

Why should not the plaintiffs' rights in this respect be preserved after the judgment as well as before? The proceeding authorised by the Act was certainly a novel one—practically it was found to work well, and after it had been in operation about fifteen years, the clause limiting its operation to bills under a hundred pounds was repealed. I doubt if this would have been done if it had been supposed that the construction now contended for by the defendant was the true one. The rights of all parties to a bill were to be protected so far as was consistent with the bringing of the action in this form, and as I cannot see any reason why the legislature did not intend to preserve to a plaintiff rights similar to those exercised by these plaintiffs, and as the words of the 26th section seem to me to be broad enough to cover such rights, I think they ought to recover, and are entitled to judgment on the demurrer to the replication to the second and third pleas. I think it sufficiently appears from the replication that the judgment sued on was an action under our statute against the drawers and acceptors of a bill of exchange.

HAGARTY, J.—Our legislature, for reasons satisfactory to themselves, made an innovation on long-established law by permitting, and under penalty of loss of costs practically compelling, the joinder of the various parties to a bill or note in the same action. It appears to me, after the best consideration I can give the point, that in so doing it was intended to leave the respective rights and responsibilities of the parties amongst themselves untouched. And that although in form the recovery of judgment presented the several defendants as joint debtors, that it was designed to leave the plaintiff to deal with them, and them to deal with each other, as if separate judgments had been recovered. The rule of law that the taking in execution the body of one joint debtor was in effect a discharge of all others, is at best one of a technical far more than a meritorious character.

It seems to me that to apply it to the case of a judgment recovered solely on the authority of our provincial statutes, would be to extend the technicality instead of confining it within its well established bounds. An opposite view might be pushed to inconvenient lengths. *Prima facie*, any one defendant paying the whole of a joint judgment in contract, has his claim for contribution against his co-defendants. I think it certain that the co-defendant is allowed to go behind the judgment, as it were, and shew that he was a mere surety for, or joint maker with the other defendant for the latter's accommodation.

I do not see why a plaintiff who obeys the plain requirement of our statute, may not have as good a right to shew that although in form his judgment against several defendants as co-contractors, yet that in substance they must stand towards him in the same footing as if he had sued them separately. I give this opinion with some hesitation, but I see no other way by which I can carry out what appears to me to be the intention of an Act of Parliament, which, it is admitted, makes a clear alteration in the ordinary course of law. It has not been argued before us that separate judgments might have been entered under our statute, and it is possible that plaintiffs should have sought the aid of the court to amend the entry to entitle him to the full benefit of the construction we place on the statute.

Judgment for plaintiff—DRAPER, C. J., dissenting.

CHAMBERS.

Reported by ROBERT A. HARRISON, Esquire, Barrister-at-Law.

SKELSEY V. MANNING ET AL.

Issue book—Replication in denial of plea—Service of Notice of Trial.

Held, 1. That where notice of trial is irregular defendant is not bound to wait till a verdict is rendered against him, and then move against it on the ground of irregularity: his more proper course is to move to set aside the notice before trial had.

Held, 2 That there can be only one issue book in a cause, which issue book must contain all the pleadings in the cause to issue. Where an issue book omitted the pleas of one of several defendants it was held to be irregular.

Held, 3. Plaintiff can only serve notice of trial with his replication where that replication is in denial of defendant's pleading. Where notice of trial was served with a replication confessing and avoiding the plea of defendants, it was set aside with costs.

(Chambers, May 9, 1862.)

This was an action on contract brought against three defendants. Two of them, Manning and McDonald, appeared by one attorney, and the remaining defendant, Wright, appeared by a different attorney.

The declaration in the first count set out the contract for the doing of certain work in the County of Grey, and averred non-payment as a breach. The common counts were added.

Defendant Wright pleaded to first count that he did not agree in manner and form as alleged in the declaration. He pleaded never indebted to the common counts.

Defendants Manning and McDonald pleaded—

1st. To first connt. Did not agree.

2nd. To second count. That no estimates were to be paid unless upon certain monthly certificates, and that before action defendants paid all estimates given upon monthly certificates.

3rd. To third count. That work to be done to satisfaction of County Engineer, and not so done.

4th. To so much of first and second counts as regards extra work, that none was to be paid for unless ordered in writing, &c.; and that defendants paid for all so ordered.

5th. To so much of first and second counts as regards extra haul of gravel, &c.; non-performance of, a condition precedent.

6th. To second count—never indebted.
7th. " —payment.
8th. " —set-off.

Plaintiffs took issue on the first, second, third, fifth, sixth, seventh, and eighth pleas of defendants, Manning and McDonald, and replied, waiver of orders for extra work as to fourth plea. Plaintiffs at same time served on defendants, Manning and McDonald, an issue book, omitting the pleadings relating to defendant, Wright, and served notice of trial for the last assizes for the county of Grey.

The attorney for defendants, Manning and McDonald, on the next day returned the issue book with a written notice informing plaintiffs that he would not accept the issue book and notice of trial as regular—

1st. Because issue had not been joined between the parties on plaintiff's replication to the fourth plea of defendants.

2nd. Because the said replication was in denial of defendants' fourth plea.

3rd. Because of the omission of the pleadings as regards defendant Wright.

Plaintiff not having signified his intention of abandoning his proceedings as irregular,

R. A. Harrison obtained a summons calling on plaintiff to shew cause why the issue book and notice of trial should not be set aside with costs on the grounds above stated. He referred to Rule Pr. No. 36. Har. C. L. P. A. 612.

Cause was shewn.

McLean, C. J.—This summons must be made absolute with costs. I do not think defendants are obliged to wait till plaintiff obtains a verdict, and then move to set aside the verdict for irregularity. It is more proper for them to apply, as they have done, here; and to have the proceedings, if irregular, set aside before further costs are incurred by either party. I think there can only be one issue book in a cause, and that it should contain all the pleadings in the cause to issue. The objection to the issue book, as not containing the pleadings of the defendant Wright, is good. Besides it cannot be said that plaintiffs replication to the fourth plea of defendants, Manning and McDonald, is in denial of that plea. (Rule 36. Har. C. L. P. A. 612.) Not being so, plaintiff was not in a position to serve notice of trial with that replication.

Summons absolute with costs.

Steel v. Manning.

Death of plaintiff's attorney between replication and notice of trial—Notice of trial by new attorney—Setting aside.

Where the attorney for plaintiff died after service of replication and before service of notice of trial, and a new attorney, signing himself plaintiff's attorney, gave notice of trial without a notice of the appointment of a new attorney having been previously given, the notice of trial was set aside with costs.

(Chambers, May 12, 1862.)

This was an action on a contract for the performance of work by defendant for plaintiff—breach non-payment.

The declaration also contained the common counts for work and labour.

On 20th April, 1861, the declaration was filed. During the same month defendant pleaded, and replication was filed. Notice of trial was given on 15th August, 1862 for the last Assizes for the County of Grey. Between replication and notice of trial A. G. Fraser, plaintiff's attorney on the record, died. The notice of trial was signed "Duncan Macdonell, plaintiff's attorney."

R. A. Harrison obtained a summons calling on the plaintiff to show cause why the notice of trial should not be set aside upon the ground that the attorney for the plointiff named in the proceedings died between the service of the replication and the notice of trial, and no notice of the appointment of a new attorney was given to defendant before service of the notice of trial.

M. B. Jackson contra.

John Paterson supported the summons, citing *Ryland* v. *Noakes*, 1 Taunt. 342; *Ashley* v. *Brown*, 15 Jur. 399.

Richards, J., upon the authority of the cases cited, made absolute the summons with costs.

REVIEWS.

The Statutes, General Orders and Regulations relating to the Practice, Pleading and Jurisdiction of the Court of Chancery, with copious Notes, containing a Summary of every Reported Decision thereon. By George Osborne Morgan, M.A., of Lincoln's Inn, Barrister-at-Law, late Stowel, Fellow of University College, and Eldon Law Scholar in the University of Oxford. Third edition, considerably enlarged. London: V. & R. Stevens and Haynes, Law Booksellers and Publishers, 26 Bell Yard, Lincoln's Inn, 1862.

Mr. Morgan has done for the Chancery Acts and orders what Mr. Finlayson and others have done for the English Common Law Procedure Acts, and Mr. Harrison for the Upper Canada Common Law Procedure Acts. He has taken the Acts and Orders section by section, and thereunder noted every decided case bearing upon the section noted. In this way the reader is enabled to read each section by the light of adjudged cases. The volume has little of the formality of a treatise, but for practical purposes is really more convenient.

The first edition of Mr. Morgan's work was published in 1858. At that time he noted no less than twelve hundred reported cases. The second edition was issued in 1860. In that edition he noted nearly three thousand cases. He enlarged the first part of his work containing the statutes relating to the practice and jurisdiction of the court. In reality the second edition of the work was a new work. The second edition was rapidly sold, and now in 1862 we have the third edition. In this edition the whole of the notes have been carefully collated with the works of Daniell, Sidney Smith, and other approved text writers, as well as with the references in Chitteys' Equity Index, under the tittle "Practice." The whole is accompanied with an elaborate index, not the least useful part of the work.

The Legislature and the courts have of late done much to consolidate the practice of the courts both of Law and Equity. Formerly the practice could only be found by reference to well known treatises, such as Tidd and Archbold's Practice, and Maddock and Daniell in Equity.

That which formerly could only be found by reference to the pages of several ponderous volumes may nowbe found tersely and succinctly expressed in the well arranged sections of a Consolidated Act, with rules and orders made in pursuance thereof and notes thereunder, published within the covers of an ordinary volume of 500 or 600 pages.

Mr. Morgan has done his work well and done it at the proper time. Of this the best proof is the flattering reception accorded to each edition of his work. He so far appears to be without a competitor worth naming.

The edition before us is, like former editions, divided into two parts. The first contains statutes regulating the practice and jurisdiction of the Court of Chancery. The second, the consolidated general orders of the court.

The first, contains the Act to amend the law relating to the custody of infants (2 and 3 Vic., c. 54,)—The Act for perpetuating testimony in certain cases (5 and 6 Vic., c. 69,)—The Attornies and Solicitors Act (6 and 7 Vic., c. 73,)—The Act amending the latter Act (23 and 24 Vic., c. 127,)—Several clauses of the Lands Clauses Consolidation Act (8 Vic., c. 18,)—The Trustee Relief Act (10 and 11 Vic., c. 96,)—The Act for the further relief of Trustees (12 and 13 Vic., c. 76,) —The Trustee Act of 1850 (13 and 14 Vic., c. 60,)—The Trustee Extension Act of 1852 (15 and 16 Vic., c. 55,)—The Act for diminution of Delay and expense in proceedings in Chancery (13 and 14 Vic., c. 35,)—The Act establishing the Court of Appeal in Chancery (14 and 15 Vic., c. 83.)—The Master in Chancery Abolition Act (15 and 16 Vict., c. 80.)—The improvement of Jurisdiction of Equity Act (15 and 16 Vic., c. 86,)—The Suitors in Chancery Relief Act (15 and 16 Vic.,

c. 87,)—The Act relating to the appointment of persons to administer oaths in Chancery (16 and 17 Vic., c. 78,)—The Infants Settlement Act (18 and 19 Vic., c. 43.)—The Leases and Sales of Settled Estates Act (19 and 20 Vic., c. 120,)—The Act amending the last named Act (21 and 22 Vic., c. 77,)—The Chancery Amendment Act (21 and 22 Vic., c. 27)—The Law of property and Trustees Relief amendment Act (22 and 23 Vic., c. 35,)—The Act amending the last named Act (23 and 24 Vic., c. 38,)—The Chancery Evidence Commission Act (23 and 24 Vic., c. 128,)—The Trustees and Mortgagee's Act (23 and 24 Vic., c. 145.)—The Act for the Relief of Prisoners in contempt (23 and 24 Vic., c. 149.)

The second, contains: I. The preliminary order. II. Conveyancing Counsel of the Court. III. Solicitors and parties acting in person and service on them respectively. IV. Commissions to administer oaths in Chancery. V. Official attendance and vacations. VI. Selection of Court. VII. Parties, and persons under disability and paupers. VIII. Pleadings and written proceedings generally. IX. Bills. X. Service of copy of Bill. XI. Interrogatories. XII. Process for want of answer. XIII. Traversing note. XIV. Demurrers and Pleas. XV. Answers. XVI. Procedure. XVII. Replication and joinder of issue. XVIII. Affidavits. XIX. Evidence. XX. Preliminary accounts and inquiries. XXI. Setting down and hearing causes. XXII. Taking bills *pro confesso*. XXIII. Decrees and orders. XXIV. Receivers. XXV. Injunctions. XXVI. Stop orders. XXVII. Destringas. XXVIII. Subpœnas. XXIX. Process to enforce descrees and orders. XXX. Process generally. XXXI. Rehearings, Bills of Review, &c. XXXII. Review and supplement. XXXIII. Motions. XXXIV. Petitions. XXXV. Proceedings in Chambers. XXXVI. Office copies. XXXVII. Computation of time, &c. XXXVIII. Solicitors fees. XXXIX. Court fees. XL. Officers of Court. XLI. Proceedings under Statutory jurisdiction of Court. XLII. Miscellaneous points, regulations as to fees, costs, and charges.

We have only to add, that many provisions contained in our statutes regulating the jurisdiction of the Court of Chancery in Upper Canada are taken from English statutes, and that very many of the general orders of our Court of Chancery correspond with orders of the English Court of Chancery. This of itself is a sufficient recommendation of Mr. Morgan's work to Canadian practitioners.

The English decisions, so far as applicable, will be found invaluable in the construction of our statutes and orders.

Messrs. Rollo & Adams, the well known and enterprising law publishers and booksellers, of Toronto, are the agents of Messrs. V. & R. Stevens & Haynes. Orders given to them will receive prompt attention from the English publishers.

THE LAW MAGAZINE AND LAW REVIEW FOR MAY, 1862, Butterworths, 7 Fleet Street, London, is received.

The contents are as usual learned, interesting and instructive. They are, 1. Holy orders as disqualifying for the House of Commons or the Bar. 2. International general average. 3. The rights, disabilities and usages of the Ancient Peasantry. 4. The machinery of legislation. 5. The science of civilization. 6. On equitable interests in ships. 7. The law of judgments. 8. On charitable trusts. 9. On insanity and prodigality. 10. Decrees nisi in divorce. 11. Case of W. Digby Seymour, Q.C., M.P.

This magazine retains unimpaired its reputation for learning and ability. It is a great pleasure to be enabled to read its pages. The articles are always well written, and often deeply interesting to the lawyer and legislator. We hope in our next issue to republish the paper on "Holy Orders as disqualifying for the House of Commons or the Bar." It will be read here with as much interest as in England.

We have received THE LONDON QUARTERLY, THE EDINBURGH, and THE WESTMINSTER, for May, together with BLACKWOOD, from Messrs. Leonard, Scott & Co.

Messrs. Leonard, Scott & Co., do great service to the cause of literature in re-printing these standard Reviews. The best talent in England is employed upon them. The papers on religion, philosophy, and statesmanship, are of a very high order. All are profound—not the ephemeral papers of a day, but essays the result of full investigation and great thought. We are informed that the circulation of these Reviews is much greater in the United States and Canada than in Great Britain. We are not surprised at this information. The American reprints are not nearly so expensive as the English copies. This, when we mention the fact, that Messrs. Leonard, Scott, & Co., pay the English publishers for the privilege of re-printing, is greatly to their credit. Any one of the four Reviews may be had for $3, any two for $5, and all together for $10 per annum.

GODEY'S LADY'S BOOK for June is received. The first plate is sitting for a portrait. Then a magnificent colored fashion plate for June; then several other plates of lesser importance. The letter press is as usual all that can be desired. We know of no Magazine so well adapted to the purposes for which it is published. The reading is entertaining and instructive. No lady should be without it. It is welcome to every household. It is edited with great care and much wisdom, and richly deserves the immense patronage bestowed upon it.

APPOINTMENTS TO OFFICE, &C.

CROWN LAW OFFICERS.

The HON. JOHN SANDFIELD McDONALD Q.C., to be Attorney General for Upper Canada, in the room and stead of The Hon. John A. Macdonald, resigned.—(Gazetted May 31, 1862.)

The HON. ADAM WILSON, Q.C., to be Solicitor General for Upper Canada, in the room and stead of the Honorable James Patton, Q.C., resigned.—(Gazetted, May 31, 1862.)

PROVINCIAL LAW CLERKS.

GUSTAVUS WILLIAM WICKSTEAD, Esquire, to be Law Clerk of the Legislative Assembly of the Province of Canada.—(Gazetted May 17, 1862.)

EDWARD LEWIS MONTEZAMBERT, Esquire, to be Law Clerk of the Legislative Council of the Province of Canada.—(Gazetted May 17, 1862.)

NOTARIES PUBLIC.

JAMES F. MACLEOD, of Bowmanville, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted May 3, 1862.)

SAMUEL GOODENOUGH LYNN, of Eganville, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 3, 1862.)

JAMES VINE, of Ingersoll, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 10, 1862.)

GEORGE CARR SHAW, of Smith's Falls, Attorney at Law, to be a Notary Public.—(Gazetted May 10, 1862.)

LAWRENCE ENGLISH, of Oshawa, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

JOHN DEWAR, of Milton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

SAMUEL GEORGE WOOD, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, May 17, 1862.)

JOHN A. SHIRLEY, of Zarber, Esq., to be a Notary Public in Upper Canada.—(Gazetted, May 17, 1862.)

JOSEPH CURRAN, of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

THOMAS CRAIG, of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted May 17, 1862.)

CORONERS.

HENRY MASON, Esquire, and CHARLES E. EWING, Esquire, to be Associate Coroners for the United Counties of Northumberland and Durham.—(Gazetted May 3, 1862.)

THOMAS ASHTON, Esquire, to be an Associate Coroner for the United Counties of Frontenac, Lennox and Addington.—(Gazetted May 3, 1862.)

TO CORRESPONDENTS.

"C. DURAND," "THE CLERK OF THE FIRST DISTRICT COURT, GRAY,"—Under "Division Courts."

DIARY FOR JULY.

1. Tuesday..... Long Vacation commences. Last day for County Councils to equalise Rolls of Local Municipality.
6. SUNDAY..... *3rd Sunday after Trinity.*
7. Monday..... County Court and Surrogate Court Term begins. Recorder's Court sits. Heir and Devisee Sittings commence.
12. Saturday..... County Court and Surrogate Court Term ends.
13. SUNDAY..... *4th Sunday after Trinity.*
14. Monday..... Last day for Judges of Co. Courts to make Return of Appeals from Assessments.
20. SUNDAY..... *5th Sunday after Trinity.*
22. Tuesday..... Heir and Devisee Sitting ends.
27. SUNDAY..... *6th Sunday after Trinity.*
31. Thursday..... Last day for County Clerk to certify Co. Rate to Municipalities in County.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

JULY, 1862.

SIR J. B. ROBINSON, BART.

In other columns will be found an address, which on Thursday, 12th June last, was presented to Sir J. B. Robinson, Bart., by the Members of the Bar of Upper Canada, and his reply to the same.

The occasion was one of no ordinary interest—that of the retirement from the Court of Queen's Bench of the distinguished Judge who had so long and so faithfully presided in that Court.

Never was a more sincere tribute paid to man than the address which on that occasion was presented to the Chief Justice. It was prompted by a spontaneous and universal feeling of respect for the man, mingled with regret at the occasion which had called it forth. During its delivery the strong feeling of emotion which pervaded both Bench and Bar was manifested by the faltering voice of the gentleman who read it and the moistened eyes of those who heard it read.

On Thursday, 19th June last, the Bar of Upper Canada entertained Sir John at a banquet of great splendour in Osgoode Hall. The tribute was alike worthy of those who gave it, and of him to whom it was given.

Sir J. B. Robinson is no ordinary man; he is one of the few great men of whom Canada can honestly boast. His career has been a long and a brilliant one. His life has been one of ceaseless activity.

He was born on the 26th July, 1791, at Berthier, in Lower Canada. His father and family came to Toronto, then town of York, in 1798. The father, within three weeks after his arrival in the town of York, died. The son, John Beverley, was educated under the Rev. Dr. Strachan, now Protestant Bishop of Toronto, first at the Grammar School in Kingston, and afterwards in Cornwall. When seventeen years old he was admitted a student of the Laws by the Law Society of Upper Canada. He was enrolled a member of the Law Society in Hilary Term, 1808. He studied successively with the late Judge Boulton and Colonel Macdonald, who afterwards, when Aide-de-Camp to General Brock, was killed at Queenston. While a Law Student he was during one session of the Parliament of Upper Canada employed as a clerk in the House of Assembly. Shortly afterwards, when the war of 1812 broke out, he followed Sir Isaac Brock in the expedition which led to the capture of Detroit.

When the war ceased he was called to the bar of Upper Canada at the age of twenty-four. His call was in Hilary Term, 1815. In the same year Mr. Boulton, Attorney General of the Province, was taken prisoner by the French, and during his detention the subject of this sketch was appointed acting Attorney General. During the same year Mr. Boulton was released, and Sir John became Solicitor General. This post he held till 1818, when he became Attorney General in the place of Mr. Boulton, who was raised to a seat on the Bench. At this time Sir John was married. He in the previous year married the estimable lady who is still the partner of his life. For a long time he was Attorney General, and the leading man of his day. He, while Attorney General, prosecuted several newspaper publishers for libel. Collins, one of these, the publisher of the *Freeman*, was condemned to two years imprisonment. The libel was one upon the Attorney General himself. It charged him with having uttered a falsehood in conducting a prosecution, and was otherwise of a very defamatory nature.

In 1829 Mr. Robinson was elevated from the office of Attorney General to that of a seat on the Bench,—Chief Justice of the Queen's Bench, the only Superior Court of common law jurisdiction at that time in Upper Canada. He, notwithstanding, continued to hold his seat in the Legislature till the Union of the Provinces of Upper and Lower Canada in 1840.

He held this exalted position till the present year, when, in consequence of the desire of his family that in the evening of his days he should have some repose, he resigned it and accepted the less arduous office of President of the Court of Error and Appeal, an office which before he filled by virtue of his office of Chief Justice of Upper Canada.

Sir J. B. Robinson, by his dignified and yet affable conduct in the discharge of his judicial duties, by his great

learning and untiring industry, has done much to ensure for the Bench of Upper Canada the great respect which it now commands. His very presence commanded respect, while his good nature and evenness of temper won the hearts of all those whose good fortune it was to practise before him. He is respected by all, admired by all, and beloved by all. All hope that he may yet be spared many years to his family, to his profession, and to his country.

Through life he was most abstemious. His regular habits of life have done much to prolong his days. Though now more than seventy years old his bodily activity is great and his mental activity equally so. His powers of intellect are still unimpaired; his habits of industry are unabated; his love of work is as strong now as in the vigor of his youth. He abhors idleness. The position which he still occupies as that of the Chief Judge of the Chief Court in Upper Canada will supply abundant material for his habits of industry. We hope that a kind Providence will yet spare him many years to grace the position which he so worthily occupies—the bench which he so truly adorns.

ON WHICH SIDE LIES THE TRUTH?

On the 15th January, 1861, the Judges of the English Court of Queen's Bench, according to the contemporaneous reports of that time, on an *ex parte* application, ordered a writ of *habeas corpus* to issue to Canada for the removal of Anderson, the fugitive slave. (*Ex parte* Anderson, 3 L. T. N. S. 622.; 30 L. J. Q. B. 129; 7 Jur. N. S. 122; 8 W. R. 255.)

In March, 1861, we took strong ground against the legality of such a proceeding; and our remarks were copied with approval in some of the London legal periodicals.

On the 11th June, 1861, the Judges of the same Court, according to the report of the *Jurist*, having apparently acted so inconsiderately in *ex parte Anderson*, as to have forgotten what they really did in that case, announced that no writ was ordered, but only that a rule *nisi* for a writ was granted (*Ex parte* Mansergh, 7 Jur. N. S. 826).

In October last, we took the Judges of the English Court to task for this extraordinary announcement—one which, according to the testimony of all the reporters of the time, was utterly at variance with the truth.

In June, 1862, we have before us Part III. of Vol. I. *Best & Smith's Queen's Bench Reports* (in continuance of *Ellis & Blackburn; Ellis, Blackburn & Ellis*, and *Ellis & Ellis*,) containing a report of *ex parte Mansergh*, which, if correct, proves the *Jurist* report, taken on the spot, and published without delay, to be the reverse of the truth.

We append extracts from the *Jurist* and *Best & Smith*:

CROMPTON, J.—1 *Best & Smith*, 409.

"*In re Anderson*, which has been referred, application was made for a *habeas corpus* to Canada; and precedents were adduced so expressly in point that, according to the great principle regulating these prerogative writs, the party had a *prima facie* right to have the writ issued. Besides, if a *habeas corpus* is improperly issued, it may be questioned on the return to the writ. We did *not* grant a rule to show cause in that case, because there was immediate danger to the party."

CROMPTON, J.—7 *Jur. N. S.*, 826.

"It is said that the application is analogous to that in Anderson's case; but it appears to me to bear no analogy to it. Nothing whatever was decided in that case. It was only a *rule to shew cause* that was granted; and it was in no way decided that the writ of *habeas corpus* ought to issue."

BLACKBURN, J.—1 *Best & Smith*, *p.* 411.

"I have said there is no authority for such a proceeding, The nearest is *In re Anderson*, where a *habeas corpus was* sent to Canada; but in that case the writ was granted, because it was necessary to act immediately; and it could afterwards be quashed if erroneous; added to which there were some very strong precedents in favor of granting it."

BLACKBURN, J.—7 *Jur. N. S.* 826.

"The case which approaches nearest to this, is the one alluded to, in which we granted a *rule nisi* to bring up the body of a prisoner in Canada. But that is no authority for granting this application. That was a case of urgency, and the *rule* was granted in order to initiate the proceedings, and, if necessary, to have the matter discussed."

It is not for us to reconcile these reports. It is impossible to do so. One thing is certain, one or the other is grossly wrong. We should like to know what our valued cotemporary of the *Jurist* has to say on the subject. We cannot think the *Jurist* is at fault.

Contradictions of this kind are not calculated to increase the confidence which the profession and the public are wont to impose in Judges, and the reports of their decisions. An explanation is due; and we hope that explanation will be forthcoming, now that attention is once more directed to the subject.

JUDGMENTS.

QUEEN'S BENCH.

Present: MCLEAN, C. J.; BURNS, J.; HAGARTY, J.

June 14, 1862.

Filleter v. *Moodie*.—Plea—Judgment for plaintiff on demurrer, with leave to amend on payment of 5s.

Coulson v. *Gzowski*.—Rule absolute to enter verdict for plaintiff for amount agreed upon.

Ryerse v. *Lyons*.—Judgment for plaintiff on demurrers to all pleas.

Bank U. C. v. *Ruttan*.—Interrogatories cannot, under Consol. Stat. U. C., cap. 22, any more than under C. L. P. Act, 1856, without leave of the Court or a Judge, be delivered either with declaration or plea. Rule discharged with costs.

Irwin v. *Sager*.—Rule absolute for new trial without costs.

Reid v. *Russell*.—Rule absolute for new trial on payment of costs.

School Trustees of Amherstburgh and The Corporation of the Town of Amherstburgh.—Rule absolute for mandamus with costs.

Totten v. *Paris and Ayr R. Co.*—Rule discharged.

Hurrell v. *Simpson.*—Rule discharged.

McKee v. *Calloway.*—Rule absolute, discharging attaching and other orders, on payment of costs.

Reilly v. *Western Assurance Co.*—Leave to amend. Rule absolute for new trial, costs to abide the event.

Workman v. *McKinstry.*—Rule discharged.

Sloman v. *Chisholm.*—Rule discharged.

Kirkpatrick v. *Rowsell.*—Rule discharged.

Mallock v. *Derivan.*—Rule absolute to enter verdict for defendant.

Lee v. *Woodside.*—Rule absolute to reduce the verdict.

Town of Barrie and The Northern Railroad Co.—Rule *nisi* discharged with costs.

Commercial Bank v, *Woodruff et al.*—Rule *nisi* to set aside judgments as against executors of Zimmerman but not as to Roblin.

Sarsfield v. *Sarsfield.*—Judgment for demandant for her dower, but without damages.

Paxton v. *Cameron.*—No rule.

Cameron v. *Paxton.*—No rule.

Great Western R. Co. v. *Desjardins Canal Co.*—Rule *nisi* to set aside judgment on terms.

Present: McLean, C. J.; Burns, J.; Hagarty, J.

June 21, 1862.

Sutherland v. *Nixon.*—Interpleader issue. Question as to sufficiency of description. Verdict to be entered distributively.

Cleaveland v. *Boice.*—Rule *nisi* to set aside verdict for plaintiff, discharged.

Hogg v. *Merrick.*—Rule discharged.

McInnes v. *Jarvis.*—Rule discharged.

The Queen v. *The Grand River Navigation Company.*—Rule discharged.

Fraser v. *Anderson.*—Rule discharged. Leave to appeal if desired.

Kendall v. *Fitzgerald et al.*—Judgment for defendant on demurrer to replication, with leave to apply in Chambers to amend before 1st July.

Davis v. *Mutchmore.*—Rule discharged.

Ham v. *Lasher et al.*—Rule absolute for new trial, costs to abide the event.

Weydell et al. v. *Provincial Insurance Co.*—Judgment for plaintiffs on demurrer to replication to second plea, and for defendants on demurrer to replication to fifth plea.

Brooks v. *McCaul.*—Judgment for defendant.

Clark v. *Morrell.*—Appeal from County Court of Perth. Judgment below reversed. New trial ordered, costs to abide the event.

Nicholson v. *Dillabough.*—Judgment for plaintiff.

Burley and The Corporation of St. Vincent.—Rule absolute to quash by-law with costs.

Weireley v. *Papst.*—Feigned issue directed.

In re Preston and Municipal Corporation of Manvers.—Rule *nisi* to quash by-law discharged with costs.

Jones v. *Todd.*—Rule absolute for new trial, costs to abide the event.

COMMON PLEAS.

Present: Draper, C. J.; Richards, J., Morrison, J.

June 16, 1862.

Carter v. *Titus.*—Appeal allowed.

Watt v. *Fender.*—Judgment for plaintiff.

In re Bullen.—Habeas corpus—No formal, judgment because party already out of custody. *Held*, That an exparte order to commit, under Con. Stat. U. C. cap. 24, sec. 41, is illegal C. J. Richards.—Ex parte order might be made; was not prepared to say a judge could not make such an order.

Lloyd v. *Clark.*—Rule absolute to enter nonsuit.

Smith v. *Spencer.*—Rule discharged—leave to plaintiff to amend upon payment of $5.

Fraser v. *Hickman.*—Rule discharged upon terms.

Townsend v. *Elliott*—Postea to plaintiff.

In re Registrar of Carleton.—Rule absolute for mandamus.

Hamilton v. *Holcomb.*—Rule discharged.

Holton v. *McDonald.*—Rule discharged.

Morland v. *Munro.*—Judgment for demurrer and rule discharged.

Ray v. *Blair.*—Rule absolute.

Higgins v. *Farewell.*—Rule for new trial on payment of costs.

Kerr v. *McEwan.*—Judgment for defendant to replication to demurrer to second plea. Third plea held bad.

Bank U. C. v. *Bartlett.*—Plaintiff entitled to judgment on demurrer.

Folmsbee v. *Brown.*—Rule discharged.

Scott v. *Miller.*—Rule discharged.

Hugill v. *Merryfield.*—Rule absolute for new trial without costs.

McDonald v. *Van Wyck.*—Rule absolute for new trial, costs to abide the event. Leave to defendant to apply to amend.

Osborne v. *Earnshaw.*—Rule discharged.

Bartells v. *Benson.*—Rule absolute for new trial on payment of costs.

In re Robinson and Burritt.—Rule absolute for mandamus.

Present: Draper, C. J.; Richards, J.; Morrison, J.

June 21, 1862.

Davidson v. *Shephard.*—Action for infringement of patent. Demurrer to pleas:—2. Plea good. 4. Plea good. 5. Plea bad. Leave given to reply specially to 2nd plea.

Rymal v. *Ashbury.*—Action on a covenant against heirs at law. Plea—nothing by descent. Replication that ancester died seized of an equity of redemption. Demurrer. Judgment for demurrer.

Barber v. *Davis.*—Judgment for plaintiff.

Perrin v. *Bingham.*—Appeal from decision of County Judge of Brant. Decision of Court below affirmed. Appeal dismissed.

School Trustees v. *Corporation of Caledon.*—Action by School Trustees for money levied by defandants as a Municipal Corporation under Con. Stat. U. C., c. 64, sec. 27, sub. sec. 12. Plea, no demand before action. Demurrer. Plea held good.

Fox v. *Macaulay.*—Appeal from decision Judge County Court Prince Edward. Decision affirmed. Appeal dismissed.

Boynton v. *Boyd.*—Appeal from decision of County Judge York and Peel. Decision affirmed. Appeal dismissed.

McAndrew v. *McKenzie.*—Appeal from decision of County Judge Waterloo. Appeal allowed.

Street v. *The County of Simcoe.*—Action for money paid under protest as taxes on unpatented lands. Verdict for plaintiff. Rule *nisi* for N. T. or to reduce verdict. Discharged.

Street v. *The County of Lambton.*—Action for money paid as taxes on unpatented lands. Verdict for defendants. Rule *nisi* for N. T. discharged as payment held to be voluntary.

Farquhason v. *Morrow.*—Rule *nisi* to enter nonsuit made absolute.

Hiscott v. *Murray.*—Question as to sufficiency of description in a Bill of Sale. Rule discharged.

Walker v. *Rodgers.*—Ejectment on receipt for sale of Crown Lands. Leave to enter nonsuit. Rule accordingly. Rule made absolute.

ADDRESS TO SIR J. B. ROBINSON, BART.

TO SIR JOHN BEVERLEY ROBINSON, BARONET, PRESIDENT OF THE COURT OF APPEAL, &c., &c., &c.

We the members of the Bar of Upper Canada at a general meeting assembled, have resolved that this is a fit and proper occasion on which to address your Lordship.

Because the various changes which have recently taken place in the constitution of the Superior Courts of the Western Province have attracted our attention and awakened in our hearts a high sense of the reality of human life, and the commanding influence of Divine Providence over the will of man.

Because the most important of those changes is that caused by your Lordship retiring from the head of the Court of Queen's Bench, where you have presided from early youth to old age, whilst many of your associates of the Bench have passed away, and a departed generation of the Bar has yielded to us the right of succession.

Because we have vainly searched the history of the Bench and the records of the lives of eminent British jurists, and there failed to find one single instance within the memory of man where any Judge has occupied as you have occupied, a place on the Bench as Chief Justice for a period of nearly equal to half the allotted duration of existence.

Because we desire that by the judicial history of this the land of our nativity or our adoption, posterity may learn, as we proudly record the fact, that your Lordship has passed thirty-three years of your life in the discharge of the arduous duties and functions of your high and important office of Chief of the first and oldest Court of the Province.

And because we as a body are inspired by feelings of proud admiration, profound respect, and reverential esteem which we are unable to express.

We venture, therefore, to address your Lordship, and to assure you that as with pleasure we beheld, and shall ever remember your presence, so with pain do we witness and shall ever deplore your departure from the Bench.

We use no language and offer no words of idle flattery, but with candour and pure sincerity we hesitate not to say that by zeal indefatigable, talents of the rarest and highest order, power of perception unequalled, patience, affability of manner, and a constant desire and anxiety to administer justice in its purity, you have never failed to inspire confidence alike in the profession and the suitor, which will ever be held dear in their memories, and have justly earned an everlasting reputation as a jurist, which will serve as an example to future ages, as a stimulant to youthful aspirants, and the pride of your family, your friends and your countrymen.

Whilst thus offering this slight tribute of our estimation and admiration of your public life, we congratulate ourselves and our country that your valuable services are not yet lost to us; that though you retire from the seat from whence your lustre has shone around you, yet you retire not to repose, but retain by special favour of the Crown, the President's Chair of the High Court now assembled.

In conclusion, we humbly invoke the blessings of our Supreme Ruler in your behalf, and pray, that as you deserve, so may you be rewarded by him, and that peace and happiness may attend the remainder of your days.

(Signed) H. ECCLES,
Chairman of the Meeting,
And Treasurer *pro tem* of the Law Society.

Sir J. B. ROBINSON then read the following reply:—

Mr. Treasurer and Gentlemen of the Law Society,

It gives me pleasure to receive this expression of your kind sentiment at the close of my long period of service in a station which has not been without its share of labour and anxiety.

Nearly thirty-three years have passed since I was appointed Chief Justice of the Queen's Bench, and I alone am now living of the three who composed at that time the only Superior Court of Law or Equity in Upper Canada.

I have also to lament the loss of others who during my tenure of office had been associated with me as Judges, who had been among my earliest and best friends—and for whom it might have been hoped that Providence intended a greater length of days.

In the bar, too, I have lived to witness great changes. Of the many who had been admitted by your excellent society to the degree of barrister before my accession to the bench, I think there are not more than six or seven who continue to be engaged in the practice of their profession, while of late years I have had the pleasure of meeting in my circuits through the Province, advocating with ability and zeal the interest of their clients, many gentlemen who were not born when I entered upon the duties, from which, by the kind consideration of the Government, I have been lately relieved.

So true does it seem that the lapse of thirty years, which we usually reckon the term of a generation, is with reason so considered, since, with a few individual exceptions, it commonly brings upon the stage new actors in all the scenes of life.

But within the period I am referring to, how great have been the changes we have witnessed in our judicial system also and in the law itself! A Court of Equity has been introduced where before that time the exercise of equitable powers in any shape had been utterly unknown. And besides this, new legislation following the example of the Imperial Parliament has enabled the common Law courts to grant in effect equitable relief to a considerable extent, in cases pending before them, thus saving to suitors the expense of resorting to a distinct equitable tribunal.

We have seen also established a second court of common law of superior jurisdiction with the same powers and duties as those of the Queen's Bench under the designation, familiar to English ears, of the Court of Common Pleas—which Court, since its foundation, has happily been presided over in succession by two Chief Justices, eminently qualified by their learning, discretion, and diligence, to secure to the Court the confidence of the Bar and of the country.

There are County Courts and Division Courts, with jurisdiction being considerably enlarged and clearly defined, and with their practice settled by written law, and presided over, not as formerly they unavoidably were, by gentlemen uninstructed in the laws, but by Judges, of whom I may venture to say

there are not a few who would be found worthy to be entrusted with higher judicial authority.

Again in the law itself we have seen changes scarcely less material than in the machinery by which it is dispensed.

Much that had been formerly uncertain or indefinite has been settled by sure legislative authority, and much that had been long settled, but in a measure not happily adjusted to the wants and feelings of mankind, has been placed upon a footing more reasonable and just. Many things that were perplexed have been simplified; what was useless has been dispensed with; what was tedious has been abridged; and above all, objections that used to be entertained on account of defects, or irregularities in what was merely matter of form and not of substance, have been discontinued, and such ample authority has been given to the Courts to amend errors in procedure that the rights of parties are now made as much as possible to depend upon the real merits of their case.

In consequence of these improvements, the time of Courts of Justice and the labours and anxious care of the advocate are now in an infinitely less degree than formerly expended upon discussions which I think we all used to feel with somewhat of shame, while we were unwillingly engaged in them, were too much of the nature of vexatio de lana caprica—a quarrel about goats' wool—or, in other words, a strife about nothing.

These are all unquestionably advantages to the suitor, but the benefit of such changes is not confined to them. It is a worthy subject of congratulation that the attention of the student, the practitioner and of the judge, can at the present time be more exclusively given to the grounds and principles of the law than to the intricacies of its practice.

More remarkable, however, than all the others I have spoken of is the alteration we have seen take place within the last twenty years in the circumstances of Upper Canada.

Since 1829 its population, I think I may venture to say, has increased six-fold; and its wealth and commercial enterprise and importance in a greater proportion. Banks, insurance companies, railway companies and other associations for the purposes of trade or manufactures, have multiplied prodigiously. A system of self-government in local matters, through municipal corporations has been formed, with a comprehensive and careful minuteness of detail scarcely to be paralleled, and a scheme for extending education to all classes throughout the Province has been framed by the Legislature, and is carried out and controlled by a multitude of provisions which require great care in the administration to do justice to the benevolent design.

We know to what a number of legal questions the enactments creating these new interests and relations have given rise. So far as the bar is concerned, I have seen with pleasure that their learning, intelligence and industry, and their earnest application of these resources in the service of their clients have been fully equal to the increased demand for professional aid.

Of the Bench it may be permitted me to say that however much their labour and responsibility have been augmented by the causes I have mentioned, still now as before, nothing can be plainer to them than their path of duty, so far, at least, as regards the spirit in which it behoves them to act. Whatever delay may take place upon the cases which individually come before them for argument, it must always be the desire of the judges to determine each, after it has been heard, with as much promptness as is compatible with a satisfactory decision; and whatever opinion they shall really form, they are bound to pronounce it, without fear or favour.

Such is their independent tenure of office that there can be nothing that should make them afraid, and while any interest in the subject of litigation, however trifling, or any relationship however remote to either of the parties, restrains them from taking part in the decision, they are exposed to nothing which can be imagined capable of drawing them from the path of duty.

It is their happy privilege that what they do, is transacted openly, and that in this country they have an apportunity of seeing, and are indeed by law bound to see, that their opinions and the grounds assigned for them, are truly reported.

This protects them against misrepresentation; and they have, besides, the satisfaction of reflecting that when they do err in judgment, except in certain classes of cases, in which the Legislature has chosen to make or to leave their decision final, their error can be corrected in a superior court, by a proceeding as simple and direct in its nature, and as free from the objections of delay and expense, as could well be contrived.

Judges can have no greater advantages than these for shielding them from injurious reflection or suspicions; and speaking as a British subject, I feel that it is characteristic of our time and country, to give credit to the Judge for upright intentions, and to treat their errors as errors of the understanding only, and not of the heart.

I much fear, gentlemen, that you have done more than justice to the success of my efforts while I presided in the Court of Queen's Bench to discharge my duty rightly and with efficiency, though it would give me pain to think that I may not justly take credit for a strong desire to acquit myself to the best of my ability, of duties so important which I had solemnly sworn to perform.

Labour at least, I am conscious, has not been spared.

You know how ably I have been assisted by those who have been taken from the Court, and by those whom I left in it, and we all, I am sure have felt how materially our labours have been lightened by the researches and arguments of a learned and industrious bar.

The leaving a Court in which the whole of the active period of my life has been passed could not fail to be attended with a painful feeling of regret, for I may say that out of my family circle it has constituted my home. But this regret has been softened by the pleasure of seeing my oldest surviving colleague honoured by being placed at the head of the Court, as a just tribute to the ability and integrity which have marked his long course of judicial services. The duties which it will give me pleasure to continue to discharge in the Court of Error and Appeal will associate me as in time past with my brethren of the Bench and of the Bar, as long as I may be blessed with health sufficient for the performance. And may God grant that we "may all bear in mind the account which "we must one day render for the time and talents committed to our charge."

BILL BEFORE THE LEGISLATURE.

An Act respecting Judgment Debtors in Upper Canada,

(Introduced into the Legislative Council by the Hon. Mr. Alexander.)

Whereas it is expedient to confer upon the Superior Courts of Common Law, and the County Courts, in Upper Canada, and the Judges thereof, certain powers in relation to judgment debtors already conferred by law upon the Division Courts there and the Judges thereof; therefore, Her Majesty, &c.:

1. Either of the Superior Courts of Common Law, or any County Court, in Upper Canada, or any Judge of any of the said Courts, may order the time or times and the proportions in which any sum and costs recovered by judgment of the Court shall be paid, reference being had to the day on which the summons was served; and, at the request of the party entitled thereto, he may order the same to be paid into Court.

2. Any party having an unsatisfied judgment or order in either of the Superior Courts of Common Law, or in a County Court, in Upper Canada, for the payment of any debt, damages or costs, may procure from the Court wherein the judgment has been obtained, a summons in the form prescribed by any rule respecting the practice and proceedings of such Court; and such summons may be served either personally upon the person to whom the same is directed, or by leaving a copy thereof at the house of the party to be served, or at his usual or last place of abode, or with some grown person there dwelling, requiring him to appear at a time and place therein expressed, to answer such things as are named therein; and if the defendant appears in pursuance thereof he may be examined upon oath, touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which formed the subject of the action, and as to the means and expectation he then had, and as to the property and means he still has, of discharging the said debt, damages or liability, and as to the disposal he has made of any property.

3. The person obtaining such summons, and all witnesses whom the judge thinks requisite, may be examined upon oath touching the enquiries authorized to be made as aforesaid.

4. The examination shall be held in the judge's chambers, unless the judge otherwise directs.

5. The costs of such summons, and of all proceedings thereon, shall be deemed costs in the cause, unless the judge otherwise directs.

6. In case a party has, after his examination, been discharged by the judge, no further summons shall issue out of the same Court at the suit of the same or any other creditor, without an affidavit satisfying the court, or a judge thereof, upon facts not before the judge upon such examination, that the party had not then made a full disclosure of his estate, effects and debts, or an affidavit satisfying the court, or a judge thereof, that since such examination the party has acquired the means of paying.

7. If the party summoned does not attend as required by the summons, or allege a sufficient reason for not attending; or, 2. If he attends and refuses to be sworn or to declare any of the things aforesaid: or, 3. If he does not make answer touching the same, to the satisfaction of the judge; or, 4. If it appear to the judge, either by the examination of the party or by other evidence (*a*), that the party obtained credit from the plaintiff, or incurred the debt or liability under false pretences, or (*b*) by means of fraud or breach of trust, or (*c*) that he wilfully contracted the debt or liability without having had, at the time, a reasonable expectation of being able to pay or discharge the same, or (*d*) has made, or caused to be made, any gift, delivery, or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or, 5, If it appears, to the satisfaction of the judge, that the party had, when summoned or since the judgment was obtained against him, has had sufficient means and ability to pay the debt, or damages, or costs recovered against him, either altogether or by the instalments which the Court in which the judgment was obtained, or any judge thereof, has ordered, and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days.

8. A party failing to attend, according to the requirements of any such summons as aforesaid, shall not be liable to be committed to gaol for the default, unless the judge is satisfied that such non-attendance is wilful, or that the party has failed to attend after being twice so summoned; and if, at the hearing, it appears to the judge, upon the examination of the party or otherwise, that he ought not to have been so summoned, or if, at such hearing, the judgment-creditor does not appear, the judge shall award the party summoned a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment-creditor in the same manner as any other judgment of the court.

9. Whenever any order of commitment as aforesaid has been made, the clerk of the court shall issue, under the seal of the court, a warrant of commitment directed to any bailiff of the court, and such bailiff may, by virtue of such warrant, take the person against whom the order has been made.

10. All constables and other peace officers within their respective jurisdictions, shall aid in the execution of every such warrant; and the gaoler or keeper of the gaol of the county in which such warrant has been issued, shall receive and keep the defendant therein until discharged under the provisions of this Act or otherwise, by due course of law.

11. Any person imprisoned under this Act who has satisfied the debt or demand, or any instalment thereof payable, and the costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining such order and all subsequent costs, shall, upon the certificate of such satisfaction, signed by the clerk of the court, or by leave of the judge of the court in which the order of imprisonment was made, be discharged out of custody.

12. The judge before whom such summons is heard may, if he thinks fit, rescind or alter any order for payment previously made against any defendant so summoned before him, and may make any further or other order, either for the payment of the whole of the debt or damages recovered forthwith, or by any instalments, or in any other manner that he thinks reasonable and just.

13. In case the defendant in any suit brought in either of the Superior Courts of Common Law, or in any County Court in Upper Canada, has been personally served with the summons to appear, or personally appears at the trial, and judgment be given against him, the court or judge, at the hearing of the cause, or at any adjournment thereof, may examine the defendant and the

plaintiff, and any other person, touching the several things hereinbefore mentioned, and may commit the defendant to prison, and make an order in like manner as he might have done in case the plaintiff had obtained a summons for that purpose after judgment.

14. No imprisonment, under this Act, shall extinguish the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution against the defendant.

15. In all orders for payment of debts, damages or costs made under this Act, due regard shall be had to the proved or admitted income of the defendant, either from official, professional or other sources; and no defendant shall be ordered to pay more than twenty-five per cent. per annum of such income under this Act.

SELECTIONS.

ERROR IN CRIMINAL CASES.

I. Writ of Error Defined.
II. Who are entitled to a Writ of Error.
III. Who may join in a Writ of Error.
IV. When a Writ of Error Lies.
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I. Writ of Error Defined.

A writ of error is an original writ, issuing from the supreme judicial court to a court of record, proceeding according to the course of the common law, requiring the record and proceedings of the complaint, indictment or information on which judgment has been actually rendered, to be sent to the supreme judicial court, who are authorized to examine the record on which judgment was given; and on such examination and a consideration of the errors assigned, to affirm or reverse the judgment according to law. *Ex parte Cooke*, 15 Pick. 237 (1834); *Thayer* v. *Commonwealth*, 12 Met. 10, 11 (1846).

A writ of error is a writ grantable *ex debito justitiæ*. *Thayer* v. *Commonwealth*, 12 Met. 10 (1846).

II. Who are Entitled to a Writ of Error.

A writ of error does not lie in a criminal case, on behalf of the commonwealth. *Commonwealth* v. *Cummings*, 3 Cush. 212 (1849).

It is the right and privilege of the defendant to bring a writ of error, and reverse an erroneous judgment; but he may well waive the error, and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offence. *Commonwealth* v. *Loud*, 3 Met. 328 (1841); *Commonwealth* v. *Keith*, 8 Met. 532, 533 (1844).

III. Who may join in a Writ of Error.

Where two are convicted on an indictment jointly charging them with the offence of larceny, and are severally sentenced thereon to longer terms of imprisonment than are warranted by law, they may join in a writ of error to reverse the judgment. *Sumner* v. *Commonwealth*, 3 Cush. 521 (1849).

IV. When a Writ of Error Lies.

Without a judgment, or an award in the nature of a judgment, no writ of error lies. *Ex parte Cooke*, 15 Pick. 237 (1834).

If a warrant of commitment be issued by a court of general jurisdiction, although it be erroneous and not conformable to law, it will stand good, unless examined and reversed by writ of error or otherwise; but if a court of special and limited jurisdiction exceed the authority conferred, and issue a warrant of commitment, the judgment is void, and not merely voidable, and the commitment under it is illegal, and may be inquired into on habeas corpus, and if the commitment is wrong, the party may be discharged. *Jones* v. *Robbins*, 8 Gray, 330 (1857).

It is not a ground of error that a defendant, who has pleaded in chief, was indicted and convicted by the name of J. T., otherwise called T. D.; misnomer being matter of abatement only. *Turns* v. *Commonwealth*, 6 Met. 224 (1843); 1 Allen, 4.

A writ of error lies to reverse a judgment in a criminal case, although the judgment was open to an appeal. *Ex parte Cooke*, 15 Pick. 234 (1834); *Thayer* v. *Commonwealth*, 12 Met. 9 (1846).

A writ of error lies to reverse a sentence of additional punishment erroneously awarded on an information. Riley's case, 2 Pick. 165 (1824); *Ex parte Cooke*, 15 Pick. 234 (1834); *Wilde* v. *Commonwealth*, 2 Met. 408 (1841). See *Herrick* v. *Smith*, 1 Gray, 49 (1854).

Where a sentence of fine and imprisonment has been imposed and the fine paid, and the judgment is erroneous in imposing imprisonment, the supreme judicial court in the exercise of its discretionary power may discharge the prisoner on habeas corpus, although for an error in the judgment of the court below, a writ of error is the ordinary remedy. Feeley's case, 12 Cush. 598 (1853).

Where one of two counts in an indictment is bad, and the defendant is found guilty and sentenced, generally, the presumption of law is, that the court awarded sentence by the law applicable to the offence charged in that count; and a writ of error will not lie to reverse the judgment, if the sentence is warranted by the law applicable to the offence charged in that count. *Brown* v. *Commonwealth*, 8 Mass. 64 (1811); *Jennings* v. *Commonwealth*, 17 Pick. 80 (1835); *Josslyn* v. *Commonwealth*, 6 Met. 236 (1843).

When a defendant is found guilty, generally, on an indictment which charges him, in one count, with entering a dwelling-house in the night time of a certain day, with intent to commit a larceny, and, in another count, with a larceny on the same day in the same dwelling-house, and he is sentenced to a greater punishment than is warranted by law, either for such entry or for mere larceny in a dwelling-house; the court cannot, on a writ of error, presume that one and the same offence only is charged in the indictment. *Carlton* v. *Commonwealth*, 5 Met. 532 (1843), explained in *Crowley* v. *Commonwealth*, 11 Met. 578, 579 (1846).

When an indictment charges, in one count, a breaking and entering a building, with intent to steal, and in another count, a stealing in the same building, on the same day, and the defendant is found guilty generally the sentence, whether that which is proper for burglary only, or for burglary and larceny also, cannot be reversed in error, because the record does not show whether one offence only, or two, were proved on the trial; and as this must be known by the judge who tried the case, the sentence will be presumed to have been according to the law that was applicable to the facts proved. *Crowley* v. *Commonwealth*, 11 Met. 575 (1846); *Kite* v. *Commonwealth*, 11 Met. 581 (1846).

Where a defendant is found guilty, generally, on an indictment which charges him with adultery, on three different days, with a woman of one name, and on a different day, with a woman of another name, and he is sentenced to a greater punishment than is warranted by law for a single act of adultery; the court cannot, on a writ of error, presume that a single offence only was charged in the indictment. *Booth* v. *Commonwealth*, 5 Met. 535 (1843).

V. ALLEGING DIMINUTION OF THE RECORD.

In *Turns* v. *Commonwealth*, 6 Met. 227, 228 (1843), when the case first came before the court, with a return of the record upon the writ of error, upon motion of the attorney-general, founded upon a suggestion of diminution of the record, a writ of certiorari was ordered, though opposed by the counsel for the plaintiff in error, directed to the chief justice of the court of common pleas, requiring the entire record to be certified and returned to the supreme judicial court.*

VI. SECOND WRIT OF ERROR.

An affirmance of a judgment, on a writ of error to which *in nullo est erratum* is pleaded, is a bar to a second writ of error to reverse the same judgment for any error apparent on the record when it was brought before the court on the first writ. *Booth* v. *Commonwealth*, 7 Met. 285 (1843).

But where the error arises from matter subsequent to the former decision, and which did not then exist, a new writ of error may be brought, and such new matter assigned for error. *Booth* v. *Commonwealth*, 7 Met. 286 (1843).

In *Hopkins* v. *Commonwealth*, 3 Met. 460 (1842), a judgment had been rendered on an information for additional punishment, which judgment was founded upon three or more former convictions. The errors assigned, in the first writ of error, to the judgment on information were, in several instances, supposed defects in those former judgments. But it was decided that whilst such former judgments were in force, the court could not take notice of such defects. Then writs of error were brought to reverse those former judgments, and one or more of them was reversed. When these supports of the judgment on the information were thus removed, the latter became erroneous, by such matter subsequent. This matter of error was not in issue on the first writ, and could not have been considered and determined in the judgment of affirmance. See also *Wilde* v. *Commonwealth*, 2 Met. 408 (1841).

VII. THE PLEA IN NULLO EST ERRATUM.

The plea *in nullo est erratum* is in the nature of a demurrer, and puts in issue the validity of the judgment in all matters of law. *Booth* v. *Commonwealth*, 7 Met. 287 (1843); *Haggett* v. *Commonwealth*, 3 Met. 458 (1842); 6 Met. 490; 3 Gray, 512.

New errors may be assigned *viva voce* at the hearing, taking care that the adverse party is not surprised; and if the judgment is erroneous, in the particulars thus indicated, though not in the particulars assigned for error, the judgment will be reversed. *Booth* v. *Commonwealth*, 7 Met. 287 (1843).

VIII. JUDGMENT OF REVERSAL.

When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in part only, it must be wholly reversed. *Christian* v. *Commonwealth*, 5 Met. 530 (1843).

Where a convict brings two writs of error at the same time, one to reverse an original judgment, and the other to reverse a sentence to additional punishment founded on an information, which sets forth such original judgment as one of the grounds of such additional punishment; if the original judgment is reversed, the sentence on the information falls with it, and will also be reversed, if the error assigned be a matter of mere law, apparent on the record, although the original judgment was in full force when the writ of error was brought to reverse the sentence on the information. *Hutchinson* v. *Commonwealth*, 4 Met. 359 (1836).

* See 2 Saund. (6th edition) 101 *a*, 101 *aa*. *Dunn* v. *Regina*, 12 Q. B., 1061.

Formerly, if the court below had pronounced an erroneous sentence, the court of error had no authority, at common law, to pronounce the proper judgment, or remit the record to the court below, but were bound to reverse the judgment and discharge the defendant. *Shepherd* v. *Commonwealth*, 2 Met. 419 (1841); *Christian* v. *Commonwealth*, 5 Met. 530 (1843); *Sumner* v. *Commonwealth*, 3 Cush. 522, 523 (1849); *Jacquins* v. *Commonwealth*, 9 Cush. 279 (1852).

And this rule applied to a case where a sentence had been awarded, to take effect after the expiration of a former sentence, and the prisoner had brought a writ of error to a hearing before the expiration of the former sentence. *Christian* v. *Commonwealth*, 5 Met. 530 (1843).

And it made no difference whether the mistake was in his favor by way of an award of sentence, less than the statute requisition, or against him by way of a greater. *Wilde* v. *Commonwealth*, 4 Met. 360 (1842); *Rice* v. *Commonwealth*, 12 Met. 247 (1847).

But it is now enacted, that, "when a final judgment in a criminal case is reversed by the supreme judicial court on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before which the conviction was had." St. 1851, c. 87; Gen. Sts. c. 146, sec. 16;* 9 Cush. 280.

This act is not *ex post facto*, or retrospective in its legislative action. It relates to future proceedings in writs of error in criminal cases, and it is not retroactive in an obnoxious sense, because it relates to writs of error on past judgments. It relates solely to remedies, and a writ of error is purely remedial. In legal effect, it directs that writs of error in criminal cases, shall only be brought on certain conditions, one of which is, that, if the error is only in the award of punishment, it shall be set right. *Jacquins* v. *Commonwealth*, 9 Cush. 279 (1852).

Where the attorney-general filed an information, *ex officio*, demanding the whole penalty for the commonwealth, on a statute which directed an offence to be prosecuted by bill, indictment, or information, the penalty to accrue, two thirds to the commonwealth and one-third to the informer, and the penalty was adjudged, two-thirds to the commonwealth and one-third to A. B., as informer, it not appearing on the record that he was the informer, the court reversed the judgment, and entered a new judgment for the commonwealth for the whole. *Howard* v. *Commonwealth*, 13 Mass. 221 (1816).

IX. SERVICE OF WRIT.

Where a writ of error is brought upon a judgment in a criminal case, under St. 1842, c. 54, the prosecuting officer of the commonwealth is not bound to take notice and act thereon, until fourteen days after a *scire facias* to hear error has been served upon him. *Christian* v. *Commonwealth*, 5 Met. 334 (1842); Gen. Sts. c. 146, sec. 12.

X. COSTS OF A WRIT OF ERROR.

A plaintiff in error, who is discharged on the writ, is entitled to his costs for travel, as an item of the legal costs, to be "borne by the commonwealth," notwithstanding that, during the pendency of the writ of error, he is imprisoned in a house of correction, under the sentence against him. *Britton* v. *Commonwealth*, 1 Cush. 302 (1848). Gen. Sts. c. 146, sec. 17.—*The Monthly Law Reporter for May*, 1862.

* The Eng St. 11 & 12 Vic., c. 78, sec. 5, contains similar provisions. See the observations of Lord Campbell, C. J., on this statute, in *Holloway* v. *Regina*, 2 Denison, 287; 17 Q. B. 317 (1851). See also Con. Stat. U. C. cap. 113, sec. 117, and *Regina* v. *Powell*, 21 U. C. Q. B. 215.

HOLY ORDERS AS DISQUALIFYING FOR THE HOUSE OF COMMONS OR THE BAR.

A Bill for the Relief of Persons in Holy Orders of the United Church of England and Ireland declaring their Dissent therefrom. Prepared and brought in by Mr. Bouverie and Mr. Edward Ellice. Ordered by the House of Commons to be printed, 12th March, 1862.

The Clergy Relief Bill, introduced by Mr. Bouverie, has been the subject of an animated discussion in the House of Commons, and will probably receive further criticism in whatever shape it may be returned by the Select Committee, in whose hands it remains for the present. The measure certainly falls short of the necessities of the case with which it professes to deal, as it only relieves those clergymen who are ready to sign a declaration of dissent from the doctrines of the Church, and leaves any who still adhere to her faith and formularies, but who have no taste for the duties of the clerical profession, labouring under the same restrictions and incapacities as at present. We do not propose to inquire into the wisdom (it is wholly unnecessary to observe on the logic) of this shortcoming in the Bill; but it may be useful to ascertain how far the clergy are really incapacitated by law for secular pursuits, and more especially for fulfilling the important duties of legislators and advocates. It will be found, we apprehend, that their exclusion from the House of Commons originated in an enactment which must be condemned by every reasonable man, and that their ineligibility for the Bar (if it really exists) rests on a discreditable precedent.

The restriction by which persons in Holy Orders are rendered incapable of sitting in the House of Commons is one created by Statute 41 Geo. III. c. 62, intituled, "An Act to remove doubts respecting the eligibility of persons in Holy Orders to sit in the House of Commons." The history of this somewhat remarkable Act of Parliament is given in Mr. Hare's able treatise on "The Election of Representatives, Parliamentary and Municipal." Speaking of the Act in question, and the restriction created by it, Mr. Hare says, "The circumstances under which the Statute establishing this restriction was, little more than fifty years ago, carried through Parliament by a minister whom history has not placed in any very elevated position amongst statesmen, are well known. The most attentive perusal of the debates will fail to discover the shadow of a reason for the exclusion. The Bishop of Rochester adverted to what he thought the only objection, viz., 'the means by which candidates were obliged to seek admittance into the Lower House, such as opening houses of entertainment, and truckling to every voter.' (But this would obviously be a difficulty to all scrupulous men.) This prelate, however, also said, 'He did not think the business of the House of Commons was totally unconnected with the study of Divinity; for it was intermixed with the great principles of political justice and morality, and the laws of nature and nations.' The bill was characterized by Lord Thurlow as a bill of disfranchisement. It was, in truth, an attack on the rights of every elector in the kingdom. Lord Eldon, who supported it, like a skilful advocate, ingeniously endeavoured to divert the argument and rest the question upon another issue, by introducing a discourse of great learning to prove the indelibility of Holy Orders,—a point which had nothing whatever to do with the matter in question. The only true explanation of this remarkable and unjustifiable law is that which was given by the immediate object of it. Horne Tooke said, 'Deacons and priests had sat in Parliament for more than a century, but at last one got in who opposed the minister of the day, and then Parliament determined that there should no more be any deacons and priests admitted amongst them.' Nothing, abstractedly, could appear more unreasonable than the exclusion of a set of men whose education and functions necessarily point their attention to the greatest subjects that can occupy the thoughts of men; and whose habits and duties moreover bring them into communication with every phase of society, and especially with the poor, whose interests require the closest, the most attentive, and the most practical consideration.

"In the great questions which arise in Parliament affecting religion and the Church, it would be in the highest degree desirable that one or two ministers of every persuasion should be present, and enabled to take part in their discussion, rather than that all such matters should be left to laymen who have taken out a dilettante degree in Divinity.

"The tone and temper of the Lower House, in dealing with subjects in which the relations between public law and national worship are in controversy, would be in no slight measure improved, if, without lessening all becoming zeal, the presence and example of the Christian minister should, to that zeal, add some portion of charity." Such are the observations of Mr. Hare, disinterestedly made in the course of a treatise on the subject of representation generally.

In Lord Holland's Memoirs of the Whig Party, vol. i., p. 180, we find the following somewhat caustic reference to the Act in question. His lordship says,—"There was scarcely a Parliament since the Revolution in which, *de facto*, a person in priest's or deacon's orders had not sat. A strange compromise between principle and indulgence was recommended by Mr. Addington, and adopted by the House. Mr. Horne Tooke was allowed to sit during that Parliament, but all deacons and priests but himself during that limited period were declared to be ineligible."

Doubtless, when the Clergy possessed their right of Convocation, with all the privileges incident thereto, the privileges not only of debate, but of enacting laws binding on their order, and especially the privilege of taxing themselves, they were excluded from the House of Commons on that ground. All the cases of exclusion proceed on that clear and distinct rule.

For instance, A.D. 1553, Alexander Newell, Prebendary of Westminster, was declared by a Parliamentary Committee incapable of being a Member of the House of Commons, "being Prebendary of Westminster, and thereby having voice in Convocation." 1 Jour. p. 26.

Again, in the year 1620, In re John Robson, it was declared that he "ought not to be accepted to serve as a member of this House, by reason he is a minister, and he hath, or may have, a voice in the Convocation House." Parl. MSS. vol. xviii., p. 90.

Also, in 1661, Dr. Cradock having been returned for the Borough of Richmond—which return was disputed—the Committee reported, "That it appeared to them that Dr. Cradock was in Holy Orders, and the opinion of the Committee was, that Dr. Cradock was incapable of being elected a burgess for the borough." The House resolved "to agree with the Committee that Dr. Cradock was a person incapable to be elected, and his election void."—8 Journ. 341, 346. But in this case there had also been a scrutiny, and Dr. Cradock had not the majority of votes, so that the decision on his capability to be elected was at least extra-judicial.

All these cases, however, were decided when the powers of Convocation, so far as they regarded the clergy, were co-ordinate with those of Parliament itself. But, in 1785, long after Convocation had been shorn of its legislative rights by 25 Hen. VIII. c. 19 (except specially licensed by the Crown to exercise them); and more than 120 years after, the clergy, by a private agreement between Archbishop Sheldon and Lord Chancellor Clarendon, had silently waived the privilege of taxing their own body, and permitted themselves to be included in the money bills prepared by the Commons, we find the question of the right of a person in Holy Orders to sit in the House of Commons once more raised in the case of Rushworth,

a Deacon, returned for the borough of Newport. It was determined that he was duly elected. The decision was in no respect affected by the fact of Rushworth being merely in Deacon's orders, although he was objected to on the ground of being in Holy Orders. Between the period of 1664, when the clergy waived the privilege just now alluded to, and 1785, the date of Rushworth's election, it is believed, as stated by Lord Holland, that "there was scarcely a Parliament in which *de facto* a person in priest's or deacon's orders had not sat;" and yet sixteen years later, viz., in 1801, the bill which is now under our consideration, became the law of the land. An observation of Mr. Luder in reporting Rushworth's case, vol. ii., p. 282, is so pertinent to the second part of our subject, that we give it as follows:—

"There is a much greater analogy between the two functions of priest and barrister than between the former and that of representative; for anciently the clergy pleaded commonly at the bar of the secular Courts, and were regular advocates; which occasioned the proverbial saying, '*Nullus clericus nisi causidicus.*'"

In corroboration of this state of things we refer to a case in Coke's Second Institutes, 562, 29 edit., more for the curiosity of the case than with a view of laying much stress on a precedent of such remote antiquity,—indictment against a parson for conspiracy, who pleads that he was "*Communis advocatus,*" and so justified as attorney to the other. It was found that he was "*Communis advocatus,*" and not guilty.

We now proceed to consider the ineligibility of persons in Holy Orders to be called to the Bar. It is somewhat remarkable that the only precedent for such exclusion was created about the same time, and directed against the same obnoxious individual, as was the unjustifiable law upon which we have just now commented. Can any one doubt that they were both the emanations of party spirit and political rancor?

In the 20th volume of Howel's "State Trials," on the Proceedings against John Horne (afterwards John Horne Tooke) for libel, the following note occurs:—

"In Trinity term, 1779, Horne Tooke applied to be called to the Bar, when only three benchers (Sir James Burrow, Mr. Baron Maseres, and Mr. Wood) voted in his favour, and eight voted against him. Upon this occasion the benchers of the Inner Temple had consulted those of the other three Inns respecting the propriety of calling to the Bar a gentleman in priest's orders (Mr. Horne Tooke had received priest's orders). Eleven benchers of Lincoln's Inn who took the matter into consideration, reported, June 16th, 1779, their unanimous opinion that it was not proper to call to the Bar a person in priest's orders. And a verbal answer, expressing a like opinion, was sent from the benchers of the Middle Temple and of Gray's Inn. See 2 Luder's Rep. of Election cases, p. 281, note.

"Mr. Tooke made his second attempt to be called to the Bar in Trinity term, 1782. At this time Lord Shelburne, afterwards the first Marquis of Lansdowne, was First Lord of the Treasury, and as it was known that he wished well to the application (as did his friend Lord Ashburton) it is probable that a successful issue was expected; the attempt, however, failed. I believe, that in favour of Mr. Tooke voted the Earl of Suffolk, Sir James Burrow, Mr. Baron Maseres, and Messrs. Coffin, Jackson, and Wood; and that on the other side voted Messrs. Annesley, Daniel Barrington, Baron, Barton, Bearcroft (in 1788 Chief Justice of Chester), Coventry, and Hall. In Michaelmas term, 1793, the benchers of the Inner Temple sent to the other law societies an inquiry whether a person in deacon's orders was admissible to the Bar. In the same term, Mr. Tooke's name being again inserted among candidates for admission to the Bar, no bencher moved his call. Particulars concerning the last-mentioned proceedings are to be found in the Order Book of the Inner Temple, in the Black Book of Lincoln's Inn, under dates, December 13th, 1793, June 2nd, July 9th, July 22nd, 1794, and I conjecture among the documents of the other societies."

From this account it would appear that there is no inflexible rule against the admission of a person in priest's orders to the Bar, but that a majority of the benchers of any Inn of Court may at any time decide either to call or to refuse, according to the disposition of the Bench, influenced as it may be by the signs or circumstances of the times.

However much each Inn of Court may desire to respect the opinion of the others, it is clear there is no rule binding upon the body, but that every Inn possesses an independent power of action, to admit or reject, according to the disposition of its constituent elements. There is, however, a check upon the arbitrary or capricious exercise of this responsible power. In the case of Hart (Pasch. 20 Geo. III. reported in Dougl. 553) Lord Mansfield laid down that "all power of the Inns of Court concerning admission to the Bar is delegated to them from the Judges, and that in every instance the conduct of those societies is subject to the control of the Judges as visitors. A mandamus will not lie to compel the Masters of the Bench of an Inn of Court to call a candidate to the Bar. From the first traces of the Inns of Court no example can be found of an interposition by the Courts of Westminster Hall proceeding according to the general law of the land; but the judges have acted as in a domestic forum." If a person conceive himself to be aggrieved by the benchers of an Inn of Court in refusing to call him to the Bar, or in disbarring him, it seems that the proper application for redress is a petition of appeal to the twelve (now fifteen) judges.

The only question remaining for consideration is, whether the Canons Ecclesiastical, or any express Act of Parliament, effectually exclude a person in Holy Orders from being called to the Bar, even assuming that the benchers or judges offered no opposition. The only Canon that can be supposed to have this effect is the 76th, which is as follows:—

"No man being admitted a deacon or minister shall, from henceforth, voluntarily relinquish the same, nor afterwards use himself in the course of his life as a layman, on pain of excommunication. And the churchwardens shall present," &c. Now "*ipso facto*" excommunication has been extinguished by 53 Geo. III. c. 127. See *Mastyn* v. *Escott*, Arches' Court, January 28, 1841.

Excommunication can now only be pronounced by a sentence of an Ecclesiastical Court, and all the civil disabilities attached thereto are abolished by 53 Geo. III. c. 127, sec. 3. An imprisonment, not exceeding six months, may form part of the sentence, but even this cannot take effect unless the sentence be certified by a "Significavit" to the Court of Chancery; and the Ecclesiastical Court is not bound to certify to the Court of Chancery, even though sentence of excommunication be passed, unless called upon to do so by the promoter of the suit. See Rogers on Ecclesiastical Law, p. 512. In re *Hoiles* v. *Scales*, 2 Hag. We might perhaps contend that an honourable calling such as the Bar, itself of a *quasi*-clerical character, is scarcely within the meaning of the Canon, but we reserve our argument on that point till we come to a consideration of any statutable prohibitions on the subject. The Stat. 1 & 2 Vict. c. 106, may be said to embody and consolidate all former Acts prohibiting the clergy from following secular avocations. In the first place, then, this prohibition only relates to such clergy as are either "beneficed," or "licensed, or otherwise allowed to perform the duties of any ecclesiastical office whatever," s. 28. And in the second place, it has reference solely to being "engaged in or carrying on any trade or dealing for gain or profit," s. 29. Now, an honorary pursuit, the remuneration attached to which is purely "*quiddam honorarium*," and which gratuity is not recoverable at law, surely cannot, by any force of construction, come within the definition of a "trade or dealing carried on

or engaged in for gain or profit." Moreover, a clergyman who holds no "benefice," neither is "licensed nor allowed by any other authority to perform the duties of any ecclesiastical office," and who, in point of fact, does not perform any ecclesiastical duty, we apprehend does not come within the penal enactments of this statute. The Act contains an exception in favour of partnerships where the number of partners exceeds six; and 4 & 5 Vict. c. 14, simply invalidates contracts where spiritual persons are directors of any such companies.

With respect to the 76th Canon before adverted to, that Canon, as we have seen, threatens with excommunication any "deacon or minister who shall voluntarily relinquish the same, or afterwards use himself in the course of his life as a layman." Now, this surely cannot mean relinquishing the duties of a deacon or minister. If so, then one-third of the clergy are at this moment in pain of excommunication. Neither can it mean voluntarily relinquishing the office of a deacon or minister, for that would be to acknowledge the delibility of Holy Orders; and indeed it has been expressly decided that this cannot be done by any voluntary act of the ordained person. *Barnes* v. *Shore*, 8 Q. B. 640. The Canon can therefore only refer to an apparent relinquishment on the part of the deacon or minister by using himself in the course of his life as a layman. The 75th Canon expressly forbids a clergyman to follow any base or servile calling, leaving it to be fairly inferred that a high and honourable calling such as that of a physician or advocate might be pursued, provided the conditions of the subsequent Canon were not infringed. Now the duty of an advocate has never been deemed inconsistent with the status of a clergyman, as we have seen so proverbially expressed by "*Nullus clericus nisi causidicus.*" Even the most ancient decretals of the Canon Law have never done more than forbid beneficed or stipendiary clergymen from acting as advocates in the temporal courts. Let us refer to their own language.

"Clerici in subdiaconatu, et supra et in ordinibus minoribus, *si stipendiis sustententur*, coram seculari judice Advocati in negotiis secularibus fieri non præsumant. Nisi propriam causam, vel Ecclesiæ fuerint prosecuti, aut pro miserabilibus forte personis quæ proprias causas administrare non possunt. Sed nec Procuratione villarum aut Jurisdictiones etiam seculares sub aliquibus Principibus et secularibus viris ut Justiciarii eorum fiant, quisquam Clericorum exercere præsumat."* Decr. Greg. 9th Lib. 1, Tit. 37, c. 1.

"Clericus autem qui contra Ecclesiam, *a qua beneficium obtinet*, pro extraneis Advocatus vel Procurator esse præsumat," &c. Ibid, c. 3, A.D. 1230.

There is a further decretal forbidding the clergy to take any part in trials involving capital punishment, upon the ground that they are ministers of Him who "willeth not the *death* of a sinner, but rather that he should turn from his wickedness and *live*."—Council of Oxford, c. 8, Hen. III. A.D. 1222.

But this only shows that so strong is the sense ever entertained by the Church Catholic against the shedding of blood, it has thought fit to forbid its advocate to take part in trials involving capital punishment. All these Legentine decretals do but create exceptions. The rule of Clerical Advocacy is admitted by them, and the very exception proves the rule. And whatever might have been their weight of authority when first enacted, Lord Stowell said, in *Burgess* v. *Burgess*, 1 Hag. Con. 393,—"The older Canons can hardly be considered as carrying with them all their *first authority*." We submit then, that by acting as an advocate a clergyman does not, in an ecclesiastical sense, "voluntarily relinquish the office of a deacon or minister, or use himself in the course of his life as a layman." In other words, he does not do that which is inconsistent with his position as a clergyman. He takes a part in the administration of justice, which is an attribute of the Deity itself. We can easily understand how those sustained by clerical stipends or benefices might well be required to devote their whole time, with the exceptions allowed as above, to the still higher and the multifarious duties of their sacred calling; but beyond this we see no prohibition. In the debate in the Lords, in Horne Tooke's case, the Bishop of Rochester acknowledged that clergymen, by having seats in the House of Commons, would not be necessarily relinquishing their clerical calling and conducting themselves as laymen. His lordship said, "He could by no means subscribe to that despicable puritanical maxim, that a clergyman ought never to exercise himself but in the immediate duties of his calling." It cannot be denied that the clergy in the Middle Ages acted as advocates in the temporal or secular courts. The adoption of the coif, now represented by the small linen frill, surmounted by the black patch or cap on the Serjeants' and Common Law Judges' wigs, originated in a desire to hide the clerical tonsure. The decretals before referred to were the cause of the adoption of the coif by those *beneficed* clergy who still persisted in acting as advocates, but yet would not appear to do open violence to the law of the Church.

Upon these considerations, we can come to no other conclusion than that there is no statute or common law rendering an *unbeneficed* or *unlicensed* clergyman, or one unauthorized and unoccupied in the performance of any ecclesiastical office, ineligible to be called to the Bar; and even if there be any ecclesiastical law prohibiting such from acting as Advocates, upon the ground that they are thereby "using themselves in the course of their lives as laymen," we have seen that the penalty of excommunication carries with it no civil disability cognizable by the temporal Courts. The punishment of imprisonment is not in the nature of a civil disability, and in practice is now never pronounced.

The ineligibility of the clergy to sit in the House of Commons (for this restriction does not extend to the House of Lords, in which there are at the present moment many clergymen besides the Bishops) was established, as we have seen, by an arbitrary law directed against a particular individual, and passed little more than fifty years ago; and the supposed ineligibility of clergymen to be called to the Bar rests upon no better foundation than an equally arbitrary decision of the Inns of Court directed against the same individual.

We desire to be understood as contending for the rights of those clergymen alone who have virtually renounced, or who have disclaimed all ecclesiastical duty. How far the laws relating to the beneficed and licensed clergy may affect those who enjoy their protection we have not, in the present instance, attempted to inquire.

* In all the Canonical Constitutions received into the realm of England, there is a "saving of the privileges of our Lord the King," which saving (Mr. Johnson says) entirely defeats the constitution. And in some of the constitutions there is a saving for such causes *as are allowed by law*.

U. C. REPORTS.

COMMON PLEAS.

(*Reported by* R. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*)

Proudfoot v. Bush.

Taxes—Sale of land for—Redemption—Expiration of the twelve calendar months Held, that the statute allowing twelve calendar months for the redemption of land gives the whole of the day in the subsequent year upon which the sale takes place. When a sale took place upon the 7th of October, 1840, and the money was not paid to redeem until the 8th of October, 1841, *held*, that it was too late. (C. P., H. T., 25 Vic., 1862.)

Ejectment for thirty-nine acres of lot No. 22, 4th concession of Reach. The plaintiff claimed under a sheriff's sale for taxes. The defendant claimed under conveyances deducing title from the grantee of the Crown.

A *prima facie* case entitling the plaintiff to recover as vendee of the sheriff for taxes in arrear was admitted.

The defence was a redemption of the land within the proper time by payment of the necessary sum to the proper treasurer. It appeared that the sale for taxes was made on the 7th day of October, 1840, and the sheriff executed the deed under which the plaintiff claimed on the 8th day of October, 1841. On that day the redemption money was paid to the treasurer, and the only question was whether it was in time. The learned judge (Richards, J.) at the trial ruled it was not, and a verdict by his direction was entered for the plaintiff, with leave to the defendant to move to enter a verdict for him if this court should adopt a contrary view.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* to enter a verdict for the defendant on the leave reserved.

In the following term *Spencer* shewed cause. He referred to the statutes of Upper Canada, 6 Geo. 4. ch. 7, sec. 17 & 18, Consol. Stats. U. C., ch. 55, sec. 148; *Boulton* v. *Ruttan*, 2 old series, U. C. Rep. 362; *Cooke* v. *Sholl*, 5 T. R. 255; *Young* v. *Higgon*, 6 M. & W. 49. *Draper* C. J., referred to *Robinson* v. *Waddington*, 13 Q. B. 753.

M. C. Cameron, contra, cited *Lester* v. *Garland*, 15 Ves. 248; *Webb* v. *Fairmaner*, 3 M. & W. 473; *Cameron* v. *Cameron* 2 U. C. Prac. Rep. 259.

DRAPER, C. J.—The 17th section of the stat. of Upper Canada, 6 Geo. 4, ch. 7, enacts (after some provisions respecting a sale of land for taxes,) that if *within* twelve calendar months from the time of such sale the proprietor of the lot or any one on his behalf shall pay to the treasurer of the district the amount levied by sale of a portion of the same and the expense of such levy together with twenty per cent. in addition to the same, then he shall be entitled to resume possession of the land so sold; and by sec. 18, if *at* the expiration of twelve calendar months from the time of such sale the land so sold shall not be redeemed as aforesaid, then the sheriff for the time being shall, on demand, &c., execute a conveyance in fee simple, &c.

The sale being on the 7th October, 1840, that day must according to the authorities be excluded from the computation of the 12 calendar months *within* which the land might be redeemed. The right of redemption included the whole of the 7th October, of the following year, but unless there can be two eighth days of October within twelve consecutive calendar months, it could not extend beyond the 7th October, 1841. The defendant, or those under whom he claims, had that day on which to redeem—it was *within* twelve calendar months from the time of sale. At the expiration of the twelve calendar months, *i. e.*, at the end of the 7th October, 1841, the right to redeem was gone. Mr. Cameron indeed offered some speculations as to the phrase "twelve calendar months," to the effect that calendar months were not all of the same length, and that the legislature may have meant months of the same number of days as that in the month in which the sale took place, and as this was in October there should be twelve months each of 31 days allowed for redemption, but he cited no authority to lend colour to such a proposition, and urged no other argument than the trite suggestion of leaning against a forfeiture. It would require very heavy leaning not to read "within twelve calendar months," as equivalent to "within twelve consecutive calendar month." The fallacy is too plain to require serious refutation.

I think the plaintiff is entitled to judgment, and that the rule should be discharged with costs.

Per cur.—Rule discharged.

WARD v. THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

Registrar—Offices and vaults for—Duty of county council to provide—Remedy for not so doing—Consol. Stat. U. C., ch. 89.

Consol. Stat. U. C., ch. 89, makes it the duty of the county council to erect fire-proof offices and vaults for the registrar of the county. The defendants having neglected so to do, and the plaintiff, the registrar of the county, having furnished the requisite vaults and offices, sued the county council for the rent of the same. On motion for new trial.

Held, that the plaintiff was not entitled to provide the requisite offices, &c., and to charge the defendants with the rental thereof, his remedy was to compel the council by the aid of the court to furnish such offices, &c.

(C. P., H. T., 25 Vic., 1862.)

Declaration for money payable by the defendants to the plaintiff for the defendants' use by the plaintiff's permission of offices, vaults, and rooms of the plaintiff, for money paid, interest, and on account stated.

Pleas, never indebted, and Statute of Limitations.

The case was tried at Cobourg, before Richards, J. The plaintiff put in a commission appointing him to be registrar of Durham, dated 10th April, 1847, and a commission appointing him registrar of the East Riding of the county of Durham, dated 2nd December, 1859. He proved that he had provided an office at his own expense for conducting the business of the county registrar under these two commissions, at a rate of £30 per annum.

A verdict was rendered for the plaintiff with leave reserved to the defendants to move to enter a nonsuit.

In Michaelmas Term, *Galt*, Q. C., obtained a rule *nisi* accordingly.

He contended that no implied contract could arise under the registry act; that the defendants never occupied the registry office, nor was the registrar, though a county officer, an officer of the corporation, any more than the sheriff, the clerk of the peace, or even the county judge. The duty of providing a fire-proof office and vault imposed on them, does not give the registrar a right to maintain this action.

In the following term, *J. H. Cameron*, Q. C., shewed cause, and argued that the duty imposed on the county council by the statute, impliedly gave the registrar a right to maintain this action.

DRAPER, C. J.—The sections of the Consol. Stat. U. C., ch. 89, referred to on the argument, are the following: Sec. 8. For the safe keeping of all books, records, and other papers belonging to the office of registrar, the council in each and every county shall provide at the expense of the county, not exceeding $1,000, ($1,500 by 24 Vic., ch. 42,) safe and proper fire-proof offices and vaults, at the place where the registry office is to be kept, and the registry office shall from *thenceforth* be kept there. Sec. 66. If any registrar does not keep his office in the place appointed in his commission or by proclamation, or "not having a fire-proof office and vaults, neglects or refuses to remove to the office provided for him by the county council, &c., &c. Secs. 68 & 69 make it the duty of the treasurer of the county to provide a proper registry book for each township, city, and town, and on his neglect to do so within thirty days after the application of the registrar therefor, the registrar may provide the same and recover the cost thereof from the municipality of the county.

Looking back at the Stat. 9 Vic., ch. 34, which is consolidated in ch. 89, above referred to, and at the older registry acts, I have no doubt that the provision for the construction of fire-proof offices and vaults was designed for the protection and advantage of those whose muniments of title were to a greater or less extent dependent on the books, records, and other papers kept in the registrar's office, and not for the emolument and benefit of the registrar himself.

The form of the provision in the 19th sec. of 9th Vic., confirms this conclusion. It is "that safe and proper fire-proof offices and vaults shall be provided within eighteen months after the passing of this act in each and every county of the province for the keeping of all books, records, and other papers belonging to the office of registrar, and in case the registrar of any county *shall neglect* to provide such office and vault within the period aforesaid, the district council shall fix upon the most convenient and eligible site for such office within the county, and cause a proper and sufficient office to be provided at the expense of the district," &c., and then if the registrar not having a fire-proof office and vaults shall neglect or refuse to remove to that provided for him he shall be liable to removal.

Before this act (9th Vic.) the registrars had, without exception, provided offices at their own expense.

The Consolidated Act has so far changed these provisions as to make it the absolute duty (instead of its being contingent on the neglect of the registrar) of the county councils to erect such offices, &c., but it still leaves it optional with the registrar, and if he has a fire-proof office and vault he may keep the registry books and papers there, and is not obliged to remove at the will of the county council. But I see no provision obliging the county council to pay him rent. He may with the aid of the courts enforce them to do what the act directs, provide an office, &c., for him at a place of their selection, and having done so must occupy it, for

he will have made his election. but it is another thing for him to provide an office for himself and charge them as using and occupying it with a *quantum valebat*. They are only permitted to expend $1500 on the office. The charge for rental in the present case far exceeds the rate of interest on that sum which the court can allow. and it is only during the last year that more than $1,000 could be expended for this purpose.

I think the rule must be made absolute.

Per cur.—Rule absolute.

SCOBLE V. HENSON.

Covenant—Chattel mortgage given without consideration to defraud creditors—Not void between the covenantor and covenantee.

Declaration on a covenant made by the defendant to the plaintiff whereby he covenanted to pay the plaintiff £37 10s. and interest.

Defendant pleaded that the covenant was contained in a chattel mortgage made by him at the plaintiff's request, and to hinder, defeat and defraud his creditors, and without consideration. Upon demurrer, *held*, that a covenant executed as above is only void as against third parties, and not between the parties to it, and that the plaintiff, therefore, was entitled to judgment.

(H. T., 25 Vic., 1862.)

Third count.—For that the defendant by deed bearing date the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, covenanted to pay the plaintiff the sum of thirty-seven pounds ten shillings, with legal interest for the same from the date of the said deed, on or before twelve months from the date of the said deed, but hath not paid the same or any part thereof, or the interest or any part thereof.

And the defendant, for a plea on equitable grounds to the third count of the plaintiff's declaration says:

That the deed in the said count mentioned is a chattel mortgage, which was executed by the defendant to the plaintiff, at the desire, instance, and request of the plaintiff, and to hinder, delay, and defraud the creditors of the said defendant, and without any consideration for the making thereof, whereby the said defendant mortgaged and conveyed the said goods and chattels in the said deed mentioned to the plaintiff, who then accepted the same with intent to hinder, delay, and defraud the creditors of the said defendant from recovering their debts, and to protect the same from seizure by the creditors of the said defendant, and that the said deed was executed for no other purpose or consideration whatever, and that there is now nothing due thereon, and that the same was and is fraudulent and void.

To which plea the plaintiff demurred on the grounds,

1. That the defendant admitted the making of the deed in the said count mentioned, and did not avoid the same.

2. That the defendant was estopped by his deed from disputing the consideration alleged in the deed.

3. That the defendant did not shew that at the time he executed the deed to the plaintiff he (defendant) was a person in insolvent circumstances or unable to pay his debts in full, or one knowing himself to be on the eve of insolvency.

4. That if even the said deed was given under the circumstances stated by the defendant, the same would not be void as against the defendant, but only as against the creditors of the defendant.

5. That the said deed according to the declaration was executed on the twenty-fifth day of November, 1857, and the statute upon which the defendant apparently relies did not come into force till 1859.

R. A. Harrison, for the demurrer, cited *Hawes* v. *Leader*, Cro. Jac. 270; *Robinson* v. *McDonnell*, 2 B. & Ald. 134; *Bessey* v. *Windham*, 6 Q. B. 166; *Doe Newman* v. *Rusham*, 17 Q. B. 128; *Higgins* v. *Pitt*, 4 Ex. 312; Broom's Legal Maxims, 648.

Douglas, contra, cited *Higgins* v. *Pitt*, 4 Ex. 312.

DRAPER, C. J.—The third count in the declaration stated that the defendant by deed dated 25th November, 1857, covenanted to pay the plaintiff £37 10s. with legal interest, within twelve months from the date of the deed. The defendant on equitable grounds pleads that the deed is a chattel mortgage, which was executed by the defendant to the plaintiff at the request of the plaintiff, and to hinder, delay, and defraud the creditors of the defendant, and without any consideration for the making thereof, whereby the defendant mortgaged the said goods and chattels in the deed mentioned to the plaintiff, who accepted the same with intent to hinder, delay, and defraud the creditors of the defendant from recovering their debts and to protect such goods, and that the deed was executed for no other purpose, and that there is nothing due thereon. The defendant does not pretend that he was induced to enter into the covenant or to execute the deed which contains it, by any fraud practised on himself; his position, on his own shewing, is that of a party combining with another to defraud his creditors, and in that respect he brings himself within the language of Lord Mansfield, in *Montefiori* v. *Montefiori*, 1 W. Bl. 364: "no man shall set up his own iniquity as a defence any more than as a cause of action." This principle is also recognized in equity, and in *Watts* v. *Brooks*, 3 Ves 612, the Lord Chancellor says: "A man cannot set up an illegal act of his own in order to avoid his own deed." It may be observed, however, that in the latter case the court was only asked to decree an account of transactions which had taken place contrary to the provisions of an Act of Parliament, and not to enforce the contract out of which those transactions arose; and in *Montefiori* v. *Montefiori*, a marriage had taken place upon the faith of the promissory note which the defendant gave to the plaintiff to make his actual fortune appear larger than it really was.

The case of *Hawes* v. *Leader*, Cro. Jac. 270, cited by Mr. Harrison, appears to me, however, an express authority in the plaintiff's favour, and it is cited with approval by Holroyd, J., in *Doe* v. *Roberts*, 2 B. & A. 369. The ground of that decision is one which applies equally at law as in equity; that the defendant is not enabled by the statute of Eliz. ch. 5, to set up this defence, for that Act only makes the deed void against creditors, not against the party himself.

Judgment for plaintiff.

BARBER V. DANIELL.

Fi. fa., endorsement of, for larger amount than due—Damage thereby—Pleading malice—Allegation of.

Defendant being the attorney of several persons who registered a judgment against the plaintiff caused a writ of *fi. fa.* to be issued, endorsed to levy a much larger sum than actually remained due on the said judgment so recovered as aforesaid, the said judgment debtor (the now plaintiff) having paid a large sum on account thereof which he (the plaintiff herein) alleged the defendant hereto well knew.

The second count in the declaration set out the above facts, but did not shew that any damage resulted to the plaintiff by reason of such endorsement on said writ.

On demurrer, *held*, That the endorsement for a larger amount than was actually due was not *per se* an injury to the plaintiff it not being shewn that more goods were seized than was necessary to satisfy the amount actually due.

2nd. That the declaration should contain an allegation that the acts complained of were done maliciously and without reasonable and probable cause.

(H. T., 25 Vic., 1862.)

The declaration contained two counts, the second of which is demurred to. The statement of the plaintiff's cause of action is that certain persons recovered a judgment against him; that he paid a large part of the amount so recovered, leaving only a small sum due; that the defendant was attorney for the parties who recovered the judgment, and that well knowing the premises, he caused a *fi. fa.* on this judgment to be issued, and wrongfully caused it to be endorsed for the full amount recovered by the judgment, and wrongfully and injuriously delivered the same to the sheriff, and caused him to levy and seize the goods of the plaintiff, whereby the plaintiff was injured in his credit.

Demurrer, because the *fi. fa.* appears to have been rightly placed in the sheriff's hands, and it is not shewn that it was wrongfully proceeded on.

S. M. Jarvis, in support of the declaration, cited *Saxton* v. *Castle*, 6 A. & E. 652; *Leyland* v. *Tancred*, 10 Q. B. 664; *Reid* v. *Ball*, 15 U. C. Q. B. 568.

John Read, contra.

DRAPER, C. J.—I am of opinion that the count is not sufficient. The judgment was for as large a sum as the execution was issued for, and though part of it was paid, the endorsing for a larger sum than remained due after such payment, thus claiming more than was due, was not an injury *per se* to the plaintiff, and there is nothing to shew that in making a seizure for the sum (whatever it was) which remained due, any more goods were seized than was necessary or reasonable to satisfy what was really due. But I think, moreover, that the declaration should have contained a statement as in *Reid* v *Ball*, 15 U. C. Q. B. 568, that the acts complained of were done maliciously and without reasonable or

probable cause. The case of *Saxton* v. *Castle*, 6 A. & E. 662, confirms this view, and so also does *Tancred* v. *Leyland*, 16 Q. B. 669. There is no sale averred to have taken place, nor has any special damage been alleged to have resulted from the seizure; and as Lord Campbell says in *Churchill* v. *Siggers*, 3 E. & B. 937, "The creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due on the judgment."

Per cur.—Judgment for defendant.

BUCHANAN v. THE TOWN OF GALT.

Highway—Levelling thereof—Damage done by—Corporation—Liability of for.

The plaintiff claimed damages from the defendants for a breach of duty in allowing and permitting dirt and rubbish to be thrown or put upon a lane or public highway upon which his premises abutted. It appeared in evidence that the damage complained of was occasioned by the filling in and levelling a hollow in the lane, by means whereof the plaintiff's fence was pressed inwards, the filling in being done by private individuals throwing dirt and rubbish thereon.

Held, 1st, that the levelling and filling in of streets by the defendants was a matter for their own discretion or judgment under the Consol. Stat. of U. C. ch. 54. 2nd, that the mere act of a wrong-doer in throwing rubbish upon a public highway and thereby causing injury to a private individual, was not a breach of duty for which the defendants would be liable.

(H. T., 25 Vic.)

Declaration stated that the plaintiff was the owner and occupier of a certain close in the town of Galt near to and abutting upon a certain lane or public way in the said town, and divided from the lane by a fence which had been erected by the plaintiff and was then standing, and the plaintiff being so possessed of the close and fence, it was the duty of the defendants to keep the said lane or public way in repair and not to permit the same to be encumbered by earth or rubbish so as to do damage to the said close or fence; yet the defendants permitted the said lane or public way to be and continue out of repair, and put and placed and allowed to be put and placed and continued large quantities of earth and rubbish on the said lane or public way, and upon and against the plaintiff's fence, whereby the said fence was broken down and large quantities of the earth and rubbish were thereby thrown in and upon the said close. *Ad damnum.*

Pleas. Not guilty. 2. Close and fence not the plaintiff's.

The trial took place at Berlin before Burns, J. The plaintiff proved that for a year then past he had been in possession of the close mentioned in the declaration, and his garden bounded the lane on the south; that the lane was originally a low piece to ground in the middle, but the defendants filled up to level the same, and now the level of the plaintiff's garden was three feet lower than the level of the land; as a mere way or road it appeared to be in good condition. One Andrews laid out the lane originally, being then proprietor of the land now in the plaintiff's possession. The filling up was done five or six years before the trial. Rubbish of different kinds had been thrown in there by various persons. By the pressure thus occasioned the plaintiff's fence had been forced inwards over his own lands, and some of the earth and rubbish had found its way into his garden. Particular evidence was given of the nature and extent of the damage.

For the defence it was objected that the action would not lie; that the lane was bought and laid out by individuals, and it was not shewn that the defendants had by by-law assumed it, wherefore the duty stated in the declaration was not proved.

That there was no evidence that the lane was out of repair, nor was it proved that the corporation had filled up this lane so as to cause the damage complained of, which seemed rather to result from the acts of private individuals who had deposited rubbish there; and it further appeared that if any wrong was done it was before the plaintiff came into possession; that there was no duty shewn that the defendants should provide support for the fence.

The learned judge directed that there was evidence to support the plaintiff's case, and overruled the objections.

The jury found for the plaintiff—damages 1s.

In Michaelmas Term, *M. C. Cameron* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection in ruling that the plaintiff was entitled to recover, notwithstanding it was not shewn that the defendants had committed any act upon the lane or way, nor that the defendants had assumed it by any by-law, nor that it was opened by by-law, and though it appeared had it been opened by private individuals; and though it appeared that the lane for the purposes of a public way was in repair, and the injury resulted from negligence of construction and not from want of repair, and though it appeared the lane was in the condition it was at the commencement of the suit before and at the time the plaintiff's title accrued, and therefore the action could not be maintained by him. Also, for directing that the plaintiff gave sufficient evidence of title.

In Hilary Term, *J. H. Cameron, Q. C.*, shewed cause. He cited *Lowen* v. *Kaye* 4 B. & C. 3; *Rex* v. *Hatfield*, 4 B. & A. 75; *Peyton* v. *Mayor*, &c., of London, 9 B. & C. 725; *Alston* v. *Scales*, 9 Bing. 3; *Partridge* v. *Scott*, 3 M. & W. 220; *Jones* v. *Bird*, 5 B. & A. 837. See also *Roberts* v. *Read*, 16 Ea. 215; Mayor of Lyme *Regis* v. *Henley*, 1 Bing. N. C. 222.

M. C. Cameron supported the rule.

DRAPER, C. J.—The duty of the defendants as it is stated in the declaration, appears to be considered to arise from the fact that there was a lane or public way within the limits of the town of Galt, on which lane the plaintiff's close and fence abutted, and the duty itself is alleged to be to keep the lane in repair and *not permit it to be encumbered* so as to do damage to the plaintiff's close and fence, and the breach charges 1st, permitting the lane to be and continue out of repair, and 2nd, placing, and allowing to be placed, large quantities of earth and rubbish upon the lane and against the plaintiff's fence.

The plea of not guilty admits that there was a lane or public way. Whether the alleged duty arises on the facts pleaded is a question of law, but the breach of the duty is put in issue by this plea.

Then, first, was it the defendants' duty not to raise the bed or surface of this lane, so as to fill up a hollow in the centre part of it. So far from this being the case, it was a matter clearly within their lawful authority, and *quoad* its necessity or propriety, the Consol. Stats. U. C., ch. 54, sec. 331, vests the discretion in them.

They would be doubtless liable if they exercised the powers conferred on them maliciously or even negligently; but to the extent of raising the road, and for that purpose placing large quantities of earth, rubbish, &c., thereupon, there was no duty to abstain; they had rather a duty the other way, for they were entrusted with powers to make, improve, alter, &c., roads and streets within the town. So far as the evidence applied only to the placing earth, &c., for this purpose, I fail to perceive any breach of duty on their part.

Neither in my opinion does the evidence shew that this public way was out of repair—using those words in their ordinary and well understood sense—nor that the injury of which the plaintiff complains arises from a want of such repair.

The evidence shews that various persons from time to time have thrown rubbish in this lane since the filling up first spoken of, but it is not proved that they did so either under the direction or even with the permission of the defendants, nor that this has been done so as to create a nuisance or obstruction to the general and public use of the way. It is complained of as causing a private injury contrary to a duty as is charged incumbent on the defendants not to permit this lane to be encumbered by earth or rubbish so as to cause damage to the plaintiff. (See *Metcalfe* v. *Hetherington*, 11 Exch. 257.) But I do not perceive that this duty arises from the premises stated in the declaration, that is, that if a mere wrong-doer throws a load of rubbish on any part of a public highway to the private and particular injury of an individual, the corporation charged with the repair of such highway have thereby committed a breach of duty, and are liable to make compensation.

The case involves several enquiries. Was the lane a public highway which the defendants were bound to keep in repair; Was it out of repair as a public way, and if so, was that want of repair the cause of the injury of which the plaintiff complains? If so the plaintiff would be entitled to recover for his particular damage, while the defendants would also be indictable for the non-repair; but if not, was the lane incumbered by earth and rubbish so as to cause particular injury to the plaintiff? If so, was such earth and rubbish placed there by the defendants or by their permission and under their authority, or was it placed there by mere wrong-doers?

The first of these questions is not in issue, but all the others may be raised on not guilty, and as it does not appear to me the jury have determined any of them, or have been asked to decide upon them in such a way as properly to determine the liability of the defendants, I think there should be a new trial. It will be for the plaintiff to consider whether on this declaration he can recover for such injuries as the evidence shews, which if the defendants are liable at all, must rest rather on the ground of negligence than on the breach of any such duty as the declaration charges.

Per cur.—Rule absolute without costs.

CURTIS v. THE GRAND TRUNK RAILWAY CO.

Railway—Passenger—Ticket—Conductor—Liability of company for acts of.

The plaintiff while travelling between St. M. & L. mislaid, and being called upon to produce could not find, his ticket, the conductor after waiting some time stopped the train and turned him off he offering to pay, but the conductor refusing to take his fare. Upon an action brought against the railway company and $300 damages awarded.

Held, that the defendants were responsible for the acts of the officer, duly authorised and styled under the statute "conductor," when not committed in excess of his authority derived from them, and although the damages were considerable, it being the second verdict obtained by the plaintiff, the court would not on that ground disturb the verdict.

(H. T., 25 Vic.)

TRESPASS—assaulting the plaintiff and forcibly expelling him from a railway car.

Plea. Not guilty, and that the plaintiff refused to pay his fare, and improperly conducted himself.

The trial took place at London, before Sir J. B Robinson, C.J. The evidence shewed that the plaintiff dealt in grain, wool, sheepskins, &c.; that on Saturday, 4th August, 1860, he left St. Mary's on the defendant's train going towards London. A witness named Cousins saw the plaintiff on the platform at St. Mary's, and saw a ticket in his possession. A similar ticket was produced at the trial by the plaintiff, marked "Stratford to London, 4th August, 1860." This witness was a passenger, and said there were about ten passengers in the car. After the train left St. Marys, the conductor as is usual asked the passengers to shew their tickets. The plaintiff felt for his and did not find it. The conductor passed him and soon returned, while in the meantime the plaintiff had pulled a great many things out of his pockets, without finding his ticket. Some of the passengers were laughing at the collection of stuff the plaintiff pulled out, sampless of wool, papers, &c., and the conductor apparently thought they were laughing at him. The plaintiff told the conductor that Cousins knew he had a ticket, and the conductor asked Cousins if he had the plantiff's ticket. He answered, no; but he knew the plaintiff had a ticket. The conductor got angry, pulled a rope and rang a bell and four or five men came in. Cousins told them not to put the plaintiff out as he had a ticket. The plaintiff at first said "give me time, and if I cant find a ticket I'll pay you," and he repeated this. He then gathered up some of his papers, leaving some on the seat, and resisted them, cathing hold of the seat, but the train being stopped or nearly so, they put him out about half way between St. Mary's and Thorndale, about 2 or 3 o'clock in the afternoon. There was no other train going to London until the following Monday morning. Cousins described the plaintiff as a man very slow in his movements, or as he expressed it, in doing business, and very peculiar in his manner, and said he thought the conductor was perfectly convinced the plaintiff had no ticket and was a kind of loafer worth nothing. The conductor was not acquainted with Cousins as far as appeared. Another witness stated that after the conductor had asked for passengers' tickets, the plaintiff, who had been feeling for his, pulled out papers and other things from his pockets. The conductor helped him to search, and then left him for a short time. The plaintiff continued pulling out papers, letters, newspapers and pieces of wool, till the conductor returned. This witness laughed heartily at the conductor and the oddity of the thing. There was a good deal of laughing and jeering, and the conductor got vexed, apparently thinking the laughter was at him, and he asked the plaintiff to shew a ticket or pay his fare, and then rang the bell violently and broke the string, and swore. Several men came in and took the plaintiff by the collar to put him off. The plaintiff held on, saying, "I'll pay you." Some said "Out with him." The papers, &c., were still on the seat and after the plaintiff was put out the conductor threw two handsful through the window, when the car was moving, and said he would teach him to have his ticket ready, that he would take nobody's money after he had rung the bell. This witness said he thought the plaintiff a little tipsy, but he used no offensive language, and he said he thought the proceeding "hard," and asked the conductor his name that he might report him. Another witness proved that the plaintiff came to his house near Thorndale, apparently very hot and tired that afternoon, and remained all night, and on the following morning went off on foot to London. The plaintiff shewed this witness a ticket from "Stratford to London," telling how he had been put off the train. The plaintiff had a good deal of money in his possession.

A nonsuit was moved for because it was not shewn that the defendants had not ratified what their conductor did, on which the learned Chief Justice gave the defendants leave to move, and because the conductor was justified under 13 and 14 Vic., ch. 51. The jury were directed that the plaintiff could not recover for any special damage, and that the defendants would not be liable for any wanton misconduct of their officer in committing some wrong which he could not suppose came within his sphere of duty—such as throwing out the plaintiff's papers if shewn to be of value—but (subject to the leave reserved) the defendants were otherwise liable for the acts of their servant.

The jury gave the plaintiff a verdict for $300.

In Michaelmas Term, *Bell*, of Belleville, obtained a rule for nonsuit on the leave reserved, or for a new trial on the law and evidence and for excessive damages. He referred to the *Eastern Counties Railway Co.* v. *Broom*, in error, 6 Exch. 314; *Roe* v. *Berkenhead, &c., R. W. Co.*, 7 Exch. 36; *Duke* v. *Great Western R. Co.*, 14 U. C., Q. B., 369, 377; *Fulton* v. *Grand Trunk R. Co.*, 17 U. C., Q. B., 429.

M. C. Cameron shewed cause, referring to the Consol. Stats. Canada, ch. 66, sec. 106; *Childs* v. *The Great Western Railway Co.*, 6 C. P., U. C., 284; *Maund* v. *The Monmouthshire Canal Co.*, 4 M. & Gr. 452. On the point of excessive damages he referred to *Merest* v. *Harvey*, 5 Taunt. 442.

Bell supported the rule.

DRAPER, C. J.—As to the motion for a new trial, the courts very rarely grant a new trial after two concurring verdicts, though there are cases, such as *Gibson* v. *Muskett*, 4 M. & Gr. 160, where the question being substantially a point of law, a third trial has been granted. I may refer also to the well known case of *Kirby* v. *Lewis*, 1 U. C., Q. B., 285, in our own Queen's Bench reports; but upon the ground of excessive damages, the court, in *Chambers* v. *Robinson*, Str. 692, granted a new trial in an action for malicious prosecution where a verdict was given for £1000, saying it was but reasonable he should try another jury before he was finally charged with that sum. But when a second jury gave the same damages, the court said it was not in their power to grant a third trial, referring to *Clerk* v. *Udall*, Salk. 649. The Court of Common Pleas, however, in *Beardmore* v. *Carrington*, 2 Wils. 249, condemned the giving a new trial on the first application in *Chambers* v. *Robinson*, saying that the reason given was a very bad one, for if it was not it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots, and they add that this case is not law, and that there is not one single case that is law, in all the books to be found where the court has granted a new trial for excessive damages in actions for tort. The principle of this opinion would not be asserted at this day. See *Hewlett* v. *Crutchley*, 5 Taunt. 277. I think the rule for a new trial cannot be made absolute. Then as to the motion for nonsuit, it may be considered in two regards, 1st, as to authority previously given to the conductor by the defendants; 2nd, as to any subsequent ratification.

It would seem almost wholly to have escaped the notice of the plaintiff's counsel, that on the issue of not guilty, such a question as the liability of the defendants, the Grand Trunk Railway Company, for an assault on the plaintiff committed by a third person, could arise. It seems to have been assumed that the railroad and the train and cars belonged to the defendants, and that the conductor was one of their officers and in their employ. No proof was attempted to be given of what instructions the conductor was

guided by, or whether he had received any, or from whom. All that seems to have been referred to was the Railway Clauses Consolidation Act, 14 & 15 Vic. ch. 51, sec. 21, sub-sec. 6, "Passengers refusing to pay their fare, may, by the conductor of the train and the servants of the company be, with their baggage, put out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductor shall elect, first stopping the train," or as expressed in the Consol. Stats. of Canada, ch. 66, 106: "Any passenger, refusing to pay his fare, and his baggage, may, by the conductor of the train and the servants of the company, be put out of the cars at any usual stopping place or near any dwelling house, as the conductor elects, the conductor first stopping the train and using no unnecessary force."

I suppose that a man who produced no ticket but asserted he had paid the fare and had lost his ticket, and therefore declined to pay again, would, though a bystander corroborated his assertion of having had a ticket, he deemed a passenger refusing to pay his fare. "It may seem hard," as is said by the learned Chief Justice in *Duke* v. *Great Western Railway Co.*, 14 U. C., Q. B., 384, to a man who has lost his ticket, or perhaps had it stolen from him, that he should have to pay his fare a second time, but it is better and more reasonable that a passenger should now and then have to suffer the consequences of his own want of care, than that a system should be rendered impracticable which seems necessary to the transacting of this important branch of business," and this opinion justifies the conductor in the present case in putting to the plaintiff the alternative of producing a ticket or paying the fare, and as the act incorporating the Grand Trunk Railway Company, as well as that relating to the branch from Stratford to London, are public acts, we may assume, especially in the absence of any intimation that there is another company having a railway between these latter points, thrt the railway train and cars spoken of at the trial were those of the defendants.

As to the question of previous authority, the law is well summed up in the able judgment of Blackburn, J, in *Goff* v. *The Great Northern Railway Co.*, 7 Jur. N. S. 286. The question was as to the liability of that company for the acts of an officer under the English statute, 8 & 9 Vic., ch. 20, by which a penalty was imposed on any person travelling on the railway without having paid his fare with intent to avoid payment thereof, and power was given to all officers and servants on behalf of the company to apprehend such person until he could conveniently be taken before a justice. The learned judge observes: "In the ordinary course of affairs, the company must decide whether they will submit to what they believe to be imposition, or use this summary power for their protection, and as from the nature of the case, the decision, whether a particular message shall be arrested or not, must be made without delay, and as the case may be not of unfrequent occurrence, we think it a reasonable inference that for the conduct of their business the company have on the spot officers with authority to determine without the delay attending on the convening the directors whether the servants of the company shall or shall not on its behalf apprehend a person accused of this offence. We think the company would have a right to blame those officers if they did not on their behalf apprehend the person if it seemed a fit case, and if so the company must be answerable, if, in the exercise of their discretion, those officers on their behalf apprehended an innocent person."

Mutatis mutandis, this applies precisely to the case, and leaves only the question whether the "conductor," whose name is not once mentioned in the evidence, was an officer having such authority from the defendants.

I assume as already stated, that the railway train and car were the defendants. The "conductor" *eo nomine*, is recognized in our statute, and the power to put out is given to him and the servants of the company. He acted as the person having that authority, and was obeyed by others who came to his aid and at his call as their superior. I think this was evidence enough to go to the jury that he was the defendants' officer, and indeed at the trial the objection more raised the question of the liability of the defendants for the act of the conductor, than insinuated a doubt that he was their officer.

As to the question of subsequent ratification, there was, in my opinion, no evidence of it; but in the result at which I have arrived as to the previous authority, this becomes unimportant.

I am not satisfied altogether with the result. I think, carefully considering the whole evidence, the jury might have found, if not that the plaintiff was in the wrong altogether, yet that under the circumstances he was only entitled to very moderate damages. I cannot but think that if a similar question could have arisen between two private persons standing in an equal position a very different verdict would have been given, and that it is a mistaken course, and one fraught with injurious consequences to the administration of pure justice, that large corporations should be heavily mulcted in damages upon the assumption of their ability to pay.

Notwithstanding this feeling, however, I feel no doubt that this rule should be discharged.

Per cur.—Rule discharged.

COMMON LAW CHAMBERS.

HELP v. LUCAS.

Certiorari to remove cause from a Division Court—Prohibition-grounds therefor

Where a certiorari is regularly issued for the removal of a cause from a Division Court after new trial granted, a previous alleged understanding between the parties that the cause should be tried in the Division Court is no ground for interfering with the writ of certiorari.

(June 3, 1862.)

Jackson obtained a summons calling on the defendant to shew cause why the order made by the Honourable ARCHIBALD MCLEAN, then one of the Justices but now Chief Justice of the Queen's Bench, for a writ of certiorari to issue to remove this cause from the first Division Court for the County of Lambton into this Court should not be rescinded, and the writ of certiorari issued pursuant thereto and all proceedings had thereon should not be quashed or set aside, and why an order for a writ of procedendo should not be granted in this cause for proceeding with this cause in the Division Court on the grounds following:

1. That the order for the certiorari was applied for and the writ issued in breach of good faith.
2. That the order was granted in ignorance of the facts.
3. That the cause was a fit and proper one to be disposed of in the Division Court.
4. On grounds disclosed in affidavits and papers filed.

And why such order should not be made as to costs as to the presiding Judge should seem meet.

Or why such other order should not be made under the circumstances of the case as to presiding Judge should seem fit on grounds aforesaid.

The order for certiorari was issued on 18th January last upon an affidavit of defendant. He stated that on 22nd November, 1861, he was served with a summons issued out of the first Division Court for the County of Lambton, claiming $100 as the price of a horse sold by plaintiff to him, that sometime in May, 1861, plaintiff offered to sell him a horse, which he declined to purchase for cash—that plaintiff agreed to take two promissory notes made by one Richard Eady in favour of defendant, together amounting to $120, as and for the price of the horse, plaintiff giving his due bill to defendant for $20, being the difference between the price agreed upon for the price of the horse and the amount of the notes—that the case was tried at the sittings of the Division Court in Sarnia on 3rd December, 1861, before a jury, when a verdict was given in favour of plaintiff for $100, the plaintiff having been called as a witness on his own behalf and being the only witness on his behalf—that the verdict was on 8th December, 1861, set aside and a new trial granted on condition that he should within ten days from that date deposit the amount of the judgment with the Clerk of the Division Court or give security to his satisfaction for the payment of the same, both parties to be at liberty to give evidence and the trial to be by jury—that he did within ten days give the requisite security—that he had a good defence on the merits and was advised that difficult questions of law would arise on the trial.

Plaintiff in moving to set aside the order for the certiorari filed a certificate from the Division Court Judge to the effect that he had granted a new trial with the intention and with the understanding between the attorneys for plaintiff and defendant that

the cause should be again tried in the Division Court by a jury, and that both parties should be sworn in the cause—that had it not been for the understanding aforesaid he would not have granted a new trial in the cause.

Affidavits were filed in support of and in contradiction of the alleged understanding.

R. A. Harrison showed cause. He objected to the reception of a certificate from the Judge as not being evidence in the cause, but even if admissible contended that defendant at the time of his application had a right to move for a certiorari and that the cause was a proper one to be removed.

Jackson in support of the summons.

HAGARTY, J.—It is not for me to revise the decision of McLEAN, C. J., as to whether or not this was a proper case for removal by certiorari. I must, however, say that I quite coincide with him in thinking that it was a proper case for removal. Plaintiff had a right to make application for its removal notwithstanding the alleged understanding between the parties. No such understanding is in my opinion a sufficient cause for interfering with a writ of certiorari regularly issued. I must discharge the summons with costs.

Summons discharged with costs.

IN RE LEMON & PETERSON, TWO, &C.

Attorney's Bill for Conveyancing—Reference to Taxation.

Held that there is no power in Upper Canada, either at Common Law, or by Statute, to refer an Attorney's bill for conveyancing only to taxation. *Contra*, where the bill is either wholly or in part for business done in Court.

(June 16, 1862.)

John Read obtained a summons calling on Messrs. Lemon & Peterson, two Attorneys of this Court, to shew cause why their bill, delivered to Dr. Wm. Clark, should not be referred to the master of the Court of Queen's Bench, to be taxed, &c. (in the usual form).

The bill delivered was in the following form:—

"HENRY P. THOMPSON & DR. WM. CLARKE,

1861. *In acct. with* LEMON & PETERSON.

May. Att'g parties on long interview respecting exchange of properties in Town of Guelph	£0	10	0
Att'g & Ex'g 8 Deeds & Plans of Lots, Ferguson's Survey, 2s. 6d.; Att'g & Examining Deeds &	0	2	6
Plans of Lots, Kingsmill's Survey	0	2	6
Att'g & Ex'g Deeds of Lot 950, 2s. 6d.; Att'g & Ex'g Deeds of Lot 953, 5s.	0	7	6
Mem. of Pars. of same	0	5	0
Drawing Special Agree't & Copy, Interview & settling terms of same	1	5	0
Att'g to Ex. Mortg'e of Wright & others, Deeds & Papers, Mem. of Contents, & Advice as to effect of Sale	1	5	0
Ins. for & Mem. of pars. for Assign't of Mortg. by Dr. Clarke to Thompson, 10s.; Special Assignment, 20s.	1	10	0
Mem'l, 7s. 6d.; Att'g Ex'n, 2s. 6d.; Aff't, 5s.; Ins. for Sale under Power of Sale, Wright's Mo. 5s.	1	0	0
Drawing Special Notice, 10s.; Comp'n of Am't due, 2s. 6d.; Copy of Notice, 5s	0	17	6
Aff't, 5s.; Letter with to Marcon, St. Catharines, 2s. 6d.; Postg. 9d.; Return signed, 2s. 6d.	0	10	9
Postg. 1s.; Letter of Ins. with, and sending Sh'ff Hamilton for service, 5s.	0	6	0
Postg. 9d; Att'g return, 2s. 6d.; Att'g peruse papers & Aff'ts, 2s. 6d.; P'd Sh'ff's fees, 4s. 9d.	0	10	6
Postg. 1s.; Ins. for Special Deed, 10s.; Drawing & furnishing copy, 50s.: Mem'l, special, 10s.	3	11	0
Att'g Ex'n Deed, 2s. 6d.; Mem'l, 2s. 6d.; Aff't, 5s. Ins. for Deed, Thompson & Clarke, 5s.	0	15	0
Drawing Deed, 25s., Mem'l, 7s. 6d.; Att'g Ex'n of Deed, 2s. 6d.; Mem'l, 7s. 6d.	2	2	6
Att'g Ex'n of Deed, 2s. 6d.; Mem'l, 2s. 6d.; Aff't, 5s.	0	10	0
Ins. for Deed of Lots, Marcon to Clarke, 5s.; Dr'g Deed, 25s.	1	10	0
Mem'l, 7s. 6d.; Att'g Ex'n of Deed, 2s. 6d.; Mem'l, 2s. 6d.; Aff't, 5s; Ins. for Discharge	0	17	6
Judg't Colenso & Marcon, 2s. 6d.; Drawing, 5s.; Att'g Ex'n, 2s. 6d.; Aff't, 5s.	0	15	0
Mem'l & Power of Att'y, Colenso to Lemon, 7s. 6d.; Att'g Execution, 2s. 6d.	0	10	0
Att'g to get Saunders to wit. Mem'l, 2s. 6d., Aff't, 5s.	0	7	6
Att'g Reg'ry Office with, 2s. 6d.; Paid 6s. 3d.	0	8	9
Letter to Dr. Clarke that documents ready, 2s. 6d.; Bill, 5s.; 2 Copies, 5s.; Letters with, 5s.	0	17	6
	£20	9	6

"Payment is requested.

"LEMON & PETERSON,

"*Solicitors*,

"Guelph."

The application was made on an affidavit of Dr. Clarke verifying a copy of the bill as the bill delivered to him, stating that the same was being sued in the First Division Court of the County of Wellington, denying the retainer, and stating that he had been advised the whole of the charges contained in the bill were unreasonable and excessive.

R. A Harrison shewed cause. He argued—1. That at common law there was no jurisdiction to refer the bill (*Weymouth* v. *Knight*, 3 Bing. N. C. 387. 2. That in England there may be a reference under Eng. Stat. 6 & 7 Vic. c. 73, s. 37, of a bill for conveyancing. 3. That in Upper Canada, where the bill delivered contains some taxable items, the whole may be referred. (*In re Jones*, 3 U C. L. J., 167, S. C., Ib. 207; *In re Eccles*. 5 Ib. 279, S. C. 6 Ib 59.) 4. But that where the bill delivered is wholly for conveyancing, and so containing no taxable items, that there is no power to refer. He distinguished the Eng. Stat. 6 & 7 Vic. cap. 73, s. 37, from our Con. Stat. U. C. cap. 85, ss. 27, 28. The former provides that "no Attorney or Solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for *any* business done, &c.;" while the latter uses the words "for (omitting the word 'any') business done by any Attorney or Solicitor *as such*, &c." He argued that our Act does not apply to all business done by a person *being* an Attorney or Solicitor; but only to such business as done by him in his *character of an Attorney or Solicitor*, i. e., business in the Courts. He contended that this view is supported by a reference to s. 28 of our Act, which provides only for taxation "by the proper officer of any of the Courts *in which any of the business, charged for in such bill, was done*," omitting a provision for taxation by the Lord Chancellor or Master of the Rolls contained in the corresponding section of the English Act, "in case no part of such business shall have been transacted in any Court of Law or Equity."

John Read, contra, argued—1. That the English Act and ours are substantially the same. 2. That the Attorneys having, as Attorneys, delivered their bill, they were estopped from contending that it is not such a bill as might be referred to taxation. 3. That the reference to taxation may be ordered to the proper officer in the Court of Chancery, He cited *Smith* v. *Davies*, 4 Ex. 40.

BURNS, J.—I think the distinction pointed out between our Act and the English Act is well founded. I have no power to refer this bill to taxation either at common law or under the statute. To what officer can I refer it? What right have I to send it to the Court of Chancery? The officer there might very properly refuse to tax it. I have no power to refer it to the Clerk of the Division Court for taxation; and clearly not to the taxing officer of either of the Superior Courts of Common Law, for no part of the business was done in either of these courts. There is no provision here, as in England, for the reference of bills where no part of the business charged is done in any court. I can find no authority for the reference of a purely conveyancing bill. Perhaps if no bill were delivered before action, that would, if properly raised, be a good defence to an action or suit on the bill; but that cannot give jurisdiction to refer the bill to taxation where the statute is silent on the point. All the cases cited were, that where the business charged for, either wholly or in part, was done in a court. I must discharge this summons—but as the point, so far as I can learn, is new in Upper Canada—without costs.

Summons discharged without costs.

CHANCERY.

(*Reported by* THOMAS HODGINS, ESQ., LL.B., *Barrister-at-Law*).

MARTIN v. REID.

Specific Performance—Variation of Original Contract—Parol Evidence.

A. made a contract with B. for the purchase of a lot of land, and both parties signed the contract. Some delay occurred in delivering an abstract, and A.'s Solicitors wrote to B.'s Solicitor, declining to complete the contract unless the abstract was delivered by a certain day. Subsequently, negociations were entered into by the parties for a variation of the terms of payment, and two propositions, in writing, but unsigned, were made by A. for B.'s acceptance. B. accepted one of them, and so informed A. or his Solicitor; but after a little time, on the advice of his (A.'s) Solicitor, declined to carry out the contract as varied, relying upon the former letters. Upon a bill filed by B.,

Held, 1st. That the defendant could not rely upon the letters fixing a time for the delivery of the abstract, as by his subsequent dealing with the plaintiff he had waived his right to withdraw from the contract.

2nd. That parol evidence could be admitted to connect the unsigned memorandum with the signed contract.

3rd. That there was sufficient evidence to show that the proposition of the defendant had been accepted by the plaintiff.

In this case a contract dated the 12th March, 1857, had been made and signed between plaintiff, as vendor, and defendant, as purchaser, of a lot of land in the Township of North Gwillimbury for the sum of £1,250, payable by instalments. Defendant went into possession and made improvements. Various letters passed between the parties in reference to the terms of payment, the defendant asking for further time. The Solicitors of the defendant also commenced a correspondence with Mr. Miller, Solicitor for plaintiff in the transaction, requesting an abstract of title; and on the 18th March, 1859, wrote to plaintiff's Solicitor, stating that unless an abstract was delivered within three weeks from that date, the defendant would consider the contract at an end. A Registrar's certificate of title was furnished, and plaintiff and defendant continued to correspond about the contract and extension of the time for payment. On the 22nd of July, 1859, the defendant came to Toronto, and called upon the plaintiff's Solicitor, and requested him to put in writing the proposals he had to make as to extending the time; he then with plaintiff's Solicitor went to the office of his own Solicitor, who proposed an alteration in the terms and wrote out a proposal for leasing the premises, and also the following:—"The within agreement is this day confirmed between the parties in all respects, except as to the terms of payment of £750, the balance therein mentioned, which it is hereby agreed between the parties shall become due and payable in equal annual instalments of £100 each with interest—the first payment thereof to become due on the 1st January, A. D. 1861, which the within named John Martin hereby agrees to accept. In all other respects the within agreement stand."

This proposal was submitted to the plaintiff who accepted it, and during the following month the plaintiff's Solicitor verbally informed the defendant's Solicitor of the acceptance; and on the 29th September, 1859, plaintiff wrote to the defendant that he had accepted his proposal as to the extension of time. A few other letters passed between the parties, chiefly from plaintiff, requesting defendant to come to town and complete the negociation, but nothing was done until January, 1860, when defendant came to town and stated that he would leave the matter in the hands of his Solicitors; and they, on the 20th January, 1860, wrote to the plaintiff's Solicitor, withdrawing from the contract on the grounds set out in their letter of the 18th March, 1859. The following month the plaintiff filed his bill. After evidence had been taken, the cause was brought on for a hearing.

Hodgins, for plaintiff, cited Fry on Specific Performance, *Clark* v. *Moore*, 1 J. & L.; *Dalton* v. *McBride*, 7 Gr. 298; *Ridgeway* v. *Horton*, 3 De. G. M. & G., and 6 H. of Lds. 238.

Freeland, for defendant, relied on letters of March and April, 1859, withdrawing from the contract.

THE CHANCELLOR (Vankoughnet)—In this case the terms of the original agreement are sufficiently specific, and they are only varied as to the terms of payment of the balance of £750 by the proposal of July, 1859, as stated in the memorandum prepared by the defendant's solicitors and handed to plaintiff's solicitor, and subsequently accepted by the plaintiff, and marked as Exhibit B. in the cause. I consider that all that had taken place prior to July, 1859, was waived by the negociations at that time, and that defendant then agreed to carry out his original contract with the variation referred to.

This paper B. was in presence of the defendant handed by his solicitor to the plaintiff's solicitor with another paper containing an alternative proposition. I think paper B. is with the evidence sufficiently identified as the paper referred to, and mentioned in the letter from the plaintiff to the defendant, of the 29th September, 1859, and therefore is taken out of the operation of the Statute of Frauds. It is quite true that it was contemplated that this memorandum should be formally endorsed on the original agreement and signed, and if it were necessary that this should be done to enforce the plaintiff's rights the court would compel it to be done. This being so, the court can without that formality proceed here to execute it. The only question on my mind is as to an ambiguity on the face of the paper B. in regard to the time from which interest should run. no objection on this score was made at the hearing, probably because it was well understood between the parties that interest was to be payable according to the original contract; and this I think is the fair construction of the paper, which fixing itself no time from which interest is to run, leaves it to be governed by the original agreement, which, except as to the extension of time for payment of the £750, is in all other respects confirmed. The plaintiff is to blame in not having exhibited and made out to the defendant a proper title, as by the original agreement he was bound to do, and his attention was called to it more than once by the defendant's solicitors and abstracts demanded. It is quite true that the defendant's agreement was at an end for default in plaintiff's solicitor not delivering a proper abstract in time; but this was before July, 1859, and after that time the plaintiff was as much bound as before to make out a good title. The memorandum delivered to the defendant's solicitors cannot be considered such an abstract or explanation of the title as must content defendant, who was not bound to hunt up the plaintiff's title deeds or search out the chain of title at the registry office from such imperfect information as the memorandum afforded.

Decree—Specific performance of original agreement as named by Exhibit B. Reference as to title. Reserve further directions and costs.

CHANCERY CHAMBERS.

Reported by A. GRANT, ESQ., *Barrister-at-Law, Reporter to the Court.*

MAUGHAN v. WILKES.

Attachment against a married woman.

A married woman, defendant, living with her husband. was ordered to bring certain accounts, as administratrix, into the master's office, and having disobeyed the order, an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shews some ground of exemption.

In this case an order to administer the estate of the late Walter Ewing Buchan had been obtained and carried into the master's office. In proceeding to take the account, the master had issued his warrants requiring the defendants, one of whom was a married woman, to bring certain accounts relating to the estate into his office, which having been disobeyed by her a motion was made by *Freeland*, for an order to commit for contempt.

SPRAGGE, V. C.—This is an application for an order for the commitment of the defendant Anne Wilkes, a married woman, for contempt, for not bringing into the master's office certain accounts directed by the master to be carried into his office, she having, as his certificate states, been duly required so to do. Anne Wilkes is made defendant as administratrix of the estate of Walter Ewing Buchan, deceased; her husband is made a co-defendant.

Upon the application being made, I stated that it was my impression that the application could not be granted, and on a subsequent day I was referred to two cases in support of the application. One of them, *Bunyan* v. *Mortimer*, (6 Mad. 278,) only decides that an attachment cannot issue against a married woman for not answering, without a previous order that she should answer separately from her husband. In the other case, *Otway* v. *Wing*, and *Wing* v. *Otway*, (12 Sim. 90,) an order was made against a married woman for the payment of money; but upon

the express ground that she as plaintiff constituted herself a single woman for the purposes of the suit, and must take the consequences of disobeying the orders of the court made upon her as plaintiff.

I do not think that these cases warrant the application that is made. According to the English cases the general rule is that the husband is in contempt, and is punishable by attachment for his wife's default. If she fail to answer he is liable to attachment, although he answers himself; and he is only excused upon shewing his inability to get his wife to answer. By the practice of this court, there being no attachment for want of answer, an order for the wife to answer separately goes as of course in a proper case, after the expiration of the time for the husband and wife to answer, in order to the bill being taken *pro confesso* against the wife, and I am informed that in this case such order has been obtained.

An attachment will issue in England against a married woman for not answering after order obtained that she shall answer separately; but it does not seem to me to follow that she is to be treated as a *feme sole* in all subsequent proceedings in this court, because she has allowed the bill to be taken against her *pro confesso*. The order to anwer separately has not been obtained by her; but is a proceeding taken by the plaintiff, being the only course by which he can get on in his suit.

The general rule, then, appears to me to be untouched, that the husband shall answer for the wife's default unless he shews some reason for being exempted. She is assumed to be under his control, and he must shew the fact to be otherwise. And this rule will apply much more forcibly in regard to the act, sought to be enforced here, than in regard to an answer, for it may be impossible for a husband to prevail upon his wife to put in an answer upon her oath; and the court would punish a husband for contempt who by threats compels a wife to put in an answer—(*Exp. Halsam*, 2 Atk. 49,) but the preparing and bringing in of accounts would, as a matter of business, more naturally devolve upon the husband than the wife; though of course her oath would be requisite, and he might be able to shew that he was unable to prevail upon her to do what was necessary.

The nearest case that I have found to the present is that of *Scarrow* v. *Walker*, referred to in the last edition of Smith's Practice page 542, where an order for a sergeant-at-arms having been made against a *feme sole*, she married, and an order was made that the husband and wife should put in an examination within one month after personal notice, or in default, that the sergeant-at-arms should go against the husband.

The case of the *Attorney-General* v. *Adams*, (12 Jurist, 637,) is a strong case against the attachments issuing against married women; the woman in that case had not gone by her husband's name; when the subpœna was served she stated that she was unmarried, and throughout the proceedings in the suit she was treated as unmarried; she was attached for want of answer, and committed to prison, and the fact of her marriage was first discovered upon her application to be discharged. Lord *Cottenham* made an order for her discharge, and refused to impose as a condition that no action should be brought.

The distinction that obtains where a decree is made against a married woman is important upon the same point. The general rule is, that decrees are enforced *in personam;* but the case of a decree against a married woman is a recognised exception to the rule.

The case of *Pemberton* v. *McGill* is referred to in a note to the last edition of Smith's Practice (page 275, n. 4, 25 L. J., Ch. 49), where, as I infer, process was ordered against a married woman. The case is thus stated: "A *feme convert* executrix, beneficially interested under a will to her separate use, living apart from her husband, had, without proving the will, possessed herself of the assets, and parted with a portion of them. In a suit by her co-executor she had appeared and answered separately, it was held that she could not by her coverture protect herself from answering as to the proceeds of the assets, of which she possessed herself." The order was probably made against the wife in consequence of the fact of her living apart from her husband. Upon the whole, I think the application must be refused.*

* This case was subsequently affirmed in appeal.

Ross v. Steele.

Sale under decree—Parties to deed.

A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the court.

In this suit a sale had taken place under the decree of the court, of certain premises mortgaged by the ancestor of the infant defendants, who were made parties to the conveyance by the solicitor of the purchaser, so that it became necessary for the conveyance to be approved by the judge in Chambers, so far as the interests of the infants were concerned; but

Spragge, V. C.—This conveyance is submitted for my approval by reason of the infant heirs of the mortgagor being made parties. The conveyance is to a purchaser at a sale under the order of this court. I have held that the infants are not proper parties under such circumstances, and I find that the same has been held in England in *Re Williams*, (21 L. J., N. S. Chy. 437.) I think the mortgagor or his heirs not proper parties to a conveyance to a purchaser at the sale.

Cooney v. Girvin.

Married woman—Motion by—Security for costs.

Where in the course of a cause it becomes necessary for a married woman, a party to the suit, to make an application exclusively on her own behalf, she can do so, only, by her next friend.

This was an application on behalf of the defendant Arabella Girvin, who was made a defendant to this cause with her husband, for an order on the plaintiff to give security to her for such costs as she might incur in defending the suit.

G. D. Boulton, contra, stated a similar application had been refused by his Honor *V. C. Esten;* but

Spragge, V. C.—The application made before my brother *Esten* was made by the wife on behalf of herself and her husband, and was refused on that ground probably, on the authority of *Oldfield* v. *Cobbett*, (3 Beav. 482.) This application is by the wife alone for security for costs. It is objected that she has not applied to answer separately. I should not think that a necessary preliminary, but the rule is, that a motion by a married woman can only be made by her next friend. *Pearse* v. *Cole*, (16 Jurist, 214.) The application must therefore be refused.

Crooks v. Street.

Sale under decree—Paying purchase money into court.

A purchaser of real estate, at a sale under the decree of the court, will not be ordered to pay the amount of his purchase money into court until the title has been accepted or approved of.

In this case a sale by auction of certain real estate had taken place under the decree of the court, at which one James Metcalfe had become the purchaser of a portion of the estate sold, who having neglected to pay in his purchase money after several demands made upon him for that purpose, a motion was made by *Morphy*, for the plaintiff, for an order directing the purchaser to pay the amount of his purchase money into court.

Hawkins, contra

Per Curiam.—This is an application for an order that Metcalfe, the purchaser of a portion of the property sold under the decree in this cause, may pay his purchase money into court.

This sale took place on the first of June, 1859. Ten per cent. was paid at the time of sale, in accordance with the conditions, and the residue was to be paid, and the conveyance executed, on the 22nd of August.

An affidavit has been filled in opposition to the motion, in which the solicitor for the purchaser states that he had applied repeatedly to the plaintiff's solicitor for an abstract of the title, but that up to the 22nd of August no abstract had been delivered; and Mr. Hawkins contends that the motion is irregular inasmuch as the title has neither been accepted nor approved, although he admits that an abstract was delivered a few days before the motion.

The practice upon this point is not so clear as we might have expected to find it; and certainly the course pursued by the plaintiff's solicitor in this case, has been, for some time, the uniform practice of this court. But it would seem nevertheless, the objection is well founded.

It is clearly settled now, although the point appears to have

been doubted in Lord Erskine's time, that purchase money will not be ordered into court, even when the purchaser neglects to attend the motion, unless the title has been either accepted or approved, (2 Daul. Prac. 1 Eng. Ed. p. 919, and cases cited; *Rutter* v. *Marriott*, 10 Beav. 83,) and it is equally clear that the vendor's solicitor may move for a reference as to title when the purchaser neglects to take that step on his own behalf. (Sugd. V. & P. 11th ed. p. 71.) The practice is stated by Sir Edward Sugden in this way: "If the purchaser neglect to complete his purchase, the practice is for the seller to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to enquire whether the party can make out a good title, and if he can, to obtain an order upon the purchaser to complete his purchase."

Now as the vendor has a right to an enquiry whether he can make out a good title, but has no right to an order for payment of the purchase money into court until the title has been either accepted or approved, it would seem to follow that the present motion is, under the circumstances, irregular. It cannot be regular to ask that which it would be clearly irregular to grant. And the books in ordinary use would seem to shew that view of the practice to be correct, although Mr. Smith would seem to state it differently. In Ayckbourn's Practice it is said, 3rd ed. p. 482, speaking of the order to pay in purchase money, "an order for such purpose, however, cannot be obtained until the purchaser has either accepted the title, or the master, upon a reference as to title, has reported that a good title can be made." And in Jarman's Practice it is said at page 310: "But before this motion can be made he must have accepted the title; or it must have been certified that a good title can be made."

The motion, therefore, must be refused, but, under the circumstances, without costs.

IN RE KENNEDY.

Infants and the statute 12 Vic., ch. 72.

In applying for the sale of real estate settled upon infants, the mother, by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life-interest vested in her under the settlement.

This was an application by *Leith* on behalf of Mrs. Ferrie, for an order to sell a portion of the real estate settled upon her children by a former husband.

ESTEN, V. C.—I think I may fairly consider that Mr. Kennedy died insolvent, and that nothing is coming to the children from his estate. I think that Mrs. Ferrie should make an affidavit, or that it should be shewn to my satisfaction that the property she holds is hers absolutely, and that the children have no interest in it. It will then appear that the only property these children have is that mentioned in the petition. Mrs. Ferrie or her husband is not bound to maintain them. I think, therefore, that a proper case will then be presented for a sale of the Mountain property, as the produce of the Hughson-street property is wholly insufficient for the purpose, and the Mountain property being likewise exposed to waste and dilapidation. I should, however, see the settlement. It may be necessary for Mrs. Ferrie to make an appointment in favour of the children. Mrs. Ferrie must join in the sale, and must surrender her life-interest for the maintenance and education of the children.

RE MCDONALD.

Infants and the statute 12 Vic., ch. 72.

In directing the sale of infants' real estates the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit. The court will order a sale of a portion of an infant's estate to save the rest when it is made to appear to be for the benefit of the infant.

This was also a petition presented for the purpose of selling a portion of an infant's real estate to pay off a mortgage existing on another portion thereof, known as the Homestead.

ESTEN, V. C.—I think it may fairly be considered within the scope of the act to sell part of the infant's property to save the rest, when it appears to be for the benefit of the infant. In the present case the Homestead, consisting of 70 acres, is exposed to loss by reason of the mortgage to Beattie, who will be entitled to recover on it, I presume, whatever it may be necessary to pay to the government in respect of the 55 acres purchased by him from McDonald, and which appears to be part of the lot C., of which therefore the family appear to retain about 150 acres. The mortgage is evidently intended as an indemnity against the deed for the fifty-five acres not being forthcoming, and if the government would not accept a separate sum for the 55 acres, and the whole lot C. became lost through the default in payment of the government price, no doubt Beattie could recover the whole amount of his mortgage and interest. It may be expedient and for the benefit of the infants that the residue of lot C. should be sold in order to prevent the foreclosure or sale of the 70 acres, but it is impossible not to see that the mother who presents this petition is looking rather to the present comfort of herself and her children than to their eventual good. The interest of the infants, however, is the only thing that this court can consider, and in making the enquiries which I am about to direct, the master must bear this fact in mind, namely, that he is not to consider the present comfort of the family so much as the ultimate good of the infants. The evidence is very imperfect, and has not been properly taken, as it ought all to be taken by the master. I shall therefore refer it to the master at Sarnia to enquire and state what property real and personal Angus McDonald possessed at the time of his death, and what has become of it; what debts were due to him, and what debts he owed; to enquire into and state the particulars of the transactions with Beattie, and whether the 55 acres sold to him is not part of lot C. mentioned in the petition, as still belonging to the family; and to enquire into and state the condition of the 70 acres and of lot C. respectively, and how much is due on lot C., and the respective values of lot C., or so much of it as still belongs to the family, and of the 70 acres, and how much lot C., or so much as still belongs to the family, would probably produce on a sale; and how much money would be required to procure a patent to be issued for the 55 acres purchased by Beattie, and whether a patent could be procured for such 55 acres without procuring a patent for the whole lot C.; and if the master shall be of opinion that it is expedient, and for the benefit of the infants, that the residue of lot C. should be sold in order to exonerate the 70 acres from the mortgage to Beattie, he is to state his reasons; and in making the foregoing enquiry he is to consider only the interest of the infants, and he is not to take into account the comfort or welfare of any person or persons, and he is to examine the infants separately and apart as to their consent to a sale of their interest in lot C., for the purpose before mentioned, and he is to explain the matter to them.

SIMPSON V. THE OTTAWA AND PRESCOTT RAILWAY COMPANY.

Receiver—Appointment of.

A receiver, though an officer of the court, stands in the position of trustee to all interested in the estate or fund: therefore in making the appointment the court will endeavour to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be likely to be brought into frequent communication.

In this case the receiver of the revenues of the railroad had been ordered, in consequence of the company having made default in payment of the interest due upon certain bonds of the company, and the plaintiffs having submitted the name of a person, his appointment was opposed on affidavits, setting forth that as between himself and the president of the company, a strong feeling of antagonism existed, and although perfectly fit and competent in all other respects, the consequence of his appointment would probably be that the interests of the company would sustain injury by reason of the want of friendly intercourse between the receiver and the persons interested.

The facts are more fully stated in the judgment.

Read and *Strong* for the plaintiff.

McDonald, contra.

SPRAGGE, V. C.—When a receiver is appointed it is on behalf of all interested in the estate or fund which he is appointed to receive; and, therefore, though an officer of the court, he stands in the position of trustee to all.

The case of *Wilkins* v. *Williams*, (8 Ves. 588.) contains a strong expression of opinion by Lord Loughborough in favour of the appointment of a person proposed as receiver by a mortgagee; but

inasmuch as any loss occasioned by a receiver falls upon the mortgagor or his estate, he is clearly interested in the appointment of a proper person, and when the estate is a sufficient security, even more interested than the mortgagee.

With regard to Mr Harris, the gentleman proposed in this case by the plaintiffs, his fitness as a man of integrity and business habits is not impeached. The objection is, that he and Mr. Bell, the president of the railway company, are upon a footing if not of hostility, still of unfriendliness towards each other, such as would probably operate to the prejudice of the company if he were appointed receiver. Mr. Harris, upon his examination, denies that he has any feeling of antagonism towards Mr. Bell, as president of the railway company, or individually. Upon being asked, however, if he had ever written anonymously in the newspapers against Mr. Bell, in any capacity, he denies having written against him as president of the railway company, or respecting the management of the railway, but he declined to answer further, on the ground that it was not a proper matter for cross-examination upon his affidavit. Upon being further asked if he had written letters published in the Montreal *Gazette*, reflecting upon Mr. Bell in any capacity, he says: "I cannot answer without seeing the letters, if there are any such."

It is further suggested, that some ill-feeling exists on the part of Mr. Harris, arising out of the removal of the railway account from the Montreal Bank, of which Mr. Harris was and is the agent at Ottawa; and which Mr. Harris says in his examination, were removed in spite of a pledge given to the contrary. Political differences, Mr. Bell having been a candidate for the representation of Ottawa, are also referred to, but they do not appear to have been of such such a nature as to make Mr. Harris objectionable on that score.

Now upon this application it is not necessary that I should adjudicate between Mr. Harris and Mr. Bell as if they were parties to a suit, or that I should find upon legal evidence whether Mr. Harris did write against Mr. Bell in the papers, as it is suggested that he did. Mr. Harris is proposed as a trustee, and in the discharge of his duties, will, I apprehend, necessarily have to communicate with the president of the company upon its business affairs, how much or how little I am unable to say; but if, as is sworn, the road stands in need of considerable repairs, it must almost necessarily become a matter of discussion between the receiver and the president as to what is necessary, and how it should be done, and the proceedings necessary in this court in relation thereto, and so probably in relation to repairs from time to time; new rails, new rolling stock, and the like.

If the motion was as to the appointment of a trustee to an estate upon which were mines, or a colliery, in which discussions as to conducting the business of the estate would necessarily arise between the trustee and the owner of the estate, such trustee being appointed for the protection of annuitant or other creditor, would the court hold such objections as are set up in this case sufficient reasons against the appointment of such trustee?

I think it would; the court would think it desirable that the trustee and the owner of the estate should be mutually free from unpleasant feeling. It is not wise, *unnecessarily*, when two have to work together, to appoint as one of them a person between whom and the other there exists a feeling of unfriendliness, and as to such feeling on the part of Mr. Harris, I give full credit to his disclaimer of entertaining any feeling of antagonism against Mr. Bell, but cannot read his evidence without coming to the conclusion that he regards him unfavourably—I should say with suspicion and dislike—and I must add, that I think the inference is not a violent one, that he has written against him in the newspapers; he himself says he cannot tell without seeing the letters if any there are.

Apart from this feeling, the existence of which I must ignore, I have no doubt that Mr. Harris would be a perfectly fit and competent person for the proposed office, and I decline to appoint him simply because I think it inexpedient under the circumstances.

There is no reason why some person entirely unexceptionable should not be appointed; the plaintiff should be at liberty to propose some such person, and I think that a preference should be given to the person named by him, if no valid objection exists against him.

It is not suggested that there would be any difficulty in finding such a person, and I think it would not be a sound exercise of discretion to place parties who have to act together in a false position, and that without any necessity for so doing.

In Re Freeman, Craigie, and Proudfoot, Solicitors.

Costs—Taxation of.

Where a solicitor offered to make a deduction from his bill, the court held that the master should not charge the solicitors with the costs of taxation, unless the bill had been reduced one-sixth by taxation independently of the voluntary deduction.

This was an application to vary the terms of an order made for the taxation of a solicitor's bill of costs against his client, under the circumstances stated in the judgment.

McDonald for the solicitors.

Roaf, contra.

Esten, V. C.—I do not think any of the grounds on which this order is impugned are tenable, except that it does not include all matters. The solicitors, however, waived this objection, and both parties proceeded under the order to a considerable extent: after which some difficulty arising in the master's office, and it being thought expedient to obtain a fresh order, they could not agree upon its terms. I cannot very well understand the contention with respect to the amount of the bill of costs. I think, however, that the solicitors were right in requiring the entire bill to be subjected to taxation; and then in making the promised deduction; but I think the master should not have charged them with the costs of taxation, unless the bill had been reduced one-sixth by taxation independently of the voluntary deduction. The solicitors were not warranted, I think, in introducing the words limiting the time within which the report was to be obtained; and they could, I think, have been held to their agreement, as evidenced by the correspondence; but Mr Davis, in his letter of the 18th of February, intimates that if Mr. Proudfoot insisted upon the introduction of the words objected to the agreement might be rescinded; and Mr. Proudfoot replies with a letter, which amounts, I think, to an acceptance of that offer, and thus the agreement, which had been acted upon to such an extent, was rescinded, and the parties remitted to their original rights, and the solicitors entitled *stricto jure* to discharge the order; but under the peculiar circumstances, I think I ought not to discharge it, the client undertaking to pay to the solicitors all that is due to them in respect of other matters, and not to require the removal of the books from the office of the solicitors. I award no costs to either party.

In Re Foster.

Consolidated Statutes U. C, ch. 86—Partition—Notifying incumbrancers.

Partition, where ordered, is to be made by the real representative.

The question whether partition or sale should be ordered, is proper to be referred to the real representative, who is to make sale if ordered.

The court may order a sale in the first instance, if it see fit.

The court will use its own machinery for carrying the purposes of the act into effect.

This was an application by petition for partitition under the act 20 Vic., ch. 65, Consolidated Statutes of Upper Canada, chapter, 86. *R. Martin* for the petitioners.

Esten, V. C.—All necessary parties are present, and therefore the petition may be allowed in terms of the act of parliament, and judgment of partition pronounced upon it. The order should define the estates of the different parties. I think some evidence should be offered as to the family of Hugh Foster, so as to shew who were his co-heirs. There is not even an affidavit in verification of the petition. The real representative is to make the partition, if one be ordered. It would seem to be proper, if desirable, to refer the question of partition or sale to the real representative. (See sec. 21.) The real representative is to make the sale if it be ordered. No power of sale is expressly given except upon the report of the real representative; but it would appear that the court can order a sale in the first instance, or upon the report of the real representative, if, on an order for partition, he should think a partition unadvisable, and should so report to the court. I am not at present satisfied that a sale is necessary; and I think some evidence should be adduced on that head. Suppose a sale to be ordered, the next step is to make incumbrancers parties.

(See sec. 27.) The court will use its own machinery for carrying the purposes of the act into effect, so far as possible consistently with the express directions of the act, of which the provisions are somewhat singular, and do not appear to have been necessary or to have effected any improvement in the practice so far as courts of equity are concerned. With regard to the mistake in the conveyance to the infant H. C. Foster, I do not see how it is to be rectified. A bill would be necessary, and it is difficult to understand how a mere volunteer could maintain such a bill. It is clear that no consent could be given for the infant Elizabeth Bowes. Probably some method may be discovered by which this lot may be secured for the infant H. C. Foster, in furtherance of the intention of the father. The only person to be considered is the infant Elizabeth Bowes, and her interests may be sufficiently protected.

BLAIN V. TERRYBERRY.

Opening publication—Foreign commission.

Where it was considered conducive to the ends of justice, publication was opened, and leave given to examine further witnesses, and to issue a foreign commission on payment of costs and upon the terms of examining the witnesses in Canada, at the next examination term; and the witnesses residing out of Canada, at the same term, or by foreign commission in the meantime; if the latter, the commission to be returned and depositions disclosed two weeks before the examination term: it appearing not to be owing to the negligence of the party applying that the evidence had not been taken before.

This was an application by *Scott* for the plaintiff to open publication after the examination of witnesses before the court at Hamilton.

The circumstances under which the application was made appear in the head-note and judgment.

Wilson, contra.

SPRAGGE, V. C.—I have read the affidavits upon which this application is founded, and the depositions taken, and upon the whole think that it will probably be conducive to the ends of justice that the application should be granted.

I think it was not through the negligence of the plaintiff that the witnesses, whose evidence it is now desired to take, were not examined at the same time as the other witnesses; and, when the evidence was about to be taken, the plaintiff's counsel intimated that there were witnesses resident abroad whose attendance he had been unable to procure, and that he should apply for leave to examine them. The issue was upon the defendant Terryberry, and his counsel intimated no desire to postpone the examination of his witnesses, but preferred to proceed, and witnesses on both sides were examined, the learned counsel feeling probably as I incline to think is the case, that he would not suffer any serious disadvantage from the disclosure of his evidence.

The application should be granted upon payment of the costs of this application, and of a counsel for attending examination of witnesses—which I fix at £8 10s.—and upon the terms of the witnesses residing out of Canada being examined either at the same examination term, or by foreign commission in the meantime; if by foreign commission, the commission to be returned and the depositions disclosed at least two weeks before the examination term. The commissioners to be appointed in the usual manner.

MALLOCH V. PINHEY.

Opening publication.

The court refused to open publication in order to obtain evidence of an alleged conversation between a person mentioned in the pleadings and one of the defendants.

This was an application by *Strong* to open publication, on the grounds disclosed in the affidavit of the defendant Charles Hamnett Pinhey, setting forth, that since the examination of witnesses before the court in Ottawa, he had discovered that one Cuthbert, through whom plaintiff claimed title, had had a conversation with one of the defendants, the effect of which had a material bearing upon the points in issue, and tending to support the defence of the defendant.

Fitzgerald, contra.

VANKOUGHNET, C.—At the time of the application I thought the motion should be refused, but before finally disposing of it, have consulted my brother *Esten*, before whom the evidence in the cause was taken, and my interview with him has only confirmed me in my first opinion.

The defendants seek to open publication in order to prove a conversation between Cuthbert, who is named in the pleadings, and one of the defendants. The attention of the defendants to Cuthbert's connexion with the premises is called expressly by a statement in the bill which alleges that Pinhey, the testator, with the consent of McVeigh, and as his agent, in 1842 or 1843, agreed to sell these premises to Cuthbert. Now surely it would have occurred to any one diligent in the maintenance of his supposed rights, to have taken the trouble to refer to Cuthbert, and enquire of him how this transaction occurred, and what parts respectively McVeigh and Pinhey took in it. The not doing so seems to me negligence, to counteract which publication should not be opened; a thing never lightly to be done, to let in evidence, which would not be conclusive, if of much effect at all upon the case. If the conversation occurred, and the admission made after the mortgage to the plaintiff was executed, it is very doubtful whether it could affect his position thereunder. If made before, it would be of little importance, as there was then no court of equity in which the defendant McVeigh could assert any right. The court never encourages applications of this nature; and under the circumstances stated, I think the motion must be discharged with costs.

ENGLISH CASES.

PRIVY COUNCIL.

(Present—The Right Hon. Lord CHELMSFORD, KNIGHT BRUCE, L.J., TURNER, L.J., and Sir J. T. COLERIDGE.)

BOSWELL V. KILBORN.

Sale—Tender of goods—Refusal to accept—Action for non-acceptance—Damages—Form of action—Action for goods bargained and sold.

B. agreed to buy five tons of hops of good quality from K., to be delivered by K. K. sent a large quantity, far exceeding five tons, and B., after inspection, refused to receive any of them, as being of bad quality. K. never tendered the specific quantity of five tons, and took the whole parcel away, and then sued B. for the price of five tons:

Held (reversing the judgment of the Court of Q. B. of Lower Canada), that, as the five tons had never been separated from the parcel, and there was no complete delivery, B. could not sue for the price but could merely recover damages for non-acceptance, and the measure of such damages was the difference between the contract price and the market price at the time when the contract was broken. (March 5, 1862.)

This was an appeal from a judgment of the Q. B. of Lower Canada, reversing a judgment of the Superior Court of Lower Canada.

An action was brought by the resp. for breach of a contract by the app. to deliver 5 tons of hops.

The resp. were hop merchants, and they agreed in writing to deliver for three years, viz. 1855, 1856, 1857, five tons weight of hops each year, the hops to be good and merchantable, and of the growth of each respective year, to be paid for at the rate of one shilling, Halifax currency, per pound on delivery. The hops to be delivered free in Quebec. The declaration, after setting out the contract and the amount due for hops deliverable in 1856, averred that the plts. were ready to deliver five tons of good merchantable hops of the year 1856, and requested the deft. to accept and pay for the same, but he refused, whereby the plts. lost the benefit of the sale, and were put to expense in carting away and warehousing the hops, and the plts. claimed the full contract price of the hops. The deft. pleaded that the hops were worthless, and by another pleading known as "*defense au fond en fait*" put in issue all the material averments in the declaration.

At the trial it was proved that the plts. carted and sent to deft.'s brewery eighty-two bales of hops, which far exceeded in quantity five tons, and plts. tendered of this quantity five tons, but deft., after inspecting, refused them and never accepted them, and the whole eighty-two bales were removed by the plts. and stored. No particular five tons were ever separated or set apart from the mass. Contradictory evidence was given as to quality of the hops.

The Superior Court dismissed the action on the ground, that, as the declaration did not contain a proper allegation of tender of the hops, there could be no claim for the price of the hops, as goods bargained and sold. From this judgment the plts. appealed to the Court of Q. B. of Lower Canada.

The deft. in his appeal before the Q. B. contended, amongst other things, that as the contract was only an executory contract,

and no specific or particular five tons of hops had been set apart or distinguished from the bulk, no property in any of the hops passed to him, and therefore he was not liable to an action for the full contract price; and further, that in point of law, the true measure of damages, if he was liable at all in the action, was the difference between the contract price and the market price at the time of the alleged breach; and that, as the plts. in the action had adduced no evidence of such market price, and had gone only for the whole contract price as for a debt, there was no evidence of any damage, and consequently, no sufficient materials before the court upon which they could give a judgment in favor of the plts.; he also contended that the weight of the evidence was in his favour, as showing that the hops were not according to the contract.

The court of Q. B., on the 14th December, 1858, gave judgment in the said appeal, and after reversing and annulling the said judgment of the said Superior Court, proceeded to give the judgment which they considered the court below ought to have rendered, and thereby they adjudged that the present app., the deft. in the action, should pay to the the present resps. the plts. in the action, the sum of 560*l.* of current money of the province, being the full contract price of the hops, together with interest on the said sum from the 3rd of January, 1857, and costs of suit as well in that court as in the court below; and they further adjudged that, upon such payment, the deft. should give to the plts. a delivery order for five tons of the said hops. The grounds upon which the said judgment proceeded, were as follows: That, as the plts. had sent to the deft.'s brewery eight tons of hops, and then tendered the same to him for his acceptance of five tons; and that as the deft. had refused to accept them on the ground that they were unmerchantable, when he ought to have accepted them, it appearing to the court, by the evidence, that they were according to the contract; and that as the plts., upon the deft.'s refusal to accept the hops, had stored the whole in bulk; and as the plts. had done all they were bound to do; and as it was by the deft.'s own act that the specific five tons were not set apart and distinguished from the bulk; and as he had neglected to set five tons apart when it was in his power to have done so—the five tons, although not distinguished from the bulk, were, when so stored by the plts., at the deft.'s risk, and the property therein had passed to the deft.; and that as the plts. were entitled to specific performance of the contract; and that no objection had been made by the deft. to the form of the declaration; and that the only defence taken by him was as to the quality of the hops; and that as there was, in the opinion of that court, no necessity for further allegations of tender in the declaration than those contained therein; and that it was the duty of the deft. to have gone to the store, and have claimed the hops; they considered the judgment of the court below erroneous, and proceeded to reverse the same as aforesaid.

From this judgment the plts. now appealed.

M. Smith, *Q. C.*, and *W. Williams*, for the app., contended that as the contract sued on was an executory contract, and no specific hops were bought or sold, and no property passed to the app., it followed that he could only be liable to pay damages, and not the full price, and the damages consisted of the difference between the contract price and the market price at the time the contract was broken: (*Bush* v. *Davis*, 2 M. & S. 403; *Cunliffe* v. *Harrison*, 6 Ex. 903; Pothier, Contrat de Vente; Dalloz Repertoire de Legislation, c. 3, sect. 1.)

Manistry Q. C. and *Holland* for the respondents.

Judgment was delivered by

Lord Chelmsford.—This is an appeal from the judgment of the Court of Q. B. of Lower Canada, reversing a judgment of the Superior Court of that province given in favour of the apps. in an action for not accepting and paying for a parcel of five tons of hops under the following contract signed by the respective parties:—"Quebec, 6th March, 1855. Messrs. Kilborn and Murrell sell, and Joseph K. Boswell contracts for delivery to them for the following three years, viz. 1855, 1856, and 1857, five tons weight of hops, to be good and merchantable, and of the growth of each respective year, to be paid for at the rate of 1*s.* Halifax currency per lb. on delivery. Hops to be delivered free in Quebec." The declaration in the action, after stating the terms of the contract and the amount due to the plts. for the hops deliverable in 1856, proceeded to aver that the plts. were ready and willing, and tendered and offered to deliver five tons weight of good and merchantable hops, the growth of 1856, and requested the deft. to accept and pay for the same, yet that the deft. refused to accept of or pay for the said hops, whereby the plts. not only lost the benefit of the sale, but were put to great expense and trouble in carting away and stowing the hops in a warehouse, and in other respects the whole to the damage of 600*l.* currency, for which sum they prayed judgment, together with interest and costs. The deft. pleaded that the hops tendered by the plts. in fulfilment of the contract were bad and unmerchantable, and unfit to be used in his business; and as he also pleaded what is called a defence *au fonds en fait*, the effect of which was to put in issue all the material averments in the declaration.

It appeared in evidence that the plaintiffs having in their possession a quantity of hops of the growth of 1856, sent to the defendant's brewery a portion of them, consisting of eighty-two bales, which greatly exceeded the weight of five tons. The deft. desired that the hops should be unloaded from the sleighs in which they were brought, in order that he might inspect them; and the hops were accordingly taken out of the sleighs and placed in the deft.'s brewery, the plts. agreeing to take the hops away again if the deft. should not accept them. After the examination of a few of the bales, and a tender of the hops in two separate lots, one containing fifty-three bales, and one twenty-nine bales, but without any tender of the specific quantity of five tons, and without anything having been done by the plts. to distinguish that quantity from the rest of the bales, the deft. refused to accept the hops, and they were conveyed away by the plts. and deposited by them in a storehouse in the town of Quebec. There the hops were examined by persons on behalf of the respective parties, for the purpose of ascertaining their quality, and the plts. again offered to deliver five tons of hops to the deft., but down to the time of the commencement of the action, they had never weighed or set apart five tons of hops, so as to separate and distinguish them from the larger quantity deposited in the storehouse. A great number of witnesses were called on both sides to prove that the hops were, or were not of the quality stipulated for by the contract. But, unfortunately, this very long and expensive inquiry has become entirely fruitless, from the course which the cause afterwards took.

The learned judge of the Superior court treated the action as one brought to enforce the performance of the contract by compelling the defendant to take to the hops and pay the price; and as the plts. did not by their declaration offer to deliver to the deft. the quantity of hops in pursuance of the agreement, and as the tenders alleged in the declaration were not followed by a request that they might be judicially declared to have been good and valid, he dismissed the action with costs, reserving to the plts. the right of appeal. This judgment, however, was reversed by the Court of Q. B., the Chief Justice dissenting from the reasons on which it was founded, and the other judges declining to enter into them, considering them as objections which the judge had no right to raise, the parties themselves having waived them. The Court therefore proceeded to pronounce its own judgment, that the deft. should, within fifteen days from the service upon him of a copy of the judgment, pay to the plts. the sum of 560*l.* currency (being the contract price of the hops) with interest, and that upon payment the plts. should give to the deft. a delivery note upon the occupier of the store where the hops were deposited for the delivery to the deft. of five tons weight, to wit, fifty bales of the hops which had been tendered and stored, and that upon default of payment within fifteen days, and upon leaving with the prothonotary of the court the delivery order or duplicate, one for the deft. and the other to remain of record, execution should issue against the defendant.

Even if this judgment were properly adapted to the form of action chosen by the plaintiffs, it would be open to great objection. By the contract, delivery is to precede payment; by the judgment, payment is to be made, not merely before, but without any delivery. The deft. is adjudged to pay within fifteen days after service of a copy of the judgment; if he does not, the plts., by merely depositing with the officer of the court the delivery order in duplicate, would be entitled to sue out execution. And, supposing the deft. should pay the money and obtain the delivery

order, the plts. would have discharged themselves of every duty imposed on them by the judgment, and yet the deft. might be unable to obtain the hops in accordance with the contract, in consequence of the storekeeper having a lien upon them, or by the loss or deterioration of the hops, while they were at the risk of the vendor. But the app. contends that, looking to the form of action, the judgment is one which it was not competent to the court to pronounce. He says that the action is brought, not to compel the performance of the contract, but for damages for breach of the contract by the deft. in not accepting the hops, and that the proper measure of damages in such an action is the difference between the contract price and the market price at the time of the refusal to perform the contract.

If this question were to be decided by English Law, there could be no doubt as to the extent of the defendants liability under the circumstances of the case. Where there is a sale by weight or measure, and (to use Lord Ellenborough's language in *Bush* v. *Paris*, 2 M. & S. 403) "any acts are to be done to regulate the identity and individuality of the thing to be delivered, it is not in a state fit for immediate delivery;" and no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. The necessity of separating and distinguishing the article sold from a large quantity in order to constitute a complete delivery, cannot be more strongly exemplified than in the case of *Cunliffe* v. *Harrison*, 6 Ex. 903, which was cited in the course of the argument for the appellant.

But the respa. contend that, whatever may be the law of England on this subject, the case is to be tried by the old French law, in which the principles to be applied are different; and that by that law a vendor in some cases may recover the full price agreed upon where there has been no complete delivery of the subject according to the terms of the contract. Their lordships have been referred, in support of this view, to the civil law, and also to the writings of various jurists, and particularly to the treatise of Pothier, "Du Contrat du Vente," which contains all the learning upon the subject. A very few passages from this treatise will show that there is no material difference between the English law and the old French law with respect to the completion of contracts. Pothier, in his treatise, partie iv., fol. 309, states with his usual clearness when a contract is to be regarded as perfect, and when it is imperfect. He says: "Ordinairement le contrat de vente est censé avoir reçu sa perfection aussitôt que les parties sont convenues du prix pour lequel la chose serait vendue. Cette règle a lieu lorsque la vent est d'un corps certain est qu'elle est pure et simple. Si la vente est de ces choses qui consistent *in quantitate* et qui se vendent au poids, au nombre, au à la mesure, comme si l'on a vendu dix muids de blé de celui que est dans un tel grenier, dix milliers pesont de sucre, un cent de carps, &c., la vente n'est point comptée car jusxu'à ce temps, *nondum apparet quid venierit.*" So far the law is tolerably clear; but upon the question whether, when goods are sold by number, weight, or measure, the property is transferred to the buyer immediately, or only after the goods have been counted, weighed, or measured, there is some difference of opinion. Dalloz, in his "Repertoire de Législation de Doctrine et de Jurisprudence," tit. "Vente," ch. 3, sect. 1, ranges the jurists upon the opposite sides of the question, and suggests a distinction to reconcile the difference between them. He puts a case where the seller says to the buyer, "I agree to sell you so many gallons of wine in such a cellar at so much a gallon." Here (he says) is not only a sale by measure, but also a sale of an undeterminate thing; therefore such a sale does not operate as an immediate transfer of the property. And he adds, "tout le mond est d'accord sur ce point." But where the vendor says. "I agree to sell you all the wine in this cellar at so much a gallon," here the doubt arises. In this latter case the thing is ascertained, and it may be said there is no reason why the property should not pass immediately to the buyer. But even in such a case Dalloz states his concurrence with the opinion of Troplong, that until the measurement the wine remains at the risk of the seller. It is true (he says) the thing is ascertained, but the price is not; the price is, like the thing itself, an essential element of the sale, and the ascertainment of the price is not less necessary than the identification of the thing is to the completion of the contract. The delivery of the thing, and its being at the risk of the buyer, appear to be convertible terms, and it seems clear from all the authorities, that upon a sale by weight or measure, until the thing is ascertained by weighing or measuring, it remains at the risk of the seller. Pothier, in the same section (309) which has been already referred to, says, "It is only after measuring, &c., that the thing sold is at the risk of the buyer." "Car les risques ne puivent tomber que sur quelque chose de détermine." It is difficult to understand how the vender can have any claim to receive the price of the thing contracted for until he has separated it for the use of the buyer. Until it is ascertained and identified, it may be properly said to have no existence. And yet there is one short passage in Pothier (sect. 309) which is opposed to all his reasoning in the same section, upon which the respa. rely as establishing the propriety of the judgment in their favour The passage is this: "Il est vrai que dès avant la mesure, le poids, le compte, et dès l'instant du contrat les engagements qui en naissent existent. L'acheteur a dès lors action contre le vendeur pour se faire livrer la chose vendue, comme le vendeur a action pour le paiement du fruit en offrant de le livrer." One may fairly ask, to deliver what? The contract does not give the thing existence; it depends upon the vendor himself whether it shall ever exist. When there is a condition precedent to his right to the price unperformed by him, it is difficult to understand how he can recover the price upon the mere offer to perform. The C. J. treats the present case as one where the vender has executed his contract and has done all that depends upon him to entitle him to an action *ex vendito* against the vendee, and he goes on to say that, from the moment the vendor has offered to deliver the thing sold, and has put the vendee in a position to receive it, the thing is at the risk of the vendee. But how was the vendee in a position to receive the hops in this case? He could not go to the store and help himself out of the bulk to the proper quantity. And as to the hops being at the risk of the vendee, the C. J. is here directly opposed to the authority of Pothier, in the passage which has just been mentioned. It must always be borne in mind that by the terms of the contract the delivery in this case was to be made by the vendors, and therefore that an actual delivery by them, or acts done by them which were equivalent to a delivery, were a necessary preliminary to their being entitled to the price. This the court appears to have overlooked, for in their judgment they say that "it was fully in the app.'s power to have set apart, distinguished and taken away five tons weight of good and merchantable hops from among the said bales," thereby attributing to the app. the performance of acts which by the contract belonged to the respa. The judgment therefore proceeds upon false grounds, even if it was competent for the court to give a different kind of relief to that which the plts. claimed in their declaration. The plts. demand damages for breach of the contract on the refusal of the deft. to accept the hops tendered to him. The court has converted the proceeding into a suit to enforce the performance of the contract, which they order or intend to order, by their judgment to be carried out. This, the respa contend, they had a right to do, and they referred to a passage in 4 Guyot's Repertoire, *verbe* "Conclusions," p. 351, which the court was said to have acted upon in a former case, that "le juge peut rejeter, accorder, ou modifier les conclusions prises par les parties." Whether the power thus described can be pushed to the extent of enabling the court to change the nature of the action, and to administer relief entirely different from that which is sought by the plts., may be extremely questionable. But, if such a power exists, it can hardly be exercised with propriety in a case where a party has the choice between two remedies. Assuming that the plts. might have instituted a suit to enforce the performance of the contract, it cannot be doubted that they were at liberty to waive this form of proceeding, and to bring their action to recover damages for breach of contract. And when they have deliberately preferred the latter remedy, it ought not to be in the power of the court to force upon them the other to which they made no claim. Their action is form and in substance a demand for damages merely for the breach of the contract in not accepting the hops. In such an action, it was not disputed that the plts. could not recover the price of the hops, but only the difference between the contract

price and the market price at the time of the breach of the agreement.

Their lordships, therefore, are of opinion that the judgment of the Court of Q. B. is erroneous, and ought to be reversed. This—if nothing more were said—would have the effect of setting up the judgment of the Superior Court. But this judgment cannot be supported. They will therefore recommedd to her Majesty that both the judgment of the Court of Q. B. and of the Superior Court should be set aside, and that a new trial should be had between the parties. If under the defence *au fonds en fait*, the plts. will be compelled to prove the averment that they tendered and offered to deliver the hops, and will not be at liberty to show that the deft. waived a perfect tender, their lordships think that before the next trial the plts. ought to be permitted to amend their declaration by averring an offer by them to deliver the hops, and a waiver by the deft., which it is probable a jury will have no difficulty in finding in their favour; and this will clear the way to the determination of the real question at issue between the parties, viz., the merchantable quality of the hops. Their lordships think that the costs of the appeal ought to be paid by the resps., and that the costs of the rule in the courts below should abide the event of the new trial.

Reversed with costs.

Apps.' solicitors, *Simpson, Roberts* and *Simpson*.
Resps.' solicitors, *Dawes* and *Sons*.

UNITED STATES LAW REPORTS.

SUPREME COURT OF PENNSYLVANIA.

From the Legal Intelligencer.

SCHETTIGER v. HOPPLE, *et al.*

1. Although in law a deed estops the grantor from denying that he had title in the land conveyed, or that he did not mean to convey it, in equity and good conscience it ought to operate so far as to express the intention and understanding of the parties.
2. Courts of equity have power to reform written instruments at the instance of either plaintiffs or defendants, on the ground of fraud or mistake upon parol evidence, where no statutory provision intervenes.
3. A court of law may construe and enforce a written instrument as it stands, or may set it aside altogether if there be adequate cause, but it cannot compel alterations to be made.
4. The statute of frauds and perjuries does not stand in the way of the reformation of a written instrument by parol, upon the ground of fraud or mistake, although the effect would be to pass an estate by parol for the statute must be so construed as to prevent frauds, and not to promote them.
5. Before a Chancellor can reform a written instrument by parol evidence, on the ground of mistake, he must be satisfied that the mistake is on both sides.
6. In an attempt to reform a written instrument by parol on the ground of mistake, it is for the jury to find what was proved, but it is for the court to say whether the facts found establish such a mutual misunderstanding as would make it a fraud to hold the parties to their writing.

Error to the Court of Common Pleas of Cambria County.

Ejectment by *Phillip Schettiger* against *Clemens Hopple* and *Henry Hopple*.

The facts of the case fully appear in the opinion of the court, delivered by

WOODWARD, J.—The only question on this record is, whether parol evidence was admissible to prove that fourteen acres of land were included by mistake in the deeds under which the plaintiff claims; and, instead of attempting to educe from the multitudinous and jarring authorities on the subject of parol evidence, to vary written instruments, a rule that would be applicable to the question, I propose to treat it upon its elementary principles.

The plaintiff holds the legal title to the land in controversy, by virtue of two several deeds of the defendants, duly executed and delivered at different times, both of which describe the land conveyed by metes and bounds which confessedly include the fourteen acres. Ejectment by him, therefore, is strictly an action at law. The defendants have no legal title. And, at law, Henry Hopple, the immediate grantor of the plaintiff, is estopped by his deed from denying that he had title to the fourteen acres, or that he meant to convey it to the plaintiff. In like manner Clemens is estopped from denying the title he conveyed to Henry.

But in equity and good conscience those deeds ought to operate only so far as they express the intention and understanding of the parties; and if, indeed, the fourteen acres were not bought and sold, but were included in the deeds by mistake, the defendants claim that the deeds should be reformed so as to conform to the intention of the parties. In other words, they are plaintiffs in Chancery seeking a decree that the fourteen acres be reconveyed to them because included in their deeds by mistake. Notwithstanding the former action and the common law form of the present action, this is the proper light in which to regard the case—as upon all bind answer, in which the defendants on this record would be plaintiffs, and the present plaintiff defendant—they alleging the mistake under oath, and he under oath denying it. If then, the principle that a *plaintiff* cannot go into parol evidence for the purpose of obtaining a specific performance of a written agreement with a variation, though a defendant may resist it, were applied here, it would exclude the evidence on this ground at once, and dismiss the plaintiff's bill. But this principle, though settled in many English cases, was successfully denied by Chancellor Kent, in *Gillespie* v. *Moore*, 2 Johns. Ch. R. 598. He declared what every one must feel to be true, that there would be a most deplorable failure of justice if mistakes could only be shewn and corrected when set up by a defendant to rebut an equity. Ever since that case, which was decided in 1817, it has been a conceded jurisdiction of courts of equity in the United States to reform written instruments, at the instance of either plaintiffs or defendants, on the ground of fraud or mistake, upon parol evidence, where no statutory provision intervened. It is obviously an appropriate branch of equity. A court of law may construe and enforce the instrument as it stands, or may set it aside altogether if there be a lequate cause; but it cannot compel alterations to be made, and an avoidance of the entire instrument would be in most cases a nullification, and not an affirmance of what was really meant; Adams' Equity, 406.

How then would a Chancellor regard this defence if presented in the form of a bill for the re-execution and correction of the deeds?

In the first place the statute of frauds and perjuries would not stand in his way, for, though the effect would be to pass an estate by parol, yet the statute must be so construed as to prevent frauds, and not to promote them. And this would apply where mistake and not fraud was the ground of the relief sought; for though a mistake does not necessarily include a fraud; yet to set up and use a written instrument for a different purpose from that for which it was made, would be as inequitable as to take advantage of an instrument fraudulently obtained.

But the Chancellor would have to be satisfied that the mistake was on both sides—for if it be by one party only, the altered instrument will not express the intention of both. A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific execution, but it cannot be a ground for altering its terms; Adams' Eq. 411.

And what is the kind of proof a Chancellor would require? Chancellor Kent, after reviewing all the leading English cases, says, in *Gillespie* v. *Moore*, that the cases concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, does it satisfy the mind of the court. He quotes Lord Hardwicke as saying it must be proper proof, and the strongest possible proof; and Lord Thurlow's remark, that it must be strong, irrefragable proof, the difficulty of which was so great that there was no instance of its prevailing against a party insisting that there was no mistake.

We can get an adequate idea of the degree of certainty to which the parol proof must rise, only by considering the value of the testimony afforded by deeds solemnly executed between the parties. The rule in courts of law, as already intimated, is that the written instrument contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. And let it be remembered that the only purposes for which deeds were invented, and by the statute of frauds a writing signed was rendered necessary in regard to land, were to secure evidence of contracts certain as to subject matter and interest. They become, when executed, the *agreed evidence* of the intent of the parties to what is conveyed, for what estate, and under what conditions of covenants. Donat, cited in Best. on Ev. 289.

All that precedes their execution is presumed to have been abandoned by the parties, except in the solitary instance of a deed which, by the very terms of a contract is intended as a partial

execution, as in the case of *Girard* v. *McCulloch*, 4 W. C. C. R. 292. If a man, says Glanville, acknowledge the seal attached to a deed to be his own seal, he is bound to warrant the terms of the deed, and in all respects to observe the compact expressed in the deed as contained in it without question. To overcome evidence of such dignity and worth, parol proof ought to come as near to absolute demonstration as any moral proposition can be brought, and hence Chancellors everywhere, while asserting jurisdiction to reform deeds, have demanded a clearness and fulness of proof to justify the exercise of so extraordinary a power, which in practice have amounted to an almost total abnegation of the power itself.

It is one of the peculiarities of the present case that there are two deeds to be reformed. On the 7th April, 1853, Clemens Hopple and wife conveyed to Henry Hopple two pieces of land, containing together about one hundred and seventy-five acres, and including the fourteen acres in dispute. This is the first deed in which the mistake is alleged to exist.

Henry Hopple had purchased thirty adjoining acres of Henry Keogh, and obtained his deed therefor, on the 22nd June, 1848, and at the same time the above deed, Clemens to Henry, was executed; there was endorsed on the deed from Keogh to Henry, the agreement between Clemens and Henry, which, without date or signature, is furnished to us in the defendant's paper book. It is said that this is an agreement of exchange where the fourteen acres were secured to Clemens, though included in his deed to Henry. I should be sorry to doubt that the object of this agreement was just what is claimed for it, because a doubt would imply some comprehension of its meaning, and I confess its terms are unintelligible. Be it however what it is claimed to be, a reconveyance of the fourteen acres to Clemens, it proves no mistake in the deed, and if it did, how is Schettiger to be affected by it? He was not privy to the agreement, it was not recorded, and he had no notice of it. I say it does not prove a mistake in the deed, but the very reverse. On the same day that a grantor conveys one hundred and seventy-nine acres of land to another, the grantee executes a reconveyance of fourteen acres to the grantor. Does that prove a mistake in the deed? Quite the contrary. Both parties must have known that the fourteen acres had passed by the deed, else why the reconveyance? And if both knew that the fourteen acres passed there was no mistake.

But now as to the witnesses, Bender and Baker. Bender was present at the execution of the deed of Clemens to Henry, and witnessed it. "I don't recollect anything said when the deed was executed. Don't mind anything said of the fourteen acres at that time. I wrote the agreement on back of the Keogh deed. The agreement and deed from Clemens and Henry were executed at the same time and place. Squire Luther and I were present. I know the fourteen acres. It was agreed, as it states here, that the old man was to have the fourteen acres, more or less. I was not present when the deed was written. It was said there that day that the old man was to have that land: that was the agreement." This evidence was objected to as irrelevant, and considering that the question at issue was mistake or no mistake in the deed, it was most truly irrelevant. Laying out of view the confusion and inconsistency of the statements of the witness, what more do they amount to than proof of a conveyance and re-conveyance? The witness proves the deeds executed between the father and son, and describes what he understood to be their effect. The question of mistake rests then just where it rested before—on the deeds—and this testimony goes for nothing. The deeds that day executed, interpreted as this witness interprets them, excludes the conclusion of a mistake. The testimony of Baker, was, if possible, still more irrelevant. He tells us how Clemens acquired the land he conveyed to Henry, and how the latter got the thirty acres of Keogh, and then says, "they both agreed that Henry should keep the fifty acres, and Clemens should have the thirty acres and the fourteen acres for himself, and he never sold it to Henry, but kept it for himself." When this agreement was made, whether before or after the deeds, we are not informed, but the witness was not present at the execution of the deeds—does not speak of or allude to them, and of course, proves no mistake in them or either of them.

Such was the evidence of mistake on which the defendants relied. Let us notice in what circumstances of the parties it was offered, and permitted to prevail.

Henry Hopple having obtained his father's deed on the 7th of April, 1853, as before stated, entered into an article of agreement, on the 12th of September, 1853, for the sale of the same one hundred and seventy acres to Philip Schettiger, and agreed to make "a good and indisputable title therefor, on the 1st April, 1854." Accordingly, on the 1st of April, 1854, he and his wife executed their deed to Schettiger for the land, in consideration of $2,500. Schettiger went into possession and farmed the fourteen acres—some witnesses think under Clemens Hopple, as they saw him haul grain to the old man's barn. Browne says Schettiger told him he farmed the fourteen acres on shares for the old man. Other witnesses say he refused to give the old man a share of the grain—inquired about the lines, and claimed to have bought all the land that was described in his deed. The only witness who was present at the execution of the deed says, Henry sold the one hundred and seventy acres and allowance. "Nothing mentioned about the fourteen acres at the time the article was drawn. There was no reservation at all. Schettiger was to get what was in the original old deed—that was what was said, and nothing said of any reservation." Now, where in all this was that clear and overwhelming evidence of mistake on which a Chancellor would base a decree of re-execution? The testimony of Bender and Baker related to the deed between the father and son, and failed to establish any mistake in that. If Schettiger farmed the fourteen acres under the old man, after the purchase from Henry, it may have been because of an unexpired lease—or of a misunderstanding as to lines and boundaries, or to avoid present dispute, or for other reasons. As evidence of mistake running through two deeds and an article of agreement—instruments executed with great deliberation, and at intervals of several months—it is not worthy of a moment's consideration. It has been said in Pennsylvania that what occurs at and immediately before the execution of papers may be proved by parol to establish a mistake; but all the evidence on the record that would come within that rule proves here that there was no mistake. The defence does not rest on the muddy agreement that was endorsed on Keogh's deed. If it did, it would be necessary to interpret that instrument, and to bring home notice of it to Schettiger. But the case was put on the alleged mistake, and in respect to that there was a mis-trial throughout.

The evidence relied on was entirely inadequate to establish the mistake, and the jurisdiction invoked being a chancery jurisdiction it was to be exercised by the court instead of a jury. The question, said Chancellor Kent, in all such cases, is whether the proof is satisfactory to the court. That question was not met at all in this case. If the evidence is conflicting it is for the jury to determine what is proved, but it is for the court to say whether the facts found establish such a mutual mistake as would make it a fraud to hold the parties to their writing. And by means of special verdicts the court can always reach the real question in such a manner as to deal with it on its appropriate principles. In this case the discretion of the Chancellor could have been safely exercised without a special verdict, by rejecting the inadequate evidence offered, and directing a verdict for the plaintiff.

The judgment is reversed, and a *venire de novo* awarded.

MONTHLY REPERTORY.

CHANCERY.

V. C. W. RAWLINSON V. MOSS. *June* 21.

Practice—Solicitor and client—Right of lien where Solicitor discharges client—who to bear cost of Schedule of Papers delivered over on change of Solicitor.

Where a Solicitor discharges his client the client is entitled to the convenient use of his papers in pending business, notwithstanding any lien of the Solicitor.

Where a firm of Solicitors dissolves partnership that is a discharge of the client by the Solicitors.

If a client, on discharging his Solicitor, receives his papers, giving a receipt for them, at whose expense must the Schedule of Papers necessary for such receipt be prepared—*quære?*

Where a client selected one member of an old firm as his Solicitor, and it appeared that the delivery of papers was for the convenience of that Solicitor, it was *held* that, as between him and his late partners, the Schedule of Papers must be prepared at his expense.

Q. B. COMMON LAW. *May* 3.

GARTON AND ANOTHER v. THE BRISTOL AND EXETER RAILWAY CO.

Carriers—Liability—Railway Company—Reasonable conditions.

By the 6th William IV., c. 36 (local and personal), the defendants were authorized to fix the sum to be charged for the conveyance of small parcels not exceeding 500 lbs. weight, such sum not to exceed a reasonable charge for the same.

By the 8th and 9th Vic., c. 155 (local and personal), it is provided that it shall not be lawful for defendants to charge in respect of certain articles specified therein, or other articles of merchandise, more than the sum therein fixed in respect of such articles.

Held, that the words "other articles of merchandise" mean articles *ejusdem generis* with those in the section specified, and that the latter statute did not repeal the former.

Q. B. CUSACK v. ROBINSON. *May* 9.

Sale of goods—Statute of frauds—Evidence of receipt and acceptance.

Where specific goods of above the value of £10 were sold, and were by the vendee's direction delivered by the plaintiff at a certain wharf named by the vendee,

Held, in an action brought to recover the price of the goods, that the special contract might be proved without any memorandum in writing, as there was evidence of an acceptance and an actual receipt of the goods.

The acceptance, to satisfy the statute, need not follow or be contemporaneous with the goods, but may precede it.

B. C. *May* 8, 11.

SHIELDS v. THE GREAT NORTHERN RAILWAY CO.

Railway Company—County Court—Jurisdiction—Place of carrying on business.

Where a railway company had their principal office in London for the regulation and guidance of their undertaking in the various places through which their Railway passed and a station at A.,

Held, that they carried on business in London and not at A., within the meaning of 9 & 10 Victoria, c. 95, s. 60.

Ex. SWINFEN v. BACON. *May* 14, 15.

Landlord and tenant—Double value—Wilful holding over.

A. was tenant from year to year to B.; B. subsequently died, and devised his estate to C., from whom A. afterwards took a new lease. The heir-at-law of B. disputed the devise to C., and proceeded to recover the estates, but did not succeed. Notice to quit was given by C. to A., who held over. There was reasonable ground for belief, and A. did in fact believe, that he had a *bonâ fide* ground for refusing to quit.

Held, that such holding over under the circumstances was not "wilful" within 4 Geo. II., c. 21, s. 1, so as to entitle the landlord to double value. Such holding over must be contumacious. Where it is *bonâ fide* the statute does not apply.

Judgment of the Exchequer affirmed.

Q. B. HOLLAND v. RUSSELL. *May* 30.

Money paid to an agent under mistake of fact—Termination of liability of agent to refund by settlement of accounts with his principal.

When money has been paid to an agent under a mistake of fact and the agent has either paid it over or settled his account with his principal, and is guilty of no fraud in the matter, he is not liable to refund the money.

Ex. ADAMS v. GREAT WESTERN RAILWAY CO. *Nov.* 16.

Jury—Perverse verdict—What does not amount to.

A verdict is not perverse when it is not contrary to the direction of the Judge on a matter of law, even though it be against the advice or opinion of the Judge on some matter rightly left to the jury; and as in cases of contract (except where the law gives a measure of damage) the amount of the damages is for the jury, their verdict cannot be disturbed on account of their having given an amount of substantial damages where the Judge was of opinion that they should only have given nominal damages, the amount not being excessive.

Ex. ANGELL v. FELLGATE. *Nov.* 16.

Practice—Compulsory reference—Matter of account.

An action for breach of an agreement to keep premises in repair, money being paid into Court, is a fit subject for compulsory reference under the Common Law Procedure Act, 1854, as involving in part "matter of account."

Ex. BROWN v. CLIFTON. *Nov.* 21.

Practice—Venue—Changing.

When a Judge at Chambers has made an order to change the venue, on a special affidavit shewing a *prima facie* case, the proper course is not to move to set it aside, but to apply at Chambers on a counter affidavit for an order to bring back the venue.

C. P. HOEY v. FELTON. *Nov.* 16, 18.

False imprisonment—Special damage—Rejection of evidence as too remote.

Where, in an action for false imprisonment, the plaintiff sought to prove special damage by tendering evidence to shew that, if he had not been imprisoned, he might have kept an appointment, whereby he would have obtained a situation; on regaining his liberty he was unwell, and therefore did not keep his appointment, but went on the following day, when he was too late to obtain the situation. This evidence was rejected by the Judge who tried the cause; and on a motion for a new trial on the ground of improper rejection of evidence, it was

Held, that the learned Judge was correct in his decision, as the evidence of damage was too remote.

Ex. IN RE ———. *Nov.* 21.

Attorney acting without authority—Liability of to answer an affidavit.

The Court will not grant a Rule calling on an Attorney to answer the matters in an affidavit on the grounds of his having acted without authority, when there is any doubt whether he may not have done so erroneously, and not fraudulently.

Ex. MASH v. ASH. *Nov.* 21.

Practice—Rules—Affidavits.

A Rule not drawn up as on reading affidavits, if any were read on moving, is irregular, and will be discharged.

C. P. SEARLE v. LINDSAY AND OTHERS. *Nov.* 22.

Master and servant—Liability of master—Negligence of fellow-servant.

The plaintiff was employed as third engineer on board of a ship owned by the defendants. The defendants had employed a competent head engineer, by whose neglect to put a part of the machinery in a safe condition for working it, the plaintiff was injured.

Held, that the relation of fellow-servants existed between the head engineer and the plaintiff; and that as the defendants, their masters, had not been guilty of want of due and proper care in providing proper machinery or in employing competent servants, they were not liable for the injury done to the plaintiff.

Q. B. OGDEN v. GRAHAM. *Nov.* 27.

Charter party—Construction—Safe port—Meaning of term.

By the terms of a charter party a ship was to proceed to a certain place, and thence to a safe port, to be named by the defendant. The defendant named a port at a place where, there being a rebellion, the ship could not enter without a permit, which could not be obtained.

Held, that the place named was not a safe port.

Ex. CASWELL v. GROATT. *Nov.* 22.

Arbitration—Award—Setting aside.

Where an arbitrator has awarded less than £20 to the plaintiff, and has certified under the County Court Acts that the case was fit to be tried in the Superior Courts, but has omitted to certify to give the plaintiff costs on the superior scale, under the rules as to taxation of costs, the Court will not send back the award to him merely on an affidavit of belief that he intended to give the latter a certificate; nor will the Court look at any statement on his part as to what his intention was.

Ex. POTTER v. FAULKNER. *Nov.* 26, 27.

Master and servant—Volunteer service—Injury by fellow-servant—Negligence.

B's servants were occupied in loading bales of cotton out of B's warehouse into B's waggon. A voluntarily assisted B's servants. By the negligence of B's servants A was injured.

Held, affirming the judgment of the Queen's Bench, that A had no cause of action against B.

Under the circumstances above mentioned, a volunteer servant is in no better position than if he were the regular hired servant of the master.

Ex. ROSE v. REDFERN. *Nov.* 22.

Arbitration—Award—Setting aside—Direction as to costs.

It is no ground for setting aside, or sending back, an award, that the arbitrator has fixed the cost of his own award (the amount not being shown to be excessive), nor that he has said nothing as to the plaintiff's costs, the plain inference being that he meant the plaintiff to pay his own costs.

Ex. BISSILL v. WILLIAMSON. *Nov.* 11.

County court, action in—Pendency of action in superior court on the same question—Staying of proceedings.

Plaintiff commenced an action of ejectment in one of the superior courts, and, while it was pending, entered a plaint in respect of the same matter in the county court. Defendant pleaded in defence, the action in the superior court, whereupon the Judge called for and obtained an undertaking from plaintiff to discontinue the action in the court above; and notwithstanding that the undertaking was objected to by defendant, disallowed the plea, and ordered the defendant to give up possession.

Held, on appeal to this court, that the Judge was right in so doing.

C. P. FRASER AND OTHERS v. PENDLEBURY. *Nov.* 7.

Money had and received—Involuntary payment—Duress—Estoppel.

A mortgagee agreed to assign her interest on payment of principal, interest and costs.

An excessive claim being made for costs by the mortgagee, who refused to execute the transfer unless the sum was paid, the assignee, with the sanction of the mortgagor, paid the sum claimed under protest.

Held, that the mortgagor might recover the excess in an action for money had and received as a payment made involuntarily under undue pressure.

Held, also, that the mortgagor was not estopped from setting up his claim by the recital in the assignment, that the whole sum paid was due for principal, interest and costs; because a recital, although an estoppel to the parties to the deed, where the matter of the deed itself is in dispute, is not so in a matter which is collateral to the deed.

Ex. *Nov.* 18.

THE LONDON AND NORTH-WESTERN RAILWAY COMPANY, *Appellants*, v. BARTLETT, *Respondent*.

Consignor and consignee—Acceptance of goods by consignee—Liability.

The consignee of goods may, at any time, dispense with the mode of delivery adopted by the consignor; and the contract between the consignor and the carriers is to deliver at the consignee's, unless the consignee shall otherwise order. Therefore, where a railway company, instead of delivering wheat to a consignee, kept it at one of their stations at the request of the consignee, and injury resulted from the wheat remaining too long tied up in bags.

Held, that the company were not liable in an action by the consignor for the loss sustained.

Ex. MADEN AND WIFE v. CATANACH. *Nov.* 11.

Trial—Witness—Incompetence—Absence of religious belief.

A plaintiff offering to give evidence, was sworn on the *voir dire*, and stated that she did not believe in God, or in a future state of rewards and punishments, nor in the religious obligation of an oath, but that she was bound by her own conscience to speak the truth.

Held, that her evidence was rightly rejected.

Quere, whether there was any authority to interrogate the witness as to her religious belief?

Ex. ALLSOP AND OTHERS v. DAY AND OTHERS. *Nov.* 11.

Bills of Sale Act (17 & 18 *Vic. c.* 36)—*Registration under—Receipt and inventory not a bill of sale.*

The trustees of a married woman purchased, under the terms of the settlement, the household furniture and effects belonging to her husband. The receipt was in these terms: "Received of J. D. and C. J., the trustees under the deed of settlement, for the benefit of my wife, the sum of £93 6s. 6d. for the purchase of my household goods and effects contained in the enclosed inventory and valuation as purchased this day by J. D. and C. J. as trustees named in the deed of settlement, and empowered so to purchase by such deed: the date of such deed is Nov. 5, 1858. G. French."

The goods remained in the house of French, and he and his wife continued to live together. The goods were afterwards seized under a writ of *fi. fa.*, at the suit of the plaintiffs, when the defendants, who were the trustees under the settlement, claimed them.

Held, that the receipt and inventory together did not amount to a bill of sale; that the document did not require to be registered under the Bill of Sales Act; and that therefore the defendants were entitled to the goods at the time of the seizure.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

HERBERT STONE McDONALD, of Gananoque, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 14, 1862.)

JOHN TEMPLETON, of London, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 14, 1862.)

GEORGE DUNSFORD, of the Town of Peterboro', Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 14, 1862.)

WILLIAM PATRICK, of Clifton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted June 21, 1862.)

AUGUSTUS ROCHE, of Port Hope, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted June 21, 1862.)

CLERKS OF COUNTY COURTS.

CHARLES RICE, Esquire, to be Clerk of the County Court in and for the United Counties of Lanark and Renfrew.—(Gazetted June 14, 1862.)

CORONERS.

GEORGE L. PATTS, Esquire, Associate Coroner County of Victoria.—(Gazetted June 21, 1862.)

DIARY FOR AUGUST.

3. SUNDAY..... *7th Sunday after Trinity.*
9. Saturday..... Articles, &c., to be left with Secretary of Law Society.
10. SUNDAY..... *8th Sunday after Trinity.*
13. Wednesday... Last day for service of Writ County Court.
17. SUNDAY..... *9th Sunday after Trinity.*
19. Tuesday..... Last day for Notice of Chancery Examination Term, Toronto.
21. Thursday..... Long Vacation ends.
23. Saturday..... Declare for County Court.
24. SUNDAY..... *10th Sunday after Trinity.*
25. Monday..... TRINITY TERM begins.
29. Friday..... Paper Day, Q. B.
30. Saturday..... Paper Day, C. P.
31. SUNDAY..... *11th Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

AUGUST, 1862.

THE COURT OF IMPEACHMENT AND THE COUNTY JUDGE OF ELGIN.

During the last month, the public and profession were startled by the strange and solemn proceedings incident to the impeachment of a Judge of one of our County Courts, before the Court of Impeachment for Upper Canada, composed of the three heads of the Supreme Courts in this Province. The novelty of the proceeding, the solemn character of the tribunal, and the reputation of the Judge who has been called upon to play so sad and so prominent a part in the impeachment, require from our hands something more than a passing comment.

By the Act 20 Vic. cap. 58 (Con. Stats. U. C. cap. 14), there was established in Upper Canada a Court of Impeachment, for the trial of charges preferred against Judges of County Courts, having all the incidents, powers and privileges of a Superior Court of Record. The Judges of this Court are, the Chief Justice of Upper Canada, the Chancellor of Upper Canada, and the Chief Justice of the Common Pleas; and in case of the illness or absence of any of said Judges, the senior Puisne Judge of the Superior Courts of Common Law may act in his place.

The jurisdiction of the Court is only to be invoked in case the Governor-General finds any complaint for inability or misbehaviour in office against any Judge of any County Court, *sufficiently sustained*, and *of sufficient moment* to demand judicial investigation by the Court of Impeachment; in which case he shall direct such complaint, and all papers and documents therewith connected, to be transmitted to the Chief Justice of Upper Canada as President of the Court; and thereupon the said Court shall appoint a day for the meeting of the Court, and the trial and adjudication of the charges laid and set forth in the complaint. The judgment of the Court is to be certified to the Governor, and is to be final and conclusive to all intents and purposes whatsoever. If the complaint be for inability, the Court is to determine whether such inability has been proved; and if it has, the nature of the inability, and whether the same is, in the opinion of the Court, of such a character as to render it expedient to remove the Judge. If the complaint be for misbehaviour in office, the Court is to determine whether the Judge is guilty or not guilty; and if not guilty, whether the conduct of the Judge is censurable or unbecoming. The Court may also award reasonable costs to either party, according to the nature of the adjudication, viz.: if the complaint be adjudged false or vexatious, the judge shall be entitled to his costs of defence; if the conduct of the Judge complained against (whether he be found guilty or not guilty) be adjudged censurable and unbecoming, the complainant shall be entitled to his costs of prosecution.

The object of the measure appears to be to place the County Judges in a better position of independence than they had previously occupied, and to relieve the Crown of what is in effect a criminal trial of a branch of the judiciary, and which might in some cases be influenced by political feeling. In carrying out this object, the Legislature has established a Court of criminal jurisdiction to some extent similar in purpose and effect to the High Court of Impeachment in Parliament.

In England an impeachment is in the nature of a criminal proceeding, and is described (4 Bl. Com. 259) as a presentment by the House of Commons, the most solemn grand inquest of the whole kingdom, to the House of Lords, the most high and supreme court of criminal jurisdiction in the kingdom. The articles of impeachment are a kind of bill of indictment found by the Commons and tried by the Lords, who are in cases of misdemeanor considered not only as their own peers, but the peers of the whole nation.

The mode of proceeding, as laid down by Mr. May, in his *Parliamentary Practice*, is as follows: A member of the House of Commons, in his place, first charges the accused of high treason, or of certain high crimes and misdemeanors; and after supporting his charge with proofs, moves that he be impeached. If the House deem the grounds of accusation sufficient, and agree to the motion, the member is ordered to go to the Lords, and "at their bar, in the name of the House of Commons and of all the Com-

mons of the United Kingdom, to impeach the accused," &c. (p. 501). And again, on page 49, he says: "In impeachments, the Commons, as the great representative inquest of the nation, first find the crime, and then as prosecutors support their charge before the Lords."

So in the United States. By the constitution of that country, it is declared that "the House of Representatives shall have the sole power of impeachment," and the practice there is similar to that which prevails in England—the Senate exercising the functions of the House of Lords.

These extracts indicate the practice heretofore established in conducting impeachments; and they should, we think, have been carefully considered before this case was sent to the Court of Impeachment. In Judge Hughes's case, the Crown was in no way represented—the prosecution was left to the dubious disinterestedness and solvency of a private prosecutor, who, we are informed, is the agent of a foreign corporation carrying on the business of an express company at St. Thomas.

The precedent is a bad one; but we hope, for the honor of the Crown, and for the protection of County Judges, that it will not be followed in any future cases. The impeachment of a Judge or public officer is a criminal proceeding, and is always conducted in England and the United States as a public prosecution. The wrong complained of is treated as a wrong against the whole community, and is prosecuted by the representatives of the nation as public prosecutors. So in ordinary criminal proceedings; the meanest offender is proceeded against by the Crown, "because the King," as Blackstone says, "in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore the proper prosecutor for every offence."

Now, why should the prosecution of a County Judge be treated differently? If he misbehaves in his office, he is guilty of a wrong which affects the whole community; and taking into account the dignity of his office, and the power and influence he wields, it is due to both Crown and people that his wrong-doing should be complained of by the Crown, and his impeachment conducted by the Attorney-General, or in his behalf. Besides, in the administration of justice, a judge necessarily comes into antagonism with the vices and aims of suitors; and we unhesitatingly say that as against the disappointed spleen of defeated litigants, and the envy of unprincipled aspirants or inefficient practitioners, he is entitled as of right to the protection which the honor of the Crown assures to him,—that in his impeachment no personal malice or private envy shall influence the fair trial of the charges preferred against him. The law gives the Crown the power to find a true bill against the Judge. Like the House of Commons, it must first find the crime; and then, as the public prosecutor, it should support its finding before the Court whose jurisdiction it has invoked. This view of the law and practice of impeachment was, we understand, taken by Mr. Chief Justice Draper in this case.

As to the particular case of Judge Hughes, we cannot say that the Government has exercised a wise discretion in sending him before the Court of Impeachment. The Act says that the jurisdiction of the Court is only to be appealed to in case the Governor finds any complaint against a County Judge *sufficiently sustained*, and *of sufficient moment*, to demand judicial investigation; and after a perusal of the charges and the finding of the Court, we doubt if there will be found many to say that the case was a proper one to invoke the jurisdiction of the second great court of criminal impeachment in this Province.

STATUTES OF LAST SESSION—25 VICTORIA, 1862.

The Session of Parliament just closed has not been as fruitful of legislation as former sessions. Although 109 Acts have been passed, few of them are of public or general interest; they chiefly amend the law as previously existing. The first Act (ch. 1) is *An Act to amend the Act respecting the Militia*, amending the Consolidated Militia Act (Con. Stats. Canada, ch. 35) in a few particulars. It authorizes the raising of the Active Militia or Volunteers, Class A, entitled to receive pay, from 5,000 to 10,000, leaving the number in Class B, in the unlimited discretion of the Commander-in-Chief;—and provides (sec. 10) that the Commander-in-Chief may, in the event of war, raise in addition to the Active and Sedentary Militia of the Province, regiments of Militia by voluntary enlistment for general service during such war, and for a reasonable time after its termination. The Commander-in-Chief may also (s. 11) sanction the organization of associations for purposes drill, and of independent companies of Infantry, composed of of professors, masters or pupils of Universities, Schools or other public institutions, or of persons engaged in or about the same, or of reserve men; but such associations or companies shall not be provided with any clothing or allowance therefor, nor shall they receive pay. In all other respects—especially as to "arms and ammunition" (which words were struck out of the Bill in passing through the House), we presume these associations or companies will be subject to the Militia Law.

Ch. 2 amends chapter 36 of the Con. Stats. Canada, and gives power to Her Majesty's Principal Secretary of State for War to construct, hold and work lines of telegraph, for military purposes, over any part of the Province.

Ch. 3 is the Supply act. It appropriates $3,230,926 38 for defraying the expenses of the Civil Government for the years 1861 and 1862, and authorizes a loan of 3,000,000 for the expenses of those years, to be raised by sale of Provincial Stock or Debentures. In all these Supply Acts a clause is added, apparently useless in these days of Responsible Government, providing that "the due application of all moneys expended under the authority of this Act shall be accounted for to Her Majesty, her heirs and successors, through the *Lords Commissioners of Her Majesty's Treasury*, in such manner and form as Her Majesty, her heirs and successors shall be pleased to direct."

The next three statutes relate to Customs and Excise Duties. Ch. 4 amends chapter 17 of the Con. Stats. Canada, relating to the Customs' Duties. Ch. 5 amends ch. 19 Con. Stats. Canada, relating to Duties on Spirits and Beer, and changes the name of Revenue Inspector to that of "Collector of Inland Revenue." Ch. 6 amends ch. 20 Con. Stats. of Canada, relating to Tavern Licenses.

Ch. 7 amends ch. 32 Con. Stats. Canada. This Act constitutes the Bureau of Agriculture a separate Public Department, and places all matters relating to Colonization and Immigration under the control of the Minister of Agriculture, unless the Governor in Council shall otherwise order.

Ch. 8 amends section 20 of ch. 40 of Con. Stats. Canada, respecting Emigrants and Quarantine, by requiring all persons acting as runners, soliciting emigrants for hotels, steamboats, &c., *at any port or place within this Province*, to obtain licenses from the Mayor of the Municipality within which they act.

Ch. 9 is the usual *Act to continue for a limited time the several Acts therein limited, and for other purposes.* The Acts of Canada continued are 7 Vic. c. 10, 9 Vic. c. 30, 12 Vic. c. 18, and 13 and 14 Vic. c. 20, relating to Bankrupts; 10 and 11 Vic. c. 1, Trinity House, Montreal; 14 and 15 Vic. c. 159, Sons of Temperance, Canada West; 9 Vic. c. 12, 10 and 11 Vic. c. 38, and 12 Vic. c. 97, Registration of Titles in the County of Hastings. The other Acts are certain Acts of the late Parliament of Lower Canada. All these are continued until the 1st January, 1863, and thence until the end of the next ensuing session of the Provincial Parliament and no longer.

Chs. 10, to 17, relate to Lower Canada.

Ch. 18 is *An Act respecting the Court of Error and Appeal in Upper Canada.* S. 1. The President of the Court when appointed by commission under 24 Vic. c. 36 is to have precedence over all other Judges of Law or Equity in Upper Canada. S. 2. Within six months after entering upon his duties, he is to take an oath of office before the Governor in Council. S. 3. Any retired Judge holding a patent for an annuity of two-thirds of his former salary, when appointed President, is to be entitled to a further sum per annum equal to one-third of the amount of his former salary. S. 4 Repeals s. 8, ch. 13 of Con. Stats. U. C. and substitutes the fourth Thursday next after the several terms of Hilary, Easter, and Michaelmas for the commencement of the sittings of the Court, subject to any adjournment.

Ch. 16 amends the Municipal Law of Upper Canada, so far only as relates to the Sessions of Recorders' Courts,—repealing 23 Vic. c. 50, and substituting the following for s. 377 of ch. 54, Con. Stats. U. C.: "The Recorders' Courts shall hold four sessions in every year, and such sessions shall commence on the first Monday in the months of March, June and September, and on the third Monday in December"—to take effect from the 1st August, 1862.

Ch. 20 makes a most material alteration in the Statutes of Limitation, and one highly beneficial. It is *An Act to amend the law relating to the limitation of actions and suits in Upper Canada:*—

WHEREAS it is desirable to abolish the distinction between plaintiffs or persons resident within or without the jurisdiction of the Courts of Law and Equity in Upper Canada, in the limitation of actions and suits: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. Any plaintiff or person in any action, suit or proceeding, either at Law or in Equity, who has been or is resident without or absent from Upper Canada, shall have no greater or longer period of time to bring, commence or prosecute any such suit, action or proceeding, by reason of such nonresidence in, or absence from Upper Canada, than if such plaintiff or person had been or were resident in Upper Canada, when the cause of such action, suit or proceeding first accrued; and all and every exception or distinction in any law or statute relating to the limitation of actions now in force in Upper Canada, in favour of any plaintiff or person resident without or absent from Upper Canada, by whatever terms or words such residence without or absence from Upper Canada is stated or described in such law or statute, shall be, and the same are hereby abolished and repealed.

2. This Act shall not apply to suits or other proceedings instituted before the first day of July, one thousand eight hundred and sixty-three.

As the operation of this Act is suspended by the last clause, ample opportunity is afforded to parties out of the Province to take steps to protect their interests before the 1st July, 1863.

Ch. 21, restores to Registrars the authority to discharge mortgages, on production of the proper certificate, which had been taken away by the Act abolishing registration of judgments (25 Vic. c. 41), and makes valid all certificates of discharge registered since the 18th May, 1861.

Ch. 22, amends s. 1, ch. 105, Con. Stats. U.C., by striking out the words—"or turns any horse, cattle, sheep, or swine upon, or permits any such to go or range at large upon"—from the first part of the section.

Ch. 23, alters the mode of issuing Shop and Tavern Licenses in the Cities of Upper Canada, repealing the provisions heretofore existing in regard to such in the first five subsections of s. 246 and s. 259, of ch. 54, Con. Stats. U. C., and the 23 Vic., c. 53, by giving (from the 1st January, 1863) the power heretofore exercised by City Councils to the Boards of Police Commissioners.

Ch. 24 amends the Act of last Session 24 Vic. c. 53, separating the City of Toronto from the United Counties of York and Peel, by enacting that the said Act shall not be read or construed as establishing a County Court of the County of the City of Toronto; but shall be received as establishing for the said City separate sittings for the trial of cases sued in the then existing Courts, and as providing for payment to the said City of jury fees paid on cases entered for trial at sittings of Courts holden therefor. The second section confirms all proceedings heretofore taken in the County Court of the County of the City of Toronto, and provides that all such shall be amended, renewed or continued in the County Court of the United Counties of York and Peel.

The remaining Acts are Local and Private Acts.

NEW CROWN LAW OFFICERS.

The late change of Government has given us new Law Officers of the Crown for Upper Canada. The Hon. John Sandfield Macdonald, Q. C., of Cornwall, is Premier, and has received the appointment of Attorney-General West, *vice* the Hon. John Alex. Macdonald, Q. C., of Kingston, resigned; and the Hon. Adam Wilson, Q. C., of Toronto, is the new Solicitor-General, *vice* the Hon. James Patton, LL.D., Q. C., resigned. The new Attorney-General has been for a long period in public life, being now the senior member of the House of Assembly. He received his legal education under the supervision of Chief Justices McLean and Draper, and was called to the bar in Trinity Term, 1840. In 1849, he received the honor of a silk gown, and was appointed Solicitor-General on the elevation of Mr. Solicitor-General Blake to the Chancellorship. He resigned that office in 1851, and the following year was elected Speaker of the Legislative Assembly. He also held his present office of Attorney-General for a short period in 1858. The present Solicitor-General is comparatively new to political life. He was called to the bar in Trinity Term, 1839, and was for many years the law partner of the late Hon. Robert Baldwin. In 1850, during the administration of that distinguished politician, he, together with the present Chancellor, and Justices Richards and Hagarty and others, received the patent of Queen's Counsel. He has held the office of Mayor of the City of Toronto for some years, and has the reputation of being a careful, learned and pains-taking lawyer.

The Law Officers for Lower Canada are the Hon. Louis Victor Sicotte, Q. C., Attorney General, and the Hon. J. J. C. Abbott, D.C.L., Q.C., Solicitor General.

THE YELVERTON MARRIAGE CASE.

This celebrated case is now going through the preliminary stages preparatory to its reaching the House of Lords. The Irish and Scotch Courts have given judgments directly antagonistic to each other. In Ireland, the verdict declaring Maria Theresa Longworth to be the wife of Major Yelverton, has undergone the test of an investigation in the Court of Common Pleas there, and has been sustained owing to the Judges being equally divided in opinion. In Scotland, however, Lord Ardmillan has given judgment the other way. It will be curious to watch the future proceedings in the case.

THE LAW OF REGISTERED JUDGMENTS.

At last we are likely to have some authoritative decision upon the conflicting cases relating to registered judgments. The case of *Fraser* v. *Anderson*, which will be found among the Queen's Bench cases in this number, is to be appealed. The questions involved are, as Mr. Justice Burns remarks, of great importance to the landed interests in this Province.

CHANCERY FALL CIRCUITS, 1862.

HOME CIRCUIT.

Toronto	Tuesday, 2nd September.

WESTERN CIRCUIT.

Sandwich	Tuesday,	16th September.
Chatham	"	23rd "
London	"	7th October.
Brantford	"	14th "
Hamilton	"	21st "
Barrie	"	28th "
Goderich	"	4th November.

EASTERN CIRCUIT.

Whitby	Tuesday,	16th September.
Cobourg	"	23rd "
Belleville	"	7th October.
Kingston	"	14th "
Brockville	"	21st "
Ottawa	"	28th "
Cornwall	"	4th November.

HEARING TERM.

Toronto, from Monday, 17th November, to Saturday, 29th November.

CHANCERY ORDERS.

FRIDAY, 9th May, 1862.

A Petition, filed under the 18th section of Order IX. of the General Orders of this Court, of the 3rd June, 1853, is to be set down to be heard in Court in the paper of Motions for Decrees. And when it is ordered that any new party or any present party may answer the petition, and that the petitioner shall be at liberty to set down the petition again, it is to be set down in like manner. And upon the copy of such petition to serve is to be endorsed the following memorandum or notice, namely, "If you do not appear on the petition, the Court will make such order on the petitioner's own showing, as shall appear just." And upon the copy which is to be served of the order to answer such petition, when the Court shall deem it advisable to make such order, is to be endorsed the following memorandum or notice, namely, "If you do not answer the petition, the Court will make such order on the petitioner's own showing as shall be just, in your absence; and if this order is served personally, you will not receive any notice of the future proceedings on such petition.' And when the party so served shall answer the petition, the same is to be set down to be heard upon notice in the same paper.

Petitions set down to be heard under the foregoing Order are to be set down not less than ten days before the day on which they are so set down; and notice thereof, when notice is required, is to be served upon all proper parties not less than seven days before such day.

Causes are to be set down for rehearing not less than ten days before the commencement of the rehearing Term for which they are so set down; and notice thereof is to be served upon all proper parties not less than seven days before said rehearing Term.

A notice of motion to set aside any proceeding for irregularity must specify clearly the irregularity complained of.

The Registrar is to prepare a peremptory list of causes set down for hearing for each day on which they are to be heard; and for that purpose the party setting down a cause for hearing, is to notify the Registrar of the day for which he has given notice of the hearing of such cause, not less than seven days before the day for which such notice is given.

(Signed) P. M. VANKOUGHNET, *C.*
J. C. P. ESTEN, *V. C.*
J. G. SPRAGGE, *V. C.*

6th June, 1862.

Sections fifteen and sixteen of General Order number nine of the General Orders of this Court of the 3rd June, 1853, are hereby abrogated and discharged.

Bills of Revivor.—Bills of Revivor and Supplement. Original Bills in the nature of Bills of Revivor, and Original Bills in the nature of Supplemental Bills, are abolished.

Upon any Suit becoming abated by death, marriage or otherwise, or defective by reason of some change or transmission of interest or liability, on the part of any plaintiff or defendant, by devise, bequest, descent or otherwise, it shall not be necessary to exhibit any Bill of Revivor or Supplemental Bill, or to proceed by any of the modes provided for by the sections of General Order by this Order rescinded, in order to obtain an Order to revive such suit, or a Decree or Order to carry on the proceedings; but an Order to the effect of the Order to revive, or of the usual Supplemental Decree under the former practice of this Court, may be obtained as of course upon prœcipe upon an allegation contained in such prœcipe of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an Order so obtained, when served upon the party or parties who would be defendant or defendants to a Bill of Revivor or Supplemental Bill, according to the former practice of this Court, shall from the time of such service be binding upon such party or parties in the same manner in every respect as if such order had been regularly obtained according to such former practice of the Court; and such party or parties shall thereupon become thenceforth a party or parties to the suit: Provided, that it shall be open to the party or parties so served, within fourteen days after the service of such order, to apply to the Court by motion or petition to discharge such Order on any ground which would have been open to him or them on a Bill of Revivor or Supplemental Bill stating the previous proceedings in this suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: Provided also, that if any party so served shall be under any disability other than coverture, such Order shall be o no force or effect as against such party, until a Guardian or Guardians *ad litem* shall have been duly appointed for such party, and the period of fourteen days shall have elapsed thereafter.

(Signed) P. M. VANKOUGHNET, *C.*
J. C. P. ESTEN, *V. C.*
J. G. SPRAGGE, *V. C.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

CHAPTER V.—(*Continued from page* 122.)*

The following forms of appointment by Judge and order thereupon are suggested for use :†

JUDGE'S ACT APPOINTING CLERK OR BAILIFF.

I, Judge of the County Court of the County of , by virtue and in pursuance of the powers to me given and belonging by the Division Courts' Act, do hereby appoint A. B., of the &c., *Yeoman*, Clerk, (*or* "Bailiff," *or* "a Bailiff") of the Division Court of the said County, to hold the said office during my pleasure. And I do direct that the said A. B. shall give security for the due execution of his office by entering into a covenant in the manner and form required by the statute, with *two* sufficient sureties; the specified liability thereunder as against the said A. B. to be not less than $, and as against the said sureties not less than $ each: such sureties to be approved by me.

Bond to Her Majesty,
A. B. bound in $
two sureties each in $

Given under my hand and seal at , this day of 186 .

Judge.

ORDER FOR THE APPOINTMENT OF OFFICER, CLERK OR BAILIFF.

In the Division Court in the County of

Upon the appointment by the Judge of the County Court of the said County, of A. B., of *yeoman*, as Clerk, (*or* "Bailiff," *or* "a Bailiff,") of this Court, and it appearing that the said A. B. has given the security required by law, it is ordered that the said A. B. be and he is hereby appointed and declared the Clerk (*or* "Bailiff" *or* "a Bailiff") of this Court.

Given, &c. By the Court. Clerk.

Before the order of appointment is passed the Judge, as already observed, should ascertain the sufficiency of the officer's sureties, and endorse his approval on the security covenant, the provisions in the 25th and 26th sections of the act being to enforce proper security before the officer acts; and whether the enactment be directory or imperative, the neglecting to settle the amount and approve the sureties would be a failure of duty on the part of the Judge.‡ (See Miller v. Tunis, U. C., C. P. R., vol. 10, page 425.)

As the Judge is required to approve the sureties and declare them sufficient for the sums in which they are bound, the power of making judicial investigation before approval is implied, and in cases where the Judge has not personal knowledge of the fact of sufficiency, and indeed in all cases, it seems proper that the sureties should justify by affidavit showing what they are worth over and above their debts.

The form of security covenant is given in schedule A to the Act, and follows closely, though not exactly, the form of covenant to be entered into by Sheriffs under cap. 38 Consol. Stats. U. C. There is no covenantee named, nor is the amount that each of the covenantors may be called upon to pay under the deed specified, and, *according to the form*, they may be treated either as jointly or severally liable, though the covenant is in fact a joint covenant. The proviso at the end of the deed that no greater sum shall be recovered under the covenant against the several parties than the deed specifies, is not a part of the undertaking of the covenantors, but it makes it the duty of the court to see that none of the parties to the deed shall be compelled to pay under it more in all than the sum which has been set opposite to his name, (see McArthur v. Coole 19 Q. B., U. C., 482; Miller v. Tunis, 10 C. P., U. C., 424 and sec. 149 of the Act, latter part.) The 27th sec. provides who may avail themselves of and sue as covenantees on this covenant—namely, any person suffering damage by the default, breach of duty or misconduct of the Clerk or Bailiff. The language of the covenant in this particular is "damage of any person *being a party* to any legal proceedings."

Further reference to the covenant need not be made here, as it will fall more in place when remedies thereunder against the officer come to be treated of.

COVENANT BY CLERK OR BAILIFF.

(Form A. subjoined to the Act.)

Know all men by these presents, that we, J. B., Clerk (*or* Bailiff *as the case may be*) of the ( ) Division Court, in the County of , S. S. of in the said County of (*Esquire*), and P. M., of in the said County of (*Gentleman*), do hereby jointly and severally for ourselves and for each of our heirs, executors and administrators, covenant and promise that J. B., Clerk (*or* Bailiff) of the said Division Court (*as the case may be*) shall duly pay over to such person or persons entitled to the same all such moneys as he shall receive by virtue of the said office of Clerk (*or* Bailiff, *as the case may be*) and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (*or* Bailiff) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding: nevertheless it is hereby declared, that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

Against the said J. B. in the whole, $
Against the said S. S..... .....
Against the said P. M..... .....

* A portion of the matter has been reprinted to correct an error, and the form having been in a previous number erroneously printed as a note.—EDS. L. J.

† The forms are from those used by one of the most experienced County Judges in Upper Canada.

‡ In Miller v. Tunis an omission of this nature was pointedly rebuked by Chief Justice Draper—and had the course pointed out by the statute been followed the parties in that case would have been saved the expense.

In witness whereof, we have to these presents set our hands and seals this day of in the year of our Lord one thousand eight hundred and

Signed, Sealed and delivered
in the presence of

CORRESPONDENCE.

TILSONBURG, C. W.

GENTLEMEN,—Your opinion in the following case will oblige.

A, a duly admitted attorney, delivers his bill of costs to B, by depositing it in the post office, directed to B, according to the terms of Consolidated Statutes U. C., chap. 35 sec. 27. Afterwards finding that B had left the country (absconded) A made an affidavit stating the fact of the bill being so served and that B had absconded, &c. A then applied to the county judge for leave to commence an action under section 37 of the above mentioned act, which the judge refused to grant, saying that the application should have been made previous to B's leaving the country, as the section reads as follows, viz.: "Any judge of a superior court of law or equity, or county judge, on proof to his satisfaction that there is probable cause for believing that the party chargeable *is about to leave* Upper Canada may authorize such attorney or solicitor to commence an action for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month has not expired *since delivery of the bill as aforesaid.*"

The judge held that the words "about to leave, &c.," in the above clause, in this case precluded him from giving the order, which in fact gave B a chance to remove his goods.

Yours truly,

EDWARD STONEHOUSE, *Solicitor.*

[We think, though the point is doubtful, that the judge would have been justified in granting the order asked.

The prohibition in section 27 of the act respecting attornies must be read in connection with the 28th section. The object is to secure to the party to be charged a month to enable him to have the bill taxed and paid without further charge; and had the attorney in the case but undertaken and made it part of the order to allow the defendant the same advantages as he would have under ordinary circumstances, we cannot see what reasonable objection could lie to the granting the order. Such a case would certainly seem within the spirit of the act. But it strikes us that the attorney might have prevented B taking his goods by suing out an attachment, which is a proceeding *in rem*, and when the month had elapsed, following it up by suit.

This proceeding would not be held, we think, a violation of the enactment in section 27, that "no *suit* at law or in equity," shall be brought, &c.]—EDS. L. J.

U. C. REPORTS.

COURT OF IMPEACHMENT.

Reported by THOMAS HODGINS, ESQ., M.A., LL.B., *Barrister-at-Law.*

IN RE DAVID JOHN HUGHES, ESQUIRE, JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN, AND JUDGE OF THE SURROGATE COURT IN AND FOR SAID COUNTY.

The charges set forth in this case were made to the Governor General, on the complaint of one Murdoch McKenzie, Agent of the American Express Company, at St. Thomas, against the Judge of the County Court of Elgin, for misbehaviour in his said office of Judge. The Governor General transmitted the complaint—then extending to fifty-six charges,—with the papers and affidavits in reply, to the Court of Impeachment; and on the 8th January, 1862, the Court met, and entered upon the case, striking out a number of the charges, and at an adjourned sitting on the 11th January, appointed the 3rd July, 1862, for the trial of the charges laid. On the 3rd July, the Court met, and proceeded each day with the case until the 11th July, when the evidence on both sides was closed. On the 19th July, the Court gave judgment—the Judges being, the Honorable Archibald McLean, Chief Justice of Upper Canada, the Honorable Philip Michael Matthew Scott Vankoughnet, Chancellor of Upper Canada, and the Honorable William Henry Draper, C.B., Chief Justice of the Court of Common Pleas. The charges struck out are not given in this report.

Richards, Q. C., for the prosecution.

John Wilson, Q. C., for the Judge.

(No counsel appeared for the Crown.)

5th Charge.—That the said Judge on 22nd July, 1859, became assignee of the real and personal estate of J. White and James Mitchell, by the terms of which he is entitled to receive 10 per cent.

Reply.—The defendant replies that he was chosen assignee of the *real* but not of the *personal* estate of the parties mentioned for a specified purpose, at the rate of 2 per cent. only, but that he has a personal and pecuniary interest in the estate in common with other creditors, and he has lately resigned the trust. He also replies that the charge, if it were true, shows neither inability nor misbehaviour in office.

Per Cur.—Upon the 5th charge we find 1st. That before the assignment therein mentioned, the Judge had purchased a house and portion of the lands assigned, which were encumbered, and liable to the creditors of White and Mitchell, and that the assignment was taken for the purpose, and with the hope that Judge Hughes might protect himself from heavy loss. 2nd. That the per centage to be received by him was two and not ten per cent., and, according to the evidence, might not do more than pay the expenses attending the execution of the trusts. 3rd. On this charge we adjudicate and decide that the said Judge is *not guilty* of any misbehaviour in office, and that the charge is *false.*

6th Charge.—That the holding of the said office of assignee has caused the Judge to exhibit partiality in suits where said parties had interests antagonistic to the interests of the assignors—instance *Thos. B. Hart* v. *Benson.*

Reply.—That the charge is untrue.

Per Cur.—Upon the 6th charge, we find that the adjudication thereon must depend upon the adjudication of other charges connected with the case of *Hart* v. *Benson*, (See *22nd et al.*)

9th Charge.—That previous to and during 1859, the Judge had a pecuniary interest in the business of Thomas Farrell and James Mitchell, both of St. Thomas; that he endorsed their negociable paper in consideration of receiving a portion of their profits or *a per centage* for endorsing.

Reply.—That the charge is untrue; and if it were true, that neither inability nor misbehaviour is shown. I never had any transactions with Thomas Farrell and James Mitchell. Probably the charge is intended to refer to a transaction I had with Sylvester Farrell & Co., which was negociated by me with Mr. Mitchell, whom I understood to be in the business. It was this: Mr. Wilson of London, Mr. Barwick of St. Catharines, and I, own a farm in Southwold, which has been in my charge for some years. In the fall of last year I was desirous of letting the after-grass for the season. Mr. Mitchell told me Messrs. Farrell & Co. were intending to buy cattle to export if they could get money from the bank by way of loan wherewith to buy, and a pasture to keep the cattle and sheep until ready to send away. He stated they did not like to give a fixed rent for the pasture. I offered him the pasture for the season for one-third of the profit to be realised from the sale of the stock, and to endorse the paper at the bank. This was the basis of the agreement. It had nothing whatever to do

with the buying and selling. I endorsed their paper—on which they effected a loan at the bank, without any remuneration whatever. They occupied the pasture until the close of the season, and I was paid for my co-tenants and for myself $18 73 for the use of it, which is all we ever received, either directly or indirectly. The defendant contends he had a right to engage in this operation.

Per Cur.—On the ninth charge we findthat the said judge for a long time during the year 1859, and previously had a direct pecuniary interest in the business of one Sylvester Farrell and one James Mitchell, both of St. Thomas, either as a partner or under an agreement, whereby the said judge endorsed the negociable paper of the said Sylvester Farrell and James Mitchell, in consideration of receiving a share of the profits of certain business in which they were engaged, or a per centage for so endorsing. The court finds that the judge is *not guilty;* and this finding is on the merits, and not by reason of the misnomer of Farrell in the charge. The charge is unsupported by the facts admitted in the answer of the judge—which was the only evidence advanced—and therefore the court considers this charge *vexatious.*

11*th Charge.*—That the Judge made a profit out of the Division Court patronage, by getting his children taught by John Powell, the Clerk of the Court of St. Thomas, the said Powell getting no other remuneration than the fees of the office, both for doing the duties thereof and teaching the children of the Judge.

Reply.—That the charge is untrue; and if it were true, that neither inability nor misbehaviour is shown.

Per Cur.—Upon this charge the Court finds the following proved: 1. That John Powell up to some time in Oct. 1854, was employed in the Post Office at Woodstock, and was recommended by Mr. Barwick, the Postmaster, to Judge Hughes, to be appointed a Division Court Clerk.—2. That on the 18th Oct., 1854, Judge Hughes addressed a letter to the said Powell, containing the following passage: "I guarantee to you enough to pay Mr. Warren £50, and £100 a year besides for yourself. In consideration of that guarantee you promise to perform the duties of clerk during that four years, and to give instruction to my children at certain hours that we may hereafter fix upon. If the fees of the office do more than pay all I guarantee to you and to Mr. Warren they are to be your own; and I will pay you whatever sum you and I shall fix upon as a proper remuneration for teaching my children, because I do not want them to be taught for nothing. If I have to supply any deficiency on my guarantee to you of course I should wish that to be considered as paying for their instruction."—3. That one Henry Warren was at the date of that letter, Clerk of the Division Court, which was held at St. Thomas, in the County of Elgin.—4. That the said Henry Warren was a very old man and incapable of discharging the duties as such Clerk; and that he resigned his office upon the suggestion of Judge Hughes, who held out to him the expectation that the successor, who was to be appointed by the Judge himself, should pay to him (Warren) for four years, if Warren should so long live and the successor retain the office, an annuity of £50 per annum; and that it was stipulated by the Judge that Warren should afford the new clerk such aid and explanation as should enable him to understand the business of the office and facilitate the discharge of its duties.—5. That the letter of the 18th October, 1854, was written in furtherance of the communication between Judge Hughes and Mr. Warren; and that early in November, 1854, Powell was appointed to succeed Mr. Warren, and gave to Mr. Warren his bond conditioned to pay £50 per annum for the time above stated, and that while Powell continued to hold the office (say fifteen months) he paid quarterly the sum of $50 to Henry Warren.—6. That the fees which accrued to Powell as such clerk during the time he held the office, and which, if he had insisted on immediate payment as Judge Hughes told him to do, he might have received, amounted to as much or more than £100 a year after paying the stipulated annuity to Warren, but that Powell actually received less than at the rate of £100 a year for himself.—7. That in February, 1856, Powell was dismissed by the Judge as incompetent to do the duties of clerk.—8. That while Powell held the office of clerk he gave instruction to Judge Hughes' children for about three hours per diem.—9. That no sum was ever fixed upon as a proper remuneration to be paid by Judge Hughes to Powell for teaching his children while Powell was clerk of the Division Court.—10. That soon after Powell's dismissal he applied to Judge Hughes for remuneration for teaching his children during the time he held the clerkship, and that Judge Hughes refused to pay anything unless Powell could show that the fees received did not amount to £100 a year, besides yielding enough to pay Warren.—11. That Powell never has made up any statement of the fees of his office for that or for any purpose, and that Judge Hughes never has paid him anything for teaching his children during the period that Powell was clerk of the Division Court.—12. That in appointing Powell to be clerk of the Division Court, Judge Hughes intended to secure the services of a person who could, in addition to the duties of the office, instruct his (the Judge's) children during certain hours each day on the terms expressed in the letter of 18th Oct., 1854.

The court finds that the result has been that the said judge did obtain indirect profit from the appointment of Powell, inasmuch as he paid Powell nothing for instructing his children while Powell was division court clerk, although upon a proper construction of the agreement contained in the letter of the 18th October, 1854, he might have been liable to Powell for such services, until the latter, in the final settlement made between him and Judge Hughes in 1859, abandoned all further claim on the judge. On these grounds we find the judge *guilty* on this charge.

12*th Charge.* That since the said John Powell was discharged from his office of clerk of the said division court, he was employed for a considerable time by the present clerk of that court at a salary of £100 per annum, and has been paid by the said clerk 'and judge' (interlined), and that during the time of such subsequent engagement the said Powell taught the children of the said judge who has refused to pay him any further remuneration therefor, on the ground that the said £100 per annum covered the same, which it did not.

Reply.—Denial and justification.

Per Cur.—Upon charge 12 we find the following facts as proved by Mr. Powell, the only witness who has been called on either side to give testimony in reference thereto:—1. That after Powell's removal from the office of clerk of the division court, he made an agreement with Judge Hughes to teach his children for three years ending 1st April, 1859, at the rate of £50 per annum; the time given to this teaching appears to have been from 9 to 12 each morning; and up to October, 1857, the judge paid him at this rate quarterly.—2. That in October, 1857, Powell was engaged by Mr. Farley (who had succeeded him as clerk of the division court) as a copying clerk, for the remainder of his time, after the hours of teaching the judge's children; and that Powell thereupon gave up an afternoon school which he had kept.—3. That Farley agreed to pay Powell (as he, Powell, swears) £100 per annum, and that Powell was not informed then, and did not suppose, that this payment was intended to cover anything but his services as copying clerk.—4. That when this change took place the judge ceased to make any payment directly to Powell for teaching his children.—5. That either six or nine months after Powell's employment by Farley, he rendered an account to Judge Hughes, and some time after he asked Farley to advance him some money, saying that the judge had not paid him for teaching, upon which Farley told him that tho £100 per annum was to cover both his services in the office and his tuition of the judge's children, and Judge

Hughes, coming into the office at the time, asked Powell if he was not aware that Farley was making payment for him (J. H.)—6. That up to this time Farley had paid Powell by giving cheques for the quarterly sum, making no distinction between the payment as clerk or tutor; and Powell swears that this was the first occasion he had any intimation that he was only to receive £100 per annum on both accounts.—7. That after this time Farley took receipts from Powell distinguishing the accounts on which payments were made.—8. That Powell "gave in" to the representation that he was only to receive £100 on the two accounts; and on the first April, 1859, he gave a receipt acknowledging payment in full of all demands on Judge Hughes.

Upon the foregoing charge, No. 12, the court finds that it is not proved by the foregoing evidence, and therefore adjudicate thereupon that the said judge is *not guilty*, but do not affirm that the charge is false or vexatious.

13*th Charge.*—That since the discharge of Powell the Judge has made a profit out of the St. Thomas Division Court.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge no evidence was offered other than upon charge number 12,—the charge is not proved.

16*th Charge.*—That the Judge practised as a conveyancer in drawing a deed for one Hugh Douglas to one Campbell, and thereby deprived H. Hamilton, Esq., barrister, of the profit of drawing the deed, according to an agreement previously made.

Reply.—That the charge is untrue. That a Judge of a County Court may practice as a conveyancer, and that if he had done wrong the remedy is not sought in a proper way. [See 8 Vic., chap. 13, sec. 3, and 16 Vic., chap. 20, sec. 1 and 2, and 5 Sec. Consol. Stats. U. C., chap. 15.]

Per Cur.—Upon this charge we do find and adjudicate that the said Judge is *not guilty*, and that the charge is *false.*

19*th Charge.*—That said Judge has acted as counsel and adviser of James Mitchell, in matters connected with the assignment.

Reply.—That the charge is untrue, and that any charge of the kind must be prosecuted by action or information in one of the Superior Courts of Common Law.

Per Cur.—Upon the foregoing charge, we do find and adjudicate that the said Judge is *not guilty*, and that the said charge is *vexatious*, being wholly unsupported by evidence.

22*nd Charge.*—That in delivering a certain judgment in the case of *T. B. Hart* v. *John Benson*, the Judge stated that he was not assignee of the personal estate of James Mitchell, but only a portion of his lands, while in fact he was assignee of part of personal estate of said Mitchell, and had collected monies on account thereof.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we do find that the assignment to Judge Hughes, made by White and Mitchell, was not made for the purpose of passing any merely personal property, unconnected with real estate—though some promissory notes are mentioned in a schedule attached thereto, which were not proved to be connected with any sale of part of the real estate assigned; and that the judgment complained of affords not even a plausible ground for the very offensive imputation contained in the said charge. We do, therefore, adjudicate thereon, that the said Judge is *not guilty*, and that the said charge is *false and vexatious.*

23*rd Charge.*—That the Judge made the statement because he had an interest in Mitchell's affairs, (the business of Benson really being that of Mitchell,) and also to assist Edward Horton, the attorney employed by Benson.

Reply.—That the charge is untrue.

24*th Charge.*—That in two trials of *Hart* v. *Benson*, the Judge charged the jury unfairly in favour of defendant.

Reply.—That the charge is untrue.

25*th Charge.*—That upon application being made for a new trial in the case of *Hart* v. *Benson*, on behalf of the defendant, the Judge ordered the costs to abide the event, although the verdict was not warranted by the evidence, and that the order was made to favour the aforementioned Edward Horton and the said Benson and Mitchell; and therein was unfair.

Reply.—That the charge is untrue.

26*th Charge.*—That upon applicaiion being made on behalf of the plaintiff after the second trial, (the second verdict being in favour of the defendant,) the Judge behaved in an unseemly and passionate manner, stating that the affidavit of the plaintiff was false, that he passionately refused at first to grant a rule *nisi;* that he said at length that he would consider about it, but refused for some time to name a day upon which to give his decision, until by the perseverance of the plaintiff's counsel a day was fixed.

Reply.—That the charge is untrue.

Per Cur.—Upon these charges we find, 1st. That it is not proved that the business of Benson was really that of the said James Mitchell, and that the weight of evidence before us was the other way, although contrary opinions were expressed founded in part on facts not proved before us. 2nd. That in granting one new trial, and in refusing a second, the Judge acted in the exercise of his judgment and discretion honestly, though another person in his situation might have given a contrary decision. 3rd. That whatever motive might have induced the making of the affidavit, it might well be understood by the judge to convey the same imputation which the 22nd charge contains, and might have excited, momentarily irritation, but that the Judge did not allow it to interfere with his granting a rule to show cause, which was fully discussed before him. 4th. That the evidence is not sufficient to sustain the charge of partiality in the said cause of *Hart* v. *Benson*, and, therefore, we do find and adjudicate that the said Judge is *not guilty* on the said four charges, or on the sixth charge (*ante*), or on either of them, and that the said charges are *false.*

27*th Charge.*—That in charging the jury in the case of *Benham and others* v. *John Sells*, the Judge exhibited partiality in favour of the defendant, by commenting upon statements made by plaintiff's counsel, as they had been in evidence—which they were not—thus manifesting a decided partiality for the defendant's counsel, Edward Horton.

Per Cur.—This charge being misstated in the original complaint transmitted for trial, and as we did not feel we had any authority to alter any of the charges which were so transmitted by His Excellency the Governor General; we find, however, that the Judge is *not guilty* and that the charge is *false.* (*Draper*, C. J., stated that had the charge been properly framed, the finding of the Court would be the same.)

28*th Charge.*—That in the same cause the defendant's counsel asked leave to enter a non-suit. The Judge appeared to write as if taking note of the application. No objection was made either by Judge or plaintiff. On applying for a rule to enter a nonsuit at the following term, the Judge stated that leave had not been reserved, as it could not be reserved without leave or consent of the plaintiff's counsel, and that a new trial was granted on the ground that the evidence did not support the declaration. But the said Judge in so acting was partial to Edward Horton.

Reply—To the 27th and 28th charges. The Judge replies that they are untrue. They both relate to the same cause. In the 27th the Judge is charged with favouring the defendant, and Mr. Horton is made to appear as acting for him, and in the 28th for the plaintiff, and the charge in both is that he favoured Mr. Horton.

Per Cur.—Upon this charge we find that the defendant's Counsel did not apply to the Judge at the trial to reserve leave to him to move for a non-suit in the following term on the objections raised to the plaintiff's right to recover. 2nd. That upon the declaration as it then stood, and both on the opening of his counsel and on the evidence, the plaintiff

wholly failed to show a cause of action against the defendant. 3rd. That in granting a new trial the Judge gave the defendant the only relief in his power, as no leave to move for a non-suit had been reserved. 4th. That there is no foundation in the evidence given upon this charge to justify an adjudication that the Judge was guilty of partiality in the course he pursued; and we do adjudge that he is *not guilty* of this charge, and that the same is *vexatious*, inasmuch as the defendant's counsel overlooked the necessity of his obtaining leave to move for a non-suit, which omission appears to have given rise to the subsequent difficulty.

30*th Charge.*—That the Judge in a written judgment delivered by him in the Surrogate Court, in the matter of the rule of James Finn, dated 19th May, 1860, stated among other reasons for his decision,—"Before the order was granted all parties met together some time after in my presence, and then Mr. Abbott suggested that if the executors acted further in the matter, until the validity of the will was decided, they should file a bond or give security for all their actions henceforward,"—and also further stated as follows:—"I afterwards, within an hour, advised Mr. Abbott of the manner in which the order had been modified, and he expressed his concurrence with it, and said it would now be unobjectionable, and he had no doubt the bond of the executors would be sufficient for the amount without sureties." That such alleged reasons were false, and that the Judge falsified his judgment to favour Edward Horton.

Reply.—That the charge is false, and that the statements made in the judgment were true.

31*st Charge.*—That the Judge in this case counselled with Mr. E. Horton.

Reply.—That the charge is untrue.

32*nd Charge.*—That the Judge counselled with Daniel Mc Gregor, one of the executors of the said will of James Finn.

Reply.—That the charge is untrue.

33*rd Charge.*—That in this same matter the Judge directed the Clerk of the Surrogate Court to deliver out of Court certain promissory notes amounting to several thousand dollars, upon the verbal application of E. Horton, without any evidence and without any notice to the parties interested—to favour the said E. Horton.

Reply.—That the charge is untrue.

Per cur.—Upon these charges we find, 1st. That a suit has been instituted in the Court of Chancery to try the validity of the will of the late James Finn, in which suit all questions relative to the will, the Probate, and the alleged renunciation thereof, and the proceedings in the Surrogate Court respecting the same, will, or at least may, be brought forward for adjudication, and that it is not therefore deemed proper to express any opinion thereon. 2nd. That it is not proved that any of the acts complained of were done by the Judge from partiality and favouritism to the executors, or other parties for whom Mr. Edward Horton was solicitor, or to Mr. Horton personally. 3rd. That the Judge, by his answer read by prosecutor's counsel, as evidence, admits that he did make an order, on the application of Mr. Horton, that the papers and money lodged with Mr. Murtagh, the Registrar of the Surrogate Court, by the executors of Finn's will, should be re-delivered to them. The finding already stated, as to instituting proceedings in Chancery, renders it unnecessary to say more on the mere question of right; and there is nothing in the answer of the Judge to alter or qualify the conclusion already expressed. Upon these four charges, Nos. 30, 31, 32, and 33, therefore, we find that the said Judge is *not guilty*, and that the said charges are *false*.

39*th Charge.*—That in a case tried in the County Court, *Mc Wetherell* v. *Brown*, the plaintiff based his case upon a bill of sale given to him by one Tracy. The defendant objected that the bill of sale had not the affidavit required by the statute 13 and 14 Vic., cap 62, but merely the affidavit for a chattel mortgage. The Judge ruled that the objection was not tenable, that the instrument was a mortgage, and gave as a reason that the affidavit showed the intention of the parties. When the defendant's counsel asked if the instrument was a mortgage, when the time was fixed for the payment of the money? the Judge replied he was not there to answer questions! Counsel requested the Judge to note his objections, and the Judge refused to read to him, when requested, the language he had used in noting the objections. The said instrument was an absolute bill of sale, and the Judge was actuated by an unfriendly feeling to the defendant's Counsel.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find, 1st. That the instrument referred to in this charge was, in point of law, a bill of sale, and that the Judge ought to have so held. 2nd. That though the defendant's counsel had a perfect right to request the Judge to note his objection, he had no right to call upon the Judge to read how he had noted it. That such a request, especially when made, as Mr. Baxter swears, in a manner which he considered offensive and disrespectful, was properly refused. Mr. Stanton admits in his evidence that he was on bad terms with the Judge at the time, and that either before or very shortly after, the Judge adopted towards him a severe course to enable him to conduct the business of the Court with proper decorum. 3rd. If the defendant's Counsel thought that any point on which the jury should have been directed had been omitted, he should have called the attention of the judge to that point—the question as to whether the instrument was a bill of sale or a chattel mortgage had been already discussed and disposed of. Upon this charge we find that the said judge is *not guilty*, and that the charge of partiality is *false*.

40*th Charge.*—That in the case of *Cochrane* v. *Sheppard*, respecting certain letters and receipts, signed by the plaintiff and conclusive to the defendant's favour, the Judge told the jury that perhaps the plaintiff had never seen the receipts, that it was not likely he would have brought the action if he had knowingly signed such receipts, and thus induced the jury to find for the plaintiff through the genuineness of the receipts was not questioned. The Judge also refused a new trial on any terms.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find 1st. That in the opinion of the Court of Queen's Bench, before which the case of *Cochrane* v. *Sheppard* was brought by appeal from Judge Hughes's decision, refusing a new trial, such a decision was erroneous as that court ordered a new trial on payment of costs, though apparently with some hesitation. 2nd. That, considering the language of Sir *John B. Robinson*, C. J., in in pronouncing that judgment, and comparing the evidence of Mr. Stanton in support of the charge, with that of Mr. Baxter in reply thereto, the allegation that Judge Hughes was actuated by personal feeling in favour of the plaintiff's (Cochrane's) counsel is not proved. We do, therefore, hereby adjudge that the said Judge is *not guilty* of said charge, and that the charge of partiality is *false*.

41*st Charge.*—That a contrast of the judgments and decisions of the said Judge in certain cases in the said County Court on applications for new trials, wherein Edward Horton, of St. Thomas, barrister, was counsel on one side, and James Stanton, of St. Thomas, barrister, was counsel on the opposite side, exhibits an unjust preference towards the said Edward Horton, and against the said James Stanton; and the cases referred to are *Brown* v. *McWetherall*, *Foote* v. *Howard*, *McDiarmid* v. *McDiarmid*, and *Hart* v. *Benson*.

Reply.—That the charge is untrue. That Edward Horton was neither counsel nor attorney for either party in two of the suits named.

43*rd Charge.*—That in the case of *Foote* v. *Howard*, a new trial was granted, with costs, to abide the event, without any

reasonable grounds being shown, out of favour to the defendent and his counsel, the said Edward Horton.

Reply.—That the charge is untrue.

Per Cur.—Upon charge 41, we find 1st. That in the case of *Brown* v. *McWetherall*, Mr. Nichol was concerned as counsel for the plaintiff, and Mr. Stanton for the defendant; and that Mr. Horton was not engaged in the suit. 2nd. That in *McDiarmid* v. *McDiarmid*, Mr. Stanton was counsel on one side, and Mr. Abbott on the other.* It is not positively shewn whether this case occurred during the time that Horton and Abbott were partners—the inference is that it was so. Upon charge 43, in the case of *Footé* v. *Howard*, we find 1st. That the plaintiff having obtained a verdict, a rule *nisi* for a new trial was granted, and was enlarged by consent of both parties to the 24th July, 1858, a day out of term, as appeared by the endorsement thereon, signed by Mr. Horton, and by a clerk of Mr. Stanton's; that Mr. Stanton did not attend at the return of the rule, which was thereupon made absolute, and a new trial was granted: costs to abide the event. 2nd. That the case was one in which, in the exercise of his discretion, the Judge might deem it conducive to the ends of justice to grant a new trial, though on different terms as to costs; but the absence of any one to sustain the plaintiff's case, and press such considerations as might have produced a different decision as to costs, was a matter for which the judge was not answerable; and should have prevented complaint on this head. 3rd. That the facts of the case, and the decision thereon in the County Court, afford no grounds for an imputation of improper motives on the Judge's part. We do, therefore, find and adjudicate upon the said charges 41 and 43, that the said Judge is *not guilty*, and that the charge of partiality is *false*.

46*th Charge.*—That in the suit of *Sarah Finch* v. *E. S. Ganson*, tried at Aylmer 2nd Division Court, the judge directed the jury to find a verdict contrary to evidence.

Reply.—That the charge is untrue.

47*th Charge.*—That upon being applied to, to grant a new trial in this case, the judge refused, on the ground that the defendant's conduct in managing his own case was captious. In the judgment the judge said,—"This conduct was captious in the defendent, and I must allow him to take the consequence —I therefore refuse to grant a new trial as the defendant has no one to blame for those consequences but himself."

Reply.—That the charge is untrue.

Per Cur.—Upon these charges we find, 1st. That on the first trial the Judge ought, in point of law, either to have non-suited the plaintiff, or to have directed the jury to find for the defendant. 2nd. That the Judge ought, in point of law, to have set aside the verdict which was rendered in favor of the plaintiff, and to have granted a new trial. 3rd. That owing to an error in judgment, on the part of the Judge, the defendant has been obliged to pay $112 for which he was not legally liable. 4th. That this has arisen apparently from error on the part of the Judge, and from an entire omission to call his attention to the meritorious grounds upon which the defendant was entitled to succeed, and not from a hostile feeling to the defendant, which we do not find proved. Upon these charges we find, therefore, that the Judge is *not guilty*, and (Vankoughnet, C., *dissentiente*) that neither of them is vexatious, nor can be pronounced false under the statute. Upon this latter point, affecting the question of costs,

McLean, C. J., said, that the Court was divided in opinion. He could not add that the charges were vexatious, as he could not see that the judge acted in the matter entirely free from all feeling against the defendant, and that so far as he could gather from the statements and evidence before the Court he did not see in the conduct of Ganson that captiousness with which the Judge had charged him.

Vankoughnet, C., could not agree with his brother Judges. He was very decidedly of opinion, that, having found the Judge not guilty on what was the gravemen of the charge, they should also declare the charge false, and more especially as the charge was not made by the party said to have been injured, but by another, a total stranger to the transaction. He considered that a party in such a position, bringing forward such a charge, and failing in it, should suffer the consequences of his temerity, and be ordered to pay the costs.

Draper, C. J., agreed with McLean, C. J., and said, that though he had read the evidence several times, he could not free his mind of the feeling that the conduct of Ganson had not, to some extent, influenced the Judge. He had no doubt that Ganson had given occasion for this feeling, from the facts of his being a constant litigant in the Courts, that his cases were more litigated than others, and also, because Ganson appeared so frequently as a litigant, exacting enormous interest, and as acting with harshness in his cases. But as this man had suffered so much in having to pay costs in this case, he thought it best to leave the decision of the Court as he had read it.

48*th Charge.*—That in the case of *Charles Askew* v. *Marwood Gilbert*, the jury, under the unfair direction of the judge, brought in verdict for plaintiff for $95. And that the judge refused to grant a new trial, although the application was backed by four or five of the jury, who complained that a mistake had been made. That the Judge was actuated by partiality for the plaintiff, who was a bailiff in one of his courts.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find, 1st. That an erroneous conclusion was arrived at by the Judge and jury who tried the cause, as the plaintiff has been allowed to recover much more than he could legally have demanded. 2nd. That it is not proved that this erroneous decision arose either from personal feeling on the part of the Judge against the defendant or from partiality to the plaintiff in the cause. We do therefore find that the said Judge is *not guilty* of the said charge, and that the same is *false*.

49*th Charge.*—That the Judge has lost the confidence of the people of the county of Elgin; and that it is the general opinion that persons employing the said Edward Horton have an advantage over their opponents by reason of the Judge's favouritism.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we are all of opinion that it is vague and general, involving an enquiry into opinions and feelings rather than into matters of fact affecting the administration of justice; that the Court of Impeachment could not, or at least ought not, to try what opinions were entertained respecting the Judge; and we therefore declined to hear evidence in support of this charge.

52*nd Charge.*—That the Judge caused one Robert Nicoll to be prosecuted at the Quarter Sessions, and induced the Clerk to conceal his having acted in the matter. That the Judge sentenced the prisoner to a much more severe sentence than the nature of the offence proved warranted, in all of which he was animated by personal feeling.

Reply.—That the charge is untrue.

Draper, C. J.—In this case of Nicoll we consider that the Judge did not overstep his proper duty as Chairman of the Court of Quarter Sessions in taking the matter up. He was clearly right in doing so, and besides we find by the evidence of a most respectable witness, whose testimony is in no way impeached, that he was the person who first brought the case under the notice of the Judge.

Per Cur.—Upon this charge we find that the said Judge is *not guilty*, and that the charge is *vexatious*.

* Note by the Reporter.—These two gentlemen, Messrs. Stanton and Abbott, were the most active in getting up the charges against the Judge, and were apparently the real complainants in the case.

53rd Charge.—That in a writ of *Thompson* v. *Luke* the same being an unimportant suit, the Judge granted to the plaintiff's counsel a counsel fee of £3 10s., although in the suit of *McDiarmid* v. *McDiarmid*, stated by the Judge to be the most important suit ever tried before him, he refused to grant the defendant's Counsel a higher fee than £2 10s. That in the case of *Thompson* v. *Luke* the Judge was actuated by feeling against the defendant, and so expressed himself, and in the other suit, the Counsel and Attorney for the defendant were not on good terms with him, and in both cases he showed partiality and unfairness.

Reply.—That the charge is untrue.

Per Cur.—Upon this charge we find, 1st. That in the case of *Thompson* v. *Luke*, the Judge ordered a fee of £3 10s. to be taxed to the plaintiff's counsel who had obtained a verdict. 2nd. That in the case of *McDiarmid* v. *McDiarmid*, the Judge ordered a fee of £2 10s. to be taxed to the defendant's counsel who obtained a verdict. 3rd. That the latter case took up much more time, and involved more important considerations than the former. 4th. That the charge that the Judge was actuated by ill-feeling towards Luke is not proved nor endeavoured to be sustained in argument upon the facts, and that the circumstances stated by the Judge in his answer, might (if true, and they were not denied in commenting on the case) have occasioned a larger allowance to the plaintiff's counsel, as he was detained in court a much longer time than the other trial occupied, waiting for the defendant, to whom time was given to procure a witness.* 5th. That, if as is charged, the larger fee was taxed against Luke, in consequence of the Judge's feeling against him (and Mr. Stanton's evidence tends to sustain this view, which is corroborated by the Judge's answer) there is no ground for imputing the granting such fee to a different motive, viz.: partiality to Mr. Horton or Mr. Abbott, his partner, who was counsel for Thompson; nor does the ordering of a less sum to Mr. Stanton as a counsel fee in another and more important case, afford sufficient reason for convicting the Judge of partiality or unfairness in reference to either fee. Upon this charge we find the Judge *not guilty*, and that the charge is *vexatious*.

DRAPER, C. J., stated in reference to the other charges not enumerated in the judgment of the Court, although they had either been struck out, or no evidence had been offered on behalf of the prosecution to substantiate them, yet as the Court must adjudicate upon all the charges transmitted to them by the Governor General, they find the Judge *not guilty* on such charges. As to costs, it appeared by the statute that they had to do something more than declare the accused not guilty, in order to entitle him to his costs of defence; therefore where the Court declared the charges to be *false or vexatious*, the Judge should be entitled to his costs; where nothing was said on that point, or where the Court declined to declare the charges false or vexatious, each party should pay his own costs, but where the accused was found *guilty*, the prosecutor should be entitled to his costs on that charge. The costs of the trial would, therefore, be distributive.

COURT OF ERROR AND APPEAL.

THE BANK OF TORONTO v. ECCLES.

Assignment for benefit of creditors—Preferred creditors—Power of debtor to insist on release by creditors.

(July 2nd, 1860, and January 23rd, 1861.)

[Before the Hon. Sir J. B. ROBINSON, Bart., C.J.; the Hon. W. H. DRAPER,† C. B., C. J. C. P.; the Hon. Mr. Justice MCLEAN;‡ the Hon. Vice Chancellor ESTEN; The Hon. Mr. Justice BURNS; the Hon. Vice Chancellor SPRAGGE; the Hon. Mr. Justice RICHARDS, and the Hon. Mr. Justice HAGARTY.]

On appeal from a judgment of the Court of Common Pleas.

Where a debtor had, before the passing of the Statute 22 Vic., chap. 96,—assigned and surrendered his estate and effects to trustees for the satisfaction of his debts without reserve. *Held*, affirming the judgment of the Court of Common Pleas, that he might, under the then state of the law, stipulate for the payment of some of his creditors in full, and a ratable distribution as to the rest; and also, for a release to himself from all further liability. [ESTEN & SPRAGGE, V. C. C. dissenting.] *Held* also, that such release may still be insisted upon without any reference to the amount of the dividend to be paid by his estate.

This was an appeal from a judgment of the Court of Common Pleas, as reported in the tenth volume of the Reports of that court, at page 282, where the facts of the case are distinctly set forth.

Mr. *J. Hillyard Cameron, Q. C.*, for appellants.

Mr. *M. C. Cameron* and Mr. *Anderson* for respondents.

The cases cited by counsel appear in the judgments of their Lordships.

Sir J. B. ROBINSON, Bart, C. J.—This is an action of ejectment brought, &c.

This is an action of ejectment brought by the plaintiffs, who claim that the fee in the land as purchasers at sheriff's sale, under a writ of *fi fa* against lands upon a judgment in their favor against John L. Ranney.

The defendants claim as assignees of Ranney under an assignment made on the 4th Jan., 1858, and registered 6th Jan., 1858.

The judgment against Ranney was entered upon 8th January, 1858, and was registered on the next day. The sale under that judgment was made on 15th Feb., 1859, and the sheriff's deed to the plaintiff was executed 5th March, 1859.

The deed of this land to the defendants of 4th January, 1858, is expressed in the deed itself to have been made in consideration of five shillings, and by it the land was granted to the defendants—"to hold as joint-tenants, and not as tenants in common, and to the survivor of them and the heirs of such survivor for ever." There is no mention in this deed of any further consideration than the five shillings.

On the next day (5th January ,1858) Ranney executed another deed to the same grantees (the three defendants in this action), in which he recited his deed to them of 4th Jan., and other conveyances which he had made to the same grantees of other lands; and he recites further, that the lands mentioned in the said indentures so referred to were conveyed to the said grantees, (although it was not so expressed in the said indentures) upon the like trusts and for the like purposes as those for which the said Ranney did by the deed of 5th Jan., 1858, containing these recitals, assign to the same grantees his personal estate and effects: and by this deed he assigns all his personal estate to these defendants, their executors, administrators and assigns: To have and to hold all the lands and tenements mentioned and described in the several indentures before mentioned: and all and singular, the personal estates (enumerating the various descriptions of personalty) to the said grantees (these defendants), their heirs, executors, administrators and assigns, to their own use for ever; but upon the trusts thereinafter mentioned.

These trusts are to sell the whole of the said property, real and personal, and out of the proceeds to pay first—the charges attending the trusts. Secondly,—to pay to a long list of creditors of the grantor therein named, their debts in full; and thirdly,—to take up certain bills and notes that had been made or indorsed for the accommodation of the grantor. And the defendants covenant in this deed that they will faithfully execute the trusts, and will at the request of the parties of the third part to this deed (that is the creditors of the grantor who shall execute the deed, or the major part of them, account with them in writing concerning the said trusts, and will make a just distribution of all trust monies, which they shall receive, (after the deductions before mentioned) amongst the subscribing creditors, according to the true intent of the deed.

Then follows a general release from the executing creditors to the grantor Ranney, of all actions, claims and demands on their part, provided that no creditor who should not execute this deed within 30 days from the date, should be entitled to any benefit

* Or, as it turned out, to *manufacture a witness*, by getting the plaintiff to make admissions to a little girl during the time allowed, conduct which Draper, C. J., designated as "a course which no respectable attorney would think of resorting to."

† Gave no judgment in the case. ‡ Was absent when judgment was pronounced.

under it: and the proportion of the proceeds which such non-executing creditors would have been entitled to receive,—if they had executed within the time—shall be paid over to the executing creditors in proportion to their respective debts.

And lastly, it is provided, that the trustees shall pay over to the grantors any surplus that shall remain after paying to the executing creditors the whole of their respective debts, and paying the prior charges provided for in the deed.

When the defendants set up their title under these deeds at the trial, several objections were taken on the part of the plaintiffs, and among them the objection that, the clause in the trust deed which provides for a release in full by the creditors who shall execute the deed, made the assignment invalid, because it excluded from the benefit of it all such creditors as should refuse to accept of their dividend out of the property assigned, upon that condition.

Doubts had been thrown out in both the Common Law Courts in this country of the validity of trust deeds executed by an insolvent debtor containing such a clause of release; and the learned judge at the trial acceding, for the time, to the objection, directed that a verdict should be entered for the plaintiffs, reserving leave by consent of parties to the defendants to move to have a verdict entered in their favor, if in the opinion of the Court the plaintiffs were not entitled to recover upon the evidence.

The defendants having moved accordingly in the Court of Common Pleas, judgment was given making the rule absolute for setting the plaintiffs' verdict aside, and entering a verdict for the defendants; and that judgment has been appealed from.

The other objections to the defendants' title, besides the one I have mentioned, were that the conveyance of the land to the defendants by the deed of 4th Jan., appears by the deed to have been made for a consideration of five shillings only, and is in effect a voluntary deed; and that such nominal consideration, and no other, being expressed, it was illegal to receive evidence *aliunde* to establish a valid consideration by shewing that the land was in fact conveyed to trustees to be sold with the view of paying the grantor's debts out of the proceeds.

It was objected also, that the deed of 5th January was not shewn by the evidence to have been made in full accordance with what was intended by the parties to it, at the time of the deed of 4th January being executed, but varied in several particulars; wherefore it was contended that the deed of 4th January cannot be said to have been made upon the considerations which may be collected from the face of the second deed, because they were not in the mind of the grantor at the time, and did not move him to make the deed of the 4th January.

And further, it was objected, that the trust deed of 5th January never having been registered, the registered judgment in favor of the plaintiffs cannot be affected by it, and cannot be postponed by reason of the prior registration of the first deed, if that first deed taken by itself, does not shew a valid title.

It was upon the objection which I have first stated and which is relied on as the 4th reason of appeal, that the argument for the appellants principally turned; but I will first state my opinion on the other points: 1st,—As to the exception that the deed of the 4th of January, 1858, being stated (in the deed itself) to have been made upon a consideration of five shillings, any evidence *aliunde* to prove another and more valuable consideration was inadmissible, as being repugnant to the deed. I have no doubt that the exception is not tenable. The title of the defendant is not resisted by any person claiming to hold as a purchaser for value from Ranney under a deed made subsequent to that of 4th January, 1858. This, therefore is not a case under the 27 Elizabeth, chap. 4, which was made specially for the protection of such subsequent purchaser against prior fraudulent conveyances.

The question is, whether the deed to the defendants is void under the statute 13 Elizabeth, cap. 5, passed for the protection of creditors against fraudulent conveyances, or is void at common law?

Whatever may have been held in cases coming only under the statute of 27 Elizabeth, respecting voluntary conveyances being necessarily and as a legal inference void against subsequent purchasers, upon which point the language of judges has not been always consistent (Roberts on Fraudulent Conveyances, chap. 1, secs. 4 & 5), there is no doubt, I think, that under the statute 13 Elizabeth, chap. 5, a creditor resisting a conveyance upon the ground that in the language of that act "it is feigned, covinous and fraudulent, and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent to delay, hinder or defraud creditors of their just and lawful actions, debts," &c., must show something more than the mere want of adequate and valuable consideration; because a man acting honestly and in good faith, and having no design to delay or defeat creditors, is not disabled by that statute, or unable at common law to make a voluntary gift of his lands;—or at least it may be said that the jury must be satisfied of something more than merely that the deed was made without a valuable consideration, before they can find it to be fraudulent as against creditors.

And if, as against persons not becoming creditors subsequent to the deed, but who were creditors before it was made, the jury cannot properly be told that in the absence of other evidence they may treat the total absence of consideration, or a grossly inadequate consideration, as *prima facie* leading to a conclusion of fraudulent intent, then it must on the other hand be open to the person claiming under the deed to uphold it against the imputation of fraud, by giving evidence *dehors* the deed of the intent and purposes for which it was really made.

The case of *Gale* v. *Williamson* (8 M. & W. 405), cited in the judgment appealed from, is a clear authority on that point; and it is indeed admitted in this case that the conveyance by Ranney to the defendants was in fact made in good faith, and was not collusive, but really intended for the benefit of creditors; while the objection which I am now considering is founded upon the assumption of the deed being purely voluntary, and without any other consideration than that which the deed of 4th January expresses.

The admission would of itself take this case out of the statute, which says not a word of voluntary conveyances, and still less provides that deeds appearing on the face of them to be voluntary shall without hearing evidence upon the truth of the case be treated as void, however honestly intended, and though not made to defeat creditors.

Then if evidence could be properly received, as I have no doubt it could, to show that the nominal consideration of five shillings expressed in the deed was not the only consideration upon which it was made, we must be at liberty to receive evidence of what the real purposes and objects of the deed were; and when this point is settled, it cannot be seriously contended that the case can be at all affected by the circumstance that Ranney seems to have changed his mind in respect to some of the arrangements which he had in view between the execution of the deed of the 4th January, and of the declaration of trust made on the following day.

The execution of the first deed, while we are considering the question of fraud or no fraud, must be looked upon as the mere inception of the arrangement—a preparation for securing the general body of his creditors, by creating the trust which he had then in his mind, and which he perfected the next day. It should be all regarded as one transaction (11 L. J. N. S. Chancery, 105), and it can be no objection that the declaration of trust which he executed differed in some respects in its details from that which he had contemplated the day before; that could not have the effect of establishing fraud against the truth of the case.

Then as to the point that the trust deed of 5th January having never been registered, the judgment of the plaintiffs, though subsequent, being executed on the 8th January and registered on the 9th January, 1858, will prevail over the defendants' registered conveyances of the 4th January: what the plaintiffs mean to contend is, that the deed to the defendants of 4th January, if it stood alone, must be treated as fraudulent, because it is on the face of it voluntary; that it could not have stood alone against the judgment creditors, and cannot receive aid from the declaration of trust, because that deed is still unregistered, and so must be treated as fraudulent against the plaintiffs' registered judgment. (Consol. Stat. U. C., cap. 89, sec. 53.)

But I think it was rightly held, in the court below, that as soon as we find that the authorities warrant the refusing to exclude evidence of a consideration beyond the five shillings expressed in the deed, there seems to be an end of this objection. It is under the deed of the 4th January, 1858, that the defendants make title; and if that deed is not in itself void, merely because a valuable

consideration does not appear on the face of it, then all descriptions of evidence may be resorted to in order to ascertain the real objects and intention of that deed, and thus to settle the question of *bona fides*. The objection amounts to this—that the unregistered declaration of trust is not admissible evidence, even to show the object with which the first deed was made, because we are to take the declaration of trust to be void as against these plaintiffs, who registered their judgment. That proviso of the Registry law, however, would only extend to prevent the declaration of trust from directly affecting the plaintiffs' interest. It could not annul the trust as between Ranney and his assignees, which might be established as well without deed as by a deed registered. And, fraud apart, if the deed of 4th January must stand alone, then the defendants would hold the estate discharged from the trusts, if the deed of 5th January could not be advanced for any purpose in this case. The effect of the declaration of trust is to cut down the estate of the defendants; and the effect of the Statute of Frauds, in its provision regarding trusts, is, not to require that all trusts shall be *created by writing*, but that they shall be manifested and proved by writing, plainly meaning that there should be evidence in writing proving that there was such a trust. And on this principle it is that an express declaration of trust by a bankrupt, after his bankruptcy has been held good, and when a defendant by his answer in Chancery admits a trust, it is taken as sufficient to establish it. (3 Vesey, 707; 1 Atkins, 59; 2 Vernon, 288.) Besides this, it is admitted in this case that the trustees have acted in the trust, and have sold real and personal property to the amount of £7000 or £8000. This last circumstance too deserves notice in determining the main point in the case, that is, whether this assignment of Ranney's real estate for the benefit of his creditors should be held fraudulent and void on account of the clause in the declaration of trust, which exacts from all executing creditors a release of their debts and demands in full, as the condition of their receiving any benefit from the proceeds of the property assigned.

We should not, except upon the most clear and conclusive authority, determine that a deed is void which has already been acted upon to so great an extent; for though *bona fide* purchasers from the assignees, without notice of the terms of their trust, might not be exposed to be disturbed in their titles, yet litigation might spring up in regard even to the property that has been sold by the defendants, and the affairs of the trust might be placed in an embarrassing position.

In the case of *Owen* v. *Boddy* (5 Ad. & Ell. 28), determined in 1836; and in the later cases of *Jones* v. *Whitbread* (11 C. B. 406), and *Coates* v. *Williams* (7 Ex. 295), assignments which had been made by debtors of their estates to trustees for payment of their debts, were resisted by execution creditors, on account of a clause which the assignment in each case contained, providing for the trustees continuing the business which the debtor had been carrying on, in order to the winding up more advantageously the affairs of the estate. The terms of this provision were not exactly the same in all cases: the deed that was executed in *Owen* v. *Boddy*, being such as afforded more ground than the deeds in the two other cases, for contending that the business being to be carried on for the benefit of the creditors of the assignor, who were to be paid dividends ratably out of the proceeds of the business on account of their debts, it would follow, as a consequence, that the creditors who, by executing the deed, should come in under it, and participate in the profits, would render themselves liable as partners for all the debts contracted in carrying on the business. It was on that account objected by the execution creditor that the assignment did not make provision for a just distribution of the effects of the debtor among his creditors—since those only could take the benefit of it who might be willing to subscribe a deed making them partners with the trustees,—that they might justly object to incurring such a liability; and besides, as was remarked in discussing, at a later day, the effect of such a provision, it is to be considered that by employing in trade the goods and the assets of the debtor, "they put in peril the effects which ought to have been divided equally amongst the creditors" (*Hickman* v *Cox*, 8 L. T. N. S. 142).

It was put strongly to the court that the creditors generally could not be expected to become parties to such a deed, and yet, if they did not come in, they would be *delayed and hindered* of their just actions and debts within the meaning of the statute 13 Eliz.

The validity of the assignment had been objected to upon another ground connected with this same provision. The court thought that first objection futile, and disposed of it at once; but the second objection of the deed seeming to make the creditors partners with the trustees in carrying on the business, brought up, as Lord Denman remarked, a very doubtful question, upon which the court must take time to consider.

A fortnight afterwards in the same term, Lord Denman disposed of the case, as follows: "On consideration we think that upon the second ground of objection, this assignment was not good. The deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit. The assignment, therefore, was invalid."

In the two later cases to which I have already referred, of *Jones* v. *Whitbread* and of *Coates* v. *Williams*, the deeds of assignment, in both cases, exactly the same in their terms, were substantially different from that in *Owen* v. *Boddy*, in the nature and extent of the provision which they all contained for continuing the business of the debtor by the trustees for the benefit of the creditors.

The courts which determined the two last cases, held that the assignments then before them, did clearly not make the executing creditors partners with the trustees in the business to be carried on, and therefore held that the objection taken on that ground to the assignment was not fatal. They pointed out essential differences between the provisions respecting the continued business, contained in those assignments, and that in question, in *Owen* v. *Boddy*, and grounded their decision entirely upon that difference.

Fifteen years had elapsed between the judgment given in *Owen* v. *Boddy* and those cases, which afforded ample time for considering the soundness of the decision in *Owen* v. *Boddy*, first, as to the legal inference, that the executing creditors would, in that case, have made themselves partners with the trustees in the business to be carried on; and next as to the consequence of such a provision—that being unjust and unreasonable in itself, it invalidated the assignment.

The only doubt which the courts seemed to have in either of the later cases was, as to the effect of the assignment before them in creating a partnership business. If it had done so, they seemed quite prepared to have followed *Owen* v. *Boddy* in holding the assignment to be invalid; and while they pointed out what they considered to be essential differences between the terms of the assignments, they did not seem to doubt that upon the question of partnership or no partnership, *Owen* v. *Boddy* had been rightly decided. They intimated no dissent from that judgment on either ground, but they held it not applicable in the cases before them, on account of the difference of the terms of the assignments.

The late Lord Chief Justice Jervis, of the Common Pleas, in giving judgment in *Jones* v. *Whitbread*, explained the only ground of the difference. "As to the first point," he said, "the court granted the rule expressly for the purpose of having the deed contrasted with that upon which the case of *Owen* v. *Boddy* had been decided." Upon examining that case, however, he remarked, "I am of opinion, that it is not applicable to the present, for there the deed contained minute provisions investing the trustees with power to carry on the trade, for which purpose they were authorised to lay out money in payment of rent, &c., and in keeping up the stock; and the court *held the deed void, as being one which creditors could not reasonably be expected to become parties to*. Here, however, the deed contemplates the sale of the property, and the winding up the business. And the power given to the trustees to carry on the trade, was evidently intended to be merely subsidiary to the winding up of the concern."

In the same case, Maule, J., expresses his entire concurrence in the decision of *Owen* v. *Boddy*. "I also think," he said, "for the reasons already given, that this case is clearly distinguishable from *Owen* v. *Boddy*. "What is there said by Lord Denman, understanding his language with a reasonable reference to what he is speaking about, lays down, I think, a sound and a reasonable rule.

"The main object of the deed in that case was the carrying on an extensive business for the purpose of making money to pay the

creditors who became parties to the deed. Here the object is merely to wind up the concern. That is a clear, plain, and intelligible distinction."

While the argument was going on the Chief Justice interposed with this observation, "The deed in *Owen* v. *Body* contemplated the doing of many things, but there must be some limit. The meaning of that case, I apprehend, is, *that the deed was one which no creditor could in reason be expected to execute.*" And Maule, J., in the course of the discussion, vindicated the decision of *Owen* v. *Boddy* by these very clear and forcible observations: "All deeds of this sort are within *the letter* of 13 Eliz. chap. 5, sec. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed shall be void; that is, all deeds made to or for any of the intents or purposes mentioned in section 1, viz.: 'to delay, hinder, or defraud creditors and others of their just and lawful actions, suits and debts,' &c." "In *Pickstock* v. *Lyster*, 3 M. & S. 371, however, it was decided that if a man assigns all his property to a trustee, *simply with the purpose of having it fairly distributed among all his creditors*, such an assignment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within the *spirit* of the act, and therefore is not void, because it does not deprive any of the creditors of *his fair share* of the debtor's property, if he chooses to become a party to the deed. The deed in *Owen* v. *Boddy* differed from ordinary deeds of this sort on the ground that it was not simply an assignment for equal distribution, but one by which each creditor was to participate in the proceeds only on condition of his assenting to the trustees carrying on the trade as they pleased, until interrupted by the major part of the creditors. The observation of Lord Denman, which my brother Miller professes not to understand, 'that the deed imposed such terms as might have constituted a partnership among the parties executing it, and those were terms to which creditors were not bound to submit,' means no more than this: *that the deed before them was not such a deed as it was reasonable to expect a creditor willing to take his fair share of the debtor's property, to accede to;* just as an offer of payment accompanied by a requisition of a receipt in full of all demands is not such a tender as the creditor is bound to accept, that is, his position is not deteriorated by his rejection of it. In that case there were large provisions for carrying on the trade, and the creditors were to look for the future profits."

I have cited these observations at length because it appears to me they are extremely just and forcible, and are well worth recurring to in all discussions upon such questions as that now before us.

In the case in the Exchequer of *Coates* v. *Williams*, which followed soon after *Jones* v. *Whitbread*, the court upheld a similar assignment against the same objection, distinguishing the case from *Owen* v. *Boddy*, and finding no fault with any thing that had been decided in that case.

In none of these cases was a doubt expressed, that if the creditors were by the deed made partners with the trustees, and if that were a consequence which creditors willing to take their fair share of the debtors property, could not be expected to accede to, the insertion of such terms in the deed would make it void under the Statute 13 Eliz. chap. 5, and deprive it of the support of such cases as *Pickstock* v. *Lyster;* which case, it may be noted, certainly contained no provision for releasing the debtor from his debts. No express authority seems to have been cited in support of the position, that the insertion of an unreasonable stipulation in the deed would render it invalid. The Court seems in *Owen* v. *Boddy* to have taken that ground upon reason and principle, and from that time to the present it seems to have been acquiesced in.

In regard, however, to the first point decided in *Owen* v. *Boddy*, namely, whether the deed made the executing creditors partners in carrying on the business that was provided for under it—though *Owen* v. *Boddy* can perhaps not be said to have been over-ruled, its authority has lately been greatly shaken, by the decision in the House of Lords of the case of *Hickman* v. *Cox*, 3 Law Times, Rep. N. S. 185, Oct. 20, 1860, an action instituted in the Court of Common Pleas.

That case put the soundness of the decision in *Owen* v. *Boddy* on the question of partnership or no partnership to a severe test, for assuming that the deed of assignment did in that case make the creditors partners, an action was brought against two of the executing creditors, on the ground that they were liable as partners upon bills of exchange drawn upon and accepted by "The Scranton Iron Company," under which name the trustees in the assignment carried on a business provided for in the assignment for the benefit of the creditors of the debtor who made it. The deed as regarded this feature of it scarcely differed; if at all, in its nature from that in *Owen* v. *Boddy*, and the four very learned judges of the Court of Common Pleas who heard the argument, Lord Chief Justice Jervis, Cresswell, Williams, and Willis, JJ., after taking time to deliberate, held the case to be undistinguishable from *Owen* v. *Boddy* as regarded the question of partnership, and on the authority of that case directed a verdict to be entered for the plaintiff.

The judgment was appealed from, and in the Exchequer Chamber, and after a very long and learned discussion before six judges of the Queen's Bench and Exchequer, and many months taken to consider, three of the learned judges held that the creditors were liable as partners, and three held that they were not.

The court being thus equally divided the judgment given below was in effect affirmed, and after some hesitation as to the right to carry the case further, there was an appeal to the House of Lords, where the point of partnership was again argued very fully, and upon a question put to the learned judges—the six who were in attendance were equally divided in opinion, and the Law Lords present, viz.: the Lord Chancellor, Lord Brougham, Lord Cranworth, Lord Wensleydale, and Lord Chelmsford, were unanimous in holding that the creditors were not liable as partners, and so they reversed the judgment of the Court of Common Pleas, though it had received the concurrence of a large majority of the judges who had dealt with the question in its different stages.

The case is remarkable for the difference of opinion and the unsettled state of the law which it exhibits, not only upon the main question, but upon several points which are incidentally discussed.

The judgment in the House of Lords did not go the length of over-ruling the judgment in *Owen* v. *Boddy*, even upon the legal question of partnership, but proceeded rather upon an alleged difference between the two assignments, though it must be admitted, I think, that in the result of all these discussions the authority of *Owen* v. *Boddy* upon the question of partnership or no partnership, has been greatly shaken.

But I do not perceive that since that case was decided any fault has been found with it, so far as it determined that if the creditors executing would be liable as partners for debts to be incurred in carrying on the business; that would fully justify the creditors in declining to execute the trust deed, and that it should follow as a consequence that the creditor so refusing could enforce his execution against the goods notwithstanding the assignment. Lord Cranworth, who went fully into the case in the House of Lords, and whose judgment is to my mind one of the most satisfactory, speaking of *Owen* v. *Boddy*, says, "It was at most a dictum," (alluding to the observation of Lord Denman, that the deed imposed such terms as *might have* constituted a partnership among the persons executing it—not pronouncing that it did,) and he adds, "The Court of Queen's Bench were quite right in holding that the creditors were justified in refusing to execute the deed tendered to them, and that is all that was decided." His Lordship meant, no doubt, that that was all that was decided in the case *which touched the question of partnership*, for there was this certainly decided in the case, which does not appear since to have been disputed—that as the deed imposed such terms as *might* have constituted a partnership, "those were terms to which creditors were not bound to submit, and that the assignment was therefore invalid (See 5 A. & E. 37).

Lord Wenleysdale is equally explicit on this point. "The case of *Owen* v. *Boddy*," his Lordship said, "on which some reliance was placed, is really no authority for holding that the creditors by subscription became actual partners. In the short judgment of Lord Denman the expression used is not that the deed imposed such conditions as would have constituted a partnership amongst those who subscribed it, but as *might have had the effect*, which is

a much more doubtful expression. It was quite enough for the decision of that case that the subscription exposed them to the peril of being considered partners, of which peril the opinions of the majority of the judges leave no doubt, *and that prevented the deed from being a fair deed and good against creditors.* So did the provision that the effects which ought to have been divided equally amongst the creditors should be put in peril by being employed in trade."

I have gone into this long and, I fear, tedious statement of the discussions and judgments in this much agitated case of *Hickman* v. *Cox*, not because the question of a partnership in fact, upon which alone that case necessarily turned, has any bearing upon the case now before us, but for the purpose of shewing that the correctness of what was decided in *Owen* v. *Boddy*, which has a direct bearing upon the present case, is no more called in question in this latest judgment of *Hickman* v. *Cox*, than in the other intermediate cases to which I have referred, but that it seems to be still recognized fully, and with no intimation of a doubt, that is, that even the peril of being considered partners in consequence of a provision contained in that assignment, made it a deed which the creditors generally would not be expected to sign, and that, in the words of Lord Wensleydale, "prevented it from being a fair deed and good against creditors."

Connecting, then, this deduction from the class of cases I have been referring to with what was so well expressed by Maule, J., in *Jones* v. *Whitbread*, in the passage I have already cited, it appears to me that the general principle on which the court acted in *Owen* v. *Boddy*, instead of being in any degree shaken by the judgments or discussions in the subsequent cases, has been materially strengthened and confirmed by them, for all the difference of opinion was upon the question of partnership, which we have nothing to do with in this case.

Then we have here a case in which Ranney, who, it is clear, was at the time deeply indebted, makes, on the 4th January, 1858, a deed to certain trustees, of something less than two acres of land in the township of Grantham, being the land for which the ejectment is brought; and on the next day he executed another deed, in which the fact that he was insolvent is recited; and that he had agreed to assign *all and singular his real and personal estate* and effects to these defendants as trustees for the benefit of his creditors; and that in pursuance and part performance of the agreement, he had assigned to these defendants by five several deeds, all bearing the same date, certain real estates situate in as many different counties; and it is recited that such estates were so conveyed to the defendants (though not so expressed in the said indentures), upon the like trusts, and for the like purposes, as those for which he did by the same deed of 5th January, 1858, assign all his personal estates and effects to the same trustees. And after these recitals, Ranney proceeds by this deed to assign specifically a certain schooner by name, and certain leasehold properties in the town of Brantford, and also all and singular the stock-in-trade, goods, wares, merchandise, household goods, furniture, bank stock, and all other stocks, bills, bonds, notes, accounts, judgments, mortgages, and other securities for money, debts, chattels, and all other personal estate whatsoever and wheresoever, which he, the said Ranney, or any person or persons in trust for him, then was in any way possessed of, interested in, or entitled to—To have and to hold all and singular *the lands and tenements particularly described in the said several indentures*, and the said stock-in-trade, &c. (going through the same enumeration), debts, chattels, and other personal estate in trust, &c., setting out such trusts as are usually found in assignments of this kind. The assignment contains a long list of debts, which are to be paid in full before any dividend is paid to other creditors. No objection has been taken on account of these preference claims. But we have been asked to hold the assignment invalid as against the plaintiffs in this action, on account of the following provisions at the end of the deed: "And the said parties of the third part (that is, the creditors executing the deed) for the consideration aforesaid, do severally, for themselves and their respective partners, release unto the said party of the first part (the assignor) all manner of action and actions, bonds, notes, bills, judgments, executions, and all other claims and demands whatsoever, from the beginning of the world to the day before the date hereof: Provided always, that every such creditor as shall not come in and execute these presents within 30 days from the date thereof, shall not be entitled to any distribution or advantage therefrom whatsoever; and in such case the proportion or proportions of the premises hereby assigned, which such creditor or creditors would have been entitled to receive if he had executed the same within the time aforesaid, shall be paid over to the said parties of the third part in proportion to their respective debts.

"And it is lastly agreed, that when the said parties of the third part shall have received the whole of their respective debts, and all charges, commissions, and allowances, shall have been deducted from the said trust moneys, the said parties of the second part shall deliver and pay over the remainder (if any) to the said party of the first part, his executors or administrators."

Now, in the first place, independently of any thing that can be cited as authority bearing upon the question, is this a reasonable and just provision which subjects all creditors of Ranney to these conditions before they can gain a right under the deed to share in the proceeds of the real or personal property assigned—first, that they must execute the deed within 30 days; and, secondly, that they must consent to accept in full of their debts whatever dividend may fall to them, according to the terms of the deed; and must, in consideration of their expectations under the deed, release Ranney from all debts due to them at the date of the deed. Our stat. 22 Vic., chap. 96, sec. 19, against fraudulent preferences, cannot affect this case, because it was passed after the assignment was made. There are many cases which would seem to warrant us in holding that, at common law, Ranney would have been at liberty to do what he did by this deed, notwithstanding it had the effect of giving to some of his creditors a preference over others; and that he would have been equally at liberty to do this notwithstanding the statute 13 Eliz., chap. 5, provided his assignment was not a fraudulent contrivance to keep off creditors, and made upon some secret trust or reservation in his own favour (1 M. & Sel. 395, 3 M. & Sel. 375). But although he might, no doubt, consistently under the common law, and with that statute, have transferred his property directly to one or more of his creditors, or as much of it as might be necessary for payment of his or their debts, yet, if the law is correctly laid down by the learned judges, in *Jones* v. *Whitbread*, an assignment to trustees, for the payment of debts would not be legal, and could not have the effect of tying up his property so as to protect it against execution creditors, unless it was made simply for the purpose of having it fairly distributed among all his creditors.

And, in reason, it certainly would seem to follow, that an assignment should be held to be invalid which provided that a large body of creditors should be paid in full out of the proceeds before the other creditors should receive any dividend; for this might end in their receiving little or nothing out of a large property; and which, moreover, allowed no creditor to participate to any extent in the proceeds of the goods assigned, unless he would be content to confine himself to what he should receive under the trust, and to release his debtor from all claim. But, after all, if we look at what the statute 13 Eliz., chap 5, does prohibit, and according to its recital it was intended to prohibit, and if we consider further, as I think we must, that the statute was intended to go at least as far as the common law was understood to have gone before in restraining alienations to the prejudice of creditors, then we must conclude that it was only "*feigned, covinous, and fraudulent conveyances*, contrived of malice, fraud or guile, to delay, hinder or defraud creditors," that were intended to be interfered with. It would be seldom that an assignment would be found to contain upon the face of it what, without the aid of extrinsic evidence to be submitted to a jury, would warrant a court in holding it to be fraudulent. That it placed one creditor in a more favoured position than others, would not, I conceive, be sufficient, for there might be reasons which would shew that to be perfectly just and honest.

Then, would it seem just and right on principle to hold that a conveyance like this to trustees was upon the face of it a conveyance fraudulently devised to defeat or delay creditors, because of the provision which required from all creditors who should execute it a release in full of all demands against the debtor? I think not,

without something more appearing to show fraudulent conduct or intention than the deed itself exhibits.

It is too late to contend, in the face of a multitude of authorities, and of the principles sanctioned by all bankrupt and insolvent acts, that an insolvent debtor who has been guilty of no fraud, and who honestly surrenders everything that he has, may not fairly expect to derive from the surrender the advantage of being secure from molestation afterwards on account of his then existing debts. His exacting a discharge in full therefor, however much or little the property which he has surrendered may produce, cannot be deemed a fraudulent condition, provided he has surrendered all, and has been guilty of no deception.

Each case must stand upon its own merits, as they are made to appear in evidence. The fraudulent intent and effect of the assignment may be so apparent upon the evidence, or even upon the face of the assignment without the aid of other evidence, that it would be the duty of a judge to tell the jury that it was one so manifestly fraudulent that the law would not uphold it; in which case the calling upon the jury to pronounce upon it would be rather form than substance.

In the present case, Ranney assigned all his personal property to trustees, in terms as comprehensive as could be employed. He recites in his deed that he had agreed and intended to assign *all* his real estate; but all that he has in fact done in this respect is to convey to his trustees certain real estate. For all that the deed states, what he has conveyed may be all that he owned, or it may be but a part of it, and a very small part.

If the latter had been shown to be the fact, then his exacting a release in full, notwithstanding his failure to surrender some considerable portion of his property would have been manifestly unfair and unreasonable. So also, if what he was surrendering was of small value in proportion to his debts, and if he were known to be in possession of a large income derived from official sources, or from funds abroad, it would have been a fraud upon his creditors to endeavour to place beyond the reach of execution his tangible property, and to deprive them at the same time of all claim to be paid a dividend out of his property assigned, unless they would release him from the debt in consideration of what they might receive from the trustees. A. might be indebted to B. in £50, and to others in £1,000, and might have only £500 worth of property in this country which an execution could reach, but a large income derived from other sources. If he should endeavour to place his property out of the reach of B. by assigning it to trustees, on the condition that no creditor should be paid anything who should not consent to discharge him in full, I think a jury might fairly be told that such a deed was a fraud upon creditors, and void under the statute.

But fraud is not to be presumed, and we are not at liberty to act upon the mere surmise that Ranney might have owned real estate which he had not conveyed, or other considerable means of paying his debts, besides the property which he had placed in the hands of the trustees. The reasonable inference from what appears, and in the absence of any evidence leading to a contrary conclusion, is, that he gave up all his means of satisfying his creditors.

Still it is to be considered that an assignment of this kind, voluntarily made to assignees selected perhaps wholly by himself, might afford a very uncertain and unsatisfactory provision for the due application of all his assets to the satisfaction of his debts, and that a creditor might very naturally and reasonably object to being a party to the assignment, if he must rest his hope of being satisfied entirely upon the contingency of the debtor honestly giving up all his effects, and of the trustees diligently realizing and faithfully applying them; and it seems hard that he should be deprived of any benefit under the deed, unless at the same time he gives up all hope of ever obtaining more than the deed will give him. On the other hand it is to be considered that few, if any, persons would make an assignment for the benefit of their creditors, if the exacting a release would necessarily invalidate it; for the consequence would be that they would generally be frustrated by a portion of the creditors refusing to come into the assignment, and pushing their remedy by execution against the goods, for this would wholly defeat the object of the debtor, and of those creditors who had been content to rely upon receiving their fair dividend.

This, no doubt, has led to the general introduction of a release clause into assignments of this nature, and of its being tolerated, as it appears to have been by the Courts; that is, I mean, tolerated where there is nothing in the circumstances of a particular case to make that an unjust or unreasonable condition, which has been generally allowed to be imposed. When I say that such a condition had been generally allowed, and that assignments have not been held invalid on account of it, I accede to the correctness of the view taken in the judgment of Mr. Justice Hagarty, delivered in this case,—I mean as regards the state of the English authorities upon this question.

The only case in which a decision seems to have been called for upon this exception to the assignment containing a clause of release is that cited in the judgment below, of the *King* v. *Watson*, (8 Price 6), and there the Court entered into no discussion of the exception, but in general terms said,—the assignment (by which we must suppose him to mean, such as it was) "was a very common arrangement, which it would be very injurious to disturb." The deed had been set out at length in a plea, with the condition plainly expressed, that the creditors were to receive the monies arising from the insolvent's estate in full satisfaction, and discharge of their respective debts.

This plea was specially replied to by the plaintiff, who contended that it was fraudulent and void, and in the argument the clause of release was strongly pressed as one that made the deed void. The Court, therefore, could hardly have failed to give their consideration to that point, when they held, as they did, that there was no fraud in the case affecting the assignment.

In the case of *Owen* v. *Boddy*, the assignment contained a clause of release and sale; the present Chief Justice of the Common Pleas, though he objected as counsel for the execution creditor to the validity of the assignment on other grounds, raised no question about the release. In the case of *Hickman* v. *Cox* also, the deed as set out in 18 C. B., 626, contained a similar clause of release. The validity of the assignment was not in question in that suit, and I only mention it to shew that it seems to be the universal practice to insert this clause.

In *Tatlock* v. *Smith*, (6 Bingh., 339), this matter of a release in an assignment came up incidentally, the debtor having refused to execute the assignment because it did not contain such a clause of release as he deemed sufficient. The Chief Justice—Tindal, I believe—who tried the case at Guildhall, said he thought the defendant's objection to execute the conveyance was reasonable. The defendant had insisted that a general release from the creditors was a usual and reasonable clause.

Afterwards, in *banc*, the learned Chief Justice remarked,—"Is it unreasonable that debtors who have surrendered so much, and have thereby deprived themselves of any other mode of effecting payment, should remain liable to hostile proceedings at the suit of their creditors. Their situation itself seems to preclude the possibility of any such intendment."

"I do not say"—his Lordship remarked—"that an absolute refusal to execute the conveyance, as it stood, might not have remitted the creditors to their rights, but in the present case it is only necessary to observe that there is no evidence of a sufficient tender of any release." His Lordship, we may suppose, would hardly have held this language if he had looked upon a clause of release as inconsistent with the validity of the assignment. In *Wells* v. *Greenhill*, (5 B. & Al., 875), Abbott, Chief Justice, in his judgment gives us to understand that he did not regard either the giving preference to certain creditors by directing their debts to be paid in full, or the insertion of a clause of release, as affecting necessarily the validity of an assignment. The deed the Court then had before them directed that before any dividends to other creditors, a judgment debt of £400 due to Stovell & Upton should be paid in full. The deed contained a proviso that in case any creditor whose debt should amount to £100 and upwards, or any two creditors whose debts should amount to £150, or upwards, should not execute the deed within three months, the deed should be void. And it also contained a covenant that the creditors who executed the indenture would release all their claims upon the assignee within a certain time. It was contended, that as Stovell & Upton were creditors to an amount above £150, and had not executed within the time, the deed was therefore void. The Court

said,—"If Stovell & Upton had executed the deed, they would have been parties to the latter covenant, and the effect of that would be to make them covenant to release that debt which by the provisions of the deed was to be paid in full? I have thought it worth while to refer to these two cases, in addition to the summary of English authorities so ably collected and observed upon in the Court below,—because they shew that the fact of the clause of release being in the assignment came particularly under the notice of the Court, and was remarked upon. In the judgment delivered by Mr. Justice Hagarty, the state of this question upon American authorities is, I think, correctly explained, as well as what has passed hitherto in this country, when questions have been raised in regard to the effect of these clauses of release in assignments for the benefit of creditors. I mean, their effect upon the validity of the assignment as against non-executing creditors. We had, in the cases referred to in the judgment, expressed more than a doubt of the propriety of upholding assignments containing such a clause; but it so happened that there being in those cases other objections to the assignment, which we felt bound to sustain —it had not been necessary to the disposal of the cases that we should rest our judgment upon the point in question, and in *Burritt* v. *Robertson*, 18 U. C. R., 559, as in *Maulson* v. *Topping*, 17 U. C. R., 183, I felt it proper to intimate, that I felt still some doubt as to what our decision might be in any case where the case might turn exclusively upon it.

Upon the consideration which we have since given to the matter in this case, I am persuaded we should not be warranted in departing from the conclusion come to in the Court of Common Pleas. I will mention that the attention I have bestowed upon the present case has satisfied me of the general soundness of the views expressed by my brother Burns in the case of *Taylor* v. *Whittemore* (10 U. C. Q. B. R., 440), referred to with approbation in the judgment given in this case in the Court of Common Pleas.

In my opinion, the judgment given below should be affirmed, and the appeal dismissed with costs.

BURNS, J.—The case of *Burritt* v. *Robertson* was governed by the new statute 22 Vic. cap. 96, though the previous cases of *Kerr* v. *Wilson* (17 U. C. 168) and *Maulson* v. *Topping* were mentioned by myself as sufficient to dispose of the question with respect to a release of the debtor by the creditors, introduced in an assignment made for the benefit of creditors. It becomes necessary now, upon this appeal, to decide the precise point, though in the cases cited, as will be seen upon the facts of each, it was not necessary to decide the precise question—that is, the point was not in either of them the sole question upon which the case turned.

In addition to those cases in the Queen's Bench to be reviewed, there is also the case of *McDonell* v. *Putnam*, decided in the Court of Chancery by my brother Esten, wherein he held that the provision in a deed made for the benefit of creditors, where there were provisions for giving some creditors a preference over others, rendered the deed void. I believe these cases are all, which in our own courts, are to be found upon the precise subject before the court.

Looking at the cases in the American courts, where no system of administering estates of bankrupts or insolvents exists, we find the opinions of judges and of courts very conflicting. Each of the States of the Union holds itself bound only by the decisions of the particular State, and therefore we occasionally found some subject upon which the decisions of one State conflict with those of another State. The earliest case, in point of time, I find upon the subject is that of *Lippincott* v. *Barker* (2 Binney, 174), in 1809. This case was before the Supreme Court of Pennsylvania, and the deed of assignment gave no preference to any particular creditor, but provided for all ratably who should within a certain time execute a general release of all demands. The court was not unanimous, and those judges who gave the decision did so on the particular facts of the case, and remarking that there were many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases. After the execution of the deed in that case, the greater body of creditors met, and accepted of the assignment before the writ of execution of one of the creditors came into the hands of the sheriff. The deed was upheld. In 1818, in the Circuit Court of the United States, embracing the State of Pennsylvania with New Jersey, I find Judge Washington deciding the question in favor of the assignment (*Pierpont and Lord* v. *Graham*, 4 Wash. 232). There the deed of assignment provided for payment ratably to all those who should execute a release within a specified period, giving them of course a preference; and of course those who did not release would be left to obtain what they could from the insolvent, if he had anything. In 1838 a case of *Brashier* v. *West* (7 Pet. 608) was brought upon appeal to the Supreme Court of the United States, and the judgment of the court was given by Chief Justice Marshall. In this case the deed provided for a preference to particular creditors, who were to be paid in full before others shared in the estate, and all creditors who did not execute a release within a certain time were to be excluded all benefit. The deed was executed in Pennsylvania, and it seems had not been questioned in that State, but was questioned in another State. The court upheld the validity of the assignment, upon the ground that as the courts of Pennsylvania had so decided in the two cases I have quoted, those decisions must be received in the courts of the United States, and be acted upon.

Thus I find the courts of the State of Pennsylvania and the Supreme Court of the United States upholding the law of that State to be, that a deed of assignment will be upheld where made for giving preferences to those creditors who will grant releases of their demands, and holding *that* to be so even though the deed provides for discharging the demands in unequal proportions. The criterion of the validity being the fact that the debtor has surrendered all his property for the benefit of his creditors, it is of no consequence that he should say in doing so that he exacted a release in full, that the one may be treated and taken to be a valid consideration for the other. As no bankrupt or other law compels an equal distribution of a man's property, he may dispose of it in satisfaction of his debts in any order and upon any terms he thinks proper.

Turning from the State of Pennsylvania to the courts of the State of New York, we find a different opinion enunciated, but still not such a decided and clear one that leaves the mind free from doubt as to what may ultimately prevail even in that State. The Supreme Court, in 1817 (*Hyslop* v. *Clarke*, 14 John. 458), held that a deed made to satisfy one creditor first, and then to pay the others proportionably on condition of their executing releases of their respective demands, was void. Chancellor Kent, in 1821 (*Seaving* v. *Brinkerhoff*, 5 John. C. C. 329), held that a deed conveying a portion of the debtor's property only to satisfy debts, and containing a release to the debtor, was a provision the creditor was not bound to submit to. He said, "A partial assignment upon such a condition is pernicious in its tendency, if it be not, as I rather apprehend it to be, fraudulent in its design." In 1823 the Supreme Court (*Austin* v. *Bell*, 20 John, 442) held that a deed providing for the shares of such of the creditors as refused to sign a release of their demands being paid over by the trustee to the debtor, was void under the Statute of Frauds. The court says, without in the least impugning the doctrine that a man in debt has a right to give a preference to creditors, yet that a deed which does not fairly devote the property to the payment of his creditors, but reserves a portion of it to himself, unless the creditors assent to such terms as he shall prescribe, is in law fraudulent and void as against the Statute of Frauds, being made with intent to delay, hinder or defraud creditors of their just and legal actions.

In 1833 the Court of Errors (*Grover* v. *Bakeman*, 11 Wend, 187), upon appeal from Chancellor Walworth, affirming his judgment, held that an assignment containing a provision giving a preference to certain creditors in the distribution of the property, to depend upon the execution by them of a release to the debtor of all claims against him, was void. The court consisted of no less than twenty members, and were divided in opinion, five holding that the deed was not void in consequence of such a stipulation. The deed provided for the payment in full of certain preferred creditors, and for the second class who should within a certain time agree in writing under seal to receive such proportion of their debts respectively as could be paid by the avails then remaining in the hands of the trustees, in full discharge of their respective claims, to be apportioned according to their respective debts.

In 1844 the Supreme Court, in *Goodrich* v. *Downs* (6 Hill. N. Y. 441), speaking of *Grover* v. *Wakeman*, says: "Until the Court of Errors is prepared to retrace its steps, this question must be regarded as finally settled." Chancellor Kent, in the 6th edition of his Commentaries, published in 1848 (vol. 2, p. 536), in the note, says of *Grover* v. *Wakeman*, "This appears to be the most stern decision that exists either in England or this country on this subject." He adds his own opinion as the result of his investigation, thus: "The weight of general authority, both English and American, is, that an assignment by a debtor of all his property for the payment of his debts, and at the same time giving preferences, and requiring an absolute release from each creditor who accedes, is not *per se* fraudulent and void. The circumstances of the debtor assigning over to trustees all his property, without any reservation to himself, and giving the surplus if any to those creditors if any who do not come in and agree to release on taking their preferred share, is deemed to disarm the transaction of all illegality and unfairness."

The Supreme Court of Errors of the State of Connecticut, in 1826 (*Ingraham* v. *Wheeler*, 6 Conn. R. 277), followed the decision of *Hyslop* v. *Clarke* and other cases, and held, that a deed for paying certain creditors in full, and then providing as follows —"All the rest and residue of said proceeds, if any there be after the payments aforesaid, shall be applied by said assignees to the payment in whole or in part of the claims and dividends of all other of the creditors who shall within, &c., discharge their said claims and demands; and it is hereby expressly understood that no creditor shall be entitled to receive a dividend of the proceeds aforesaid, until he shall have signed such discharge"—was fraudulent and void.

In the State of Massachusetts, before Mr. Justice Story, in the circuit court of the United States, in 1826, a deed of a similar character was upheld. *Halsey* v. *Whitney*, (4 Mason, 208). Mr. Justice Story ably reviews the authorities, both American and English, up to that time, and speaking of those of his own State, he says: "The decisions in Massachusetts, therefore, leave the question *in equilibrio*." He sums up the whole, and gives his own opinion thus: "The weight of authority is then in favour of the stipulation for the decisions in New York (that was up to 1826), did not turn upon the naked point of a release, but upon that as incorporated into a peculiar trust, I am free to say, that if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield with reluctance to what seems the tone of authority in favour of them." Mr. Justice Story reiterates his view as to the tone and weight of authority upon this point in his "Commentaries upon Equity Jurisprudence," so widely circulated, and so justly celebrated both in England and America.

Many other cases before courts in other States of America, might be added to those I have mentioned, some taking one view, and others a different view; but I deem it quite sufficient to notice those of the four States mentioned only, and two of these particularly on account of the eminent jurists who have considered the question.

In *Jackson* v. *Lomas*, (4 T. R. 166, 1791), the deed of trust, made for the benefit of creditors, contained a clause of release by the creditors to the assignor, with a proviso that in case any of the creditors should not execute the deed on or before the 26th July then next, the assignor should receive from the trustees the shares of those creditors, and that no creditor should be entitled to the benefit of the trust deed who did not sign before that day. The plaintiff did not sign until the 31st July, and he refused to sign until the assignor had agreed to make good the deficiency. And it was upon this agreement he sued the assignor. The court held this agreement fraudulent as respects the other creditors; but not a word was urged against the validity of the trust deed. It seems to have been taken for granted that the trust deed was valid. If it had been void on the ground of imposing terms which the creditor was not bound to submit to, there would have been nothing in the way of the plaintiff sustaining his action upon the original debt, for there was a count in the declaration to that effect. In *The King* (in aid of Braddock) v. *Watson* (8 Price, 6, 1816), the very point was raised, and argued upon such a clause in the deed; but the Court of Exchequer said: "There is certainly no fraud in this case affecting the assignment, which has been made for the equal benefit of all the creditors, Braddock as well as the rest." The court adds: "This is a very common arrangement, which it would be very injurious to disturb, where there has been no commission." The case of *Pickstock* v. *Lyster* (3 M. & S. 371), had then just recently been decided; and Baron Richards remarking upon that case, as applicable to *The King* v. *Watson*, says: "Such a deed certainly ought not to be avoidable by any particular creditor not attempted to be excluded from the benefit of it; and no such attempt has been made in the present (that is, in *The King* v. *Watson*,) instance." He evidently did not consider the release clause such a coercion upon the creditor as to justify him in refusing to come in. The case of *Tatlock* v. *Smith* (6 Bing. 339, 1829.) has a strong bearing upon the case before us. There certain traders assigned their stock for the benefit of creditors, and agreed also to convey certain real estate for the same purpose. The stock in trade was disposed of, and the business wound up, and the creditors realized 10s. in the pound. The agreement contained a provision that when the assignors should be called upon to convey the real estate, that there should be inserted in the deed *all other usual and necessary clauses and conditions*. When the deed of conveyance was tendered, the defendants objected to execute, because the deed did not contain a general release from the creditors. The plaintiffs then sued for the original debt. At the trial before Chief Justice Best, he held that the defendants' objection to convey for want of the release was reasonable; but as some of the creditors had executed the release, and a meeting had been appointed for all the creditors to determine what they would do, and the plaintiffs had commenced their action before that meeting was held, the Chief Justice held the action was premature, and the plaintiffs were non-suited. The court, upon an application for a new trial, upheld the ground that the action was premature. Sir N. Tindal, who had been made Chief Justice of the Common Pleas in the meantime, says: "I do not say that an absolute refusal to execute the conveyance as it stood, might not have remitted the creditors to their rights; but in the present case it is only necessary to observe that there is no evidence of a sufficient tender of any release." The deed, signed by some of the creditors which had been tendered, did contain a release of some kind; but the defendants considered it insufficient. It is evident, I think that Sir N. Tindal considered the defendants were entitled to some kind of release, for if they were not, there was no use of putting the judgment upon the ground that there was no sufficient evidence of any release, merely because some of the creditors had not signed it. And so with the judgment of the court in holding the plaintiffs were premature in bringing their action.

In *Small* v. *Marwood*, (9 B. & C., 300, 1829), the defendant, a bankrupt, had assigned his goods for the benefit of creditors to four trustees also creditors, and the deed contained a clause of release: and provided that the trustees and creditors should on or before the 1st Feb., then next, make proof of debts if required, and execute that indenture. A covenant followed that the creditors would not sue, and if any did, the deed might be pleaded as a release. The deed was executed by two only of the four trustees, and because of that, one of the executing trustees considered the deed void, and sued out a commission of bankruptcy. The question before the Court was, whether the deed was void, and whether the debt due to the trustee was a valid subsisting debt, sufficient to constitute a good petitioning creditor's debt. Bailey, J., delivered the judgment of the Court, and it was held that the property passed to the two trustees who executed the deed. In speaking of the effect of the release of the debt he says,—"I entertained a doubt for some time whether the deed would operate as a release of the debt due to Barr, (the trustee who sued out the commission) unless the personal estate was handed over. But on consideration, I am satisfied that the deed is not inoperative on that ground. Barr & Hudson have got all that the deed stipulated to give them, if they think fit to take it. The release is in consideration of the assignment; and it is therefore an operative deed. The debt was thereby extinguished, and it follows that the commission cannot be supported."

In the more recent cases of *Jones* v. *Whitebread*, and *Coates* v.

Williams, the deeds of assignment contained the clauses of release to the debtor, but no question was made to the Court about that provision making void the deeds; and yet it is obvious, that if it had been considered that such a provision would avoid the deeds, the point would have been taken. I think we must take it for granted the profession in England did not suppose that point an open question at that time, and we can scarcely think the profession there were ignorant of the views entertained upon this side of the Atlantic, especially as Mr. Justice Story's works are accepted there as standards.

Some of the cases cited, and many others which might be mentioned, were cases of traders providing for an equal distribution of their effects among their creditors; and it may be said the case before us provides for an unequal distribution among Ranney's creditors, and therefore stands upon a different footing. If this question were propounded for the first time,—that is a debtor claiming a release of debts due by him, or providing for the exclusion of such creditors as refused to accept of the assignment upon those terms, I think I should hold that it was a stipulation so far for the benefit of the debtor that it would render the deed void under the Statute of frauds; but when I see that in cases of traders, the Courts in England constantly uphold those assignments containing releases by the creditors, whereon the deed itself is not avoided on the ground of the deed itself being an act of bankruptcy: and when I see that in cases of persons not traders, the Courts constantly say that a person may select any class of creditors or any particular creditors and pay them to the exclusion of all others, and that the only question is whether the debtor has honestly given up his property to his creditors, then I am forced to the conclusion that the tone of authority is that the provision for a release being given on the one side is the consideration for surrendering the property by the debtor upon the other side. If the transfer of the property can be held to be done for a legal consideration, then of course the case does not fall within the Statute of frauds.

There is a provision in the deed before us not common in these assignments, and that is, in case any of the parties of the third part do not, within the time specified, come in and execute the deed, then the shares which such creditors would have received, shall be paid over to those creditors who do execute the deed.

At the time the deed in this case was made, the law of Upper Canada remained the same as it was when (*Taylor* v. *Whittemore*, 10 U. C., 440) was decided, persons who were traders, and those not traders being upon the same footing, and also leaving a debtor the power of saying in what order he would pay his creditors with his property. No doubt, it is true, that very many deeds of a similar character to the present have been executed and acted upon, and much real and personal property have changed hands under them, and I should say under the idea of the profession generally that was no fraud apparent upon the face of such deeds. Perhaps it was unfortunate that the point has been suggested, and that opinions to the extent they have been should have been given; and then again perhaps it is fortunate in order to settle the law and leave no doubt upon past transactions.

I think, therefore, the judgment should be affirmed.

SPRAGGE, V. C.—My brother Esten and myself agree, generally, in our views as to the law upon the point principally in question.

It is of course conceded that the debtor had, as the law stood, at the time this assignment was made, the right, although he was insolvent, of preferring one or more creditors to others. His doing so did not contravene the statute of Elizabeth; it is not hindering or delaying his creditors within the meaning of the statute. What has been done by this assignment is to give a preference to creditors, large in number, and as I should judge, large in amount; leaving the surplus, if any, to be divided ratably among the other creditors, and imposing a condition to their receiving such ratable share that they shall release the debtor.

It is admitted that in the absence of authority such a deed is void under the statute; it imposes such an unreasonable condition upon those who may come in after the preferred creditors as to be a hindering and delaying of them.

It is not unreasonable if an insolvent transfer to trustees all his assets for the general benefit of his creditors, that he should require in return that they shall grant him a release. This is in the spirit of the Bankruptcy Laws, and if there be some exceptions to the assets being for the general benefit of all creditors it may still be not unreasonable, and still within the spirit of the Bankruptcy Laws; but that I apprehend must depend upon the extent to which the exceptien is carried. The law recognizes certain preferences as reasonable and right, and does in Bankruptcy prefer certain creditors; and if the like preferences are given in a voluntary assignment there is no reason that I can see, why they should be held to invalidate the deed; for that which is in accordance with the policy of one statute cannot be said to be a fraud under another; and it may probably not be necessary that the preferences should be precisely the same as obtain in Bankruptcy, if they as substantially in the same spirit.

So far the Court would have something tangible to go upon, in holding such assignments not avoided by the statute of Elizabeth. But when an insolvent discards altogether that which is recognized as just and equitable in Bankruptcy, and chooses to substitute his own caprice or to consult his own personal or family advantage; and to postpone to these considerations the just rights of creditors, he places himself, it seems to me, out of the protection of the principle upon which assignments are upheld, which provide for a ratable distribution wholly, or with such preference substantially as obtain in Bankruptcy.

It must surely be competent to the Court to draw the line somewhere; otherwise the Court must feel itself bound to uphold whatever disposition an insolvent may make of his estate by assignment however unreasonable and unjust. If the insolvent does not stipulate for a formal release to himself the creditor is in a very different position, because with the debtors right to prefer one creditor over another he might be content to come in, although the preferences might be unreasonable, because he might get something under the assignment; and at all events his position as to his debtor otherwise would not be prejudiced, but with a clause of release, his position is very different. He may get something or he may get nothing; for all may be absorbed by the unreasonable preferences given; and it is generally impossible to tell beforehand how the estate may turn out. This alternative then is presented to him to become a party to an instrument which unjustly prefers others to himself, and at the same time to forego all other claims against the debtor's estate, or not to come in at all. I cannot help feeling strongly that such an assignment does hinder and delay creditors within the spirit and meaning of the act; while a fair and just assignment has no such effect, but tends to promote equality of payment, and may therefore be properly upheld even though it stipulate for a release.

I do not think the circumstance of there being no Bankrupcty Law in Upper Canada can make a difference in favor of an unfair, unreasonable assignment. If there were no Bankruptcy Law in England, it may well be doubted, I think, whether any preference at all would not be held to invalidate a voluntary assignment with a clause of release; but I think it would be right to uphold in Canada such assignment as came fairly within the principles of English law. But I think the assignment in question transgresses those principles in substance and in spirit,—and to a degree that renders it very unjust to the general creditors.

There is another reason, founded upon public policy, which I think should operate against sustaining such assignment as the one in question. If an insolvent can only stipulate for a release when he makes a just distribution of his estate, he will be careful to make such just distribution; and thus equality, which the law favors, will be promoted, and a very salutary check will be imposed upon the giving of unfair and unreasonable preferences: whereas, if his assignment will be held valid whether the distribution thereby made of his estate be just or unjust, he at the same time stipulating for a release to himself as the price of coming in under the assignment, a powerful motive for making a just assignment will be taken away. I speak of course of the policy of the law apart from the act against fraudulent preferences passed since the assignment in question was made.

I do not think that the question is concluded by the authorities. They show indeed that a stipulation for a release does not *per se* invalidate an assignment by an insolvent for the benefit of his creditors; but I think they do not shew that an assignment con-

taining such a stipulation, and giving unjust and unreasonable preferences will be sustained.

In the case of *Rex* v. *Watson*, referred to by my brother HAGARTY, in his learned and elaborate judgment in the Court below, as the only express decision in England that he had seen, there were no preferred creditors, and the circumstance is made a ground for sustaining the assignment. The language of the Court is,—"There is certainly no fraud in this case, affecting the assignment, which has been made for the equal benefit of all the creditors." "This is a very common arrangement, which it would be very injurious to disturb, when there has been no commission (of bankruptcy.")

RICHARDS and HAGARTY, J J., concurred in the views expressed by his Lordship the Chief Justice.

Per Cur.—Appeal dismissed with costs. [ESTEN and SPRAGGE, V.CC., dissenting.]

QUEEN'S BENCH.

Reported by C. ROBINSON, Esq., *Barrister-at-Law, Reporter to the Court.*

WAYDELL ET AL. v. THE PROVINCIAL INSURANCE COMPANY.

Action on foreign judgment—What Defences may be set up.—What law governs. 23 *Vic., ch.* 24.

To an action on a judgment recovered in the Supreme Court of the State of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B, which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who therefore could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B assigned to the plaintiffs his right of action for the recovery of the money payable therefor, and the said B not being a resident of the State of New York, the plaintiffs, in accordance with the laws of that State, sued there in their own names as such assignees, and recovered judgment, as by the laws of said State they had a right to do.

Held, on demurrer, a good replication, for defendants by their acts of incorporation being evidently designed to carry on business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Upper Canada, and if made in the State of New York the law there would govern.

Per Hagerty, J.—The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs to sue in their own name by the foreign law was a question of procedure, on which that law must govern.

In another plea the defendants set up a further provision in the policy, that in case of loss the same would be paid within sixty days after proof and adjustment, and alleged that no proof or adjustment was ever made.

The plaintiffs replied, that when called upon to pay, defendants refused, not for the want of such proof or adjustment, but for other and different reasons alleged in writing: that they thereby, according to the law of New York, waived the condition pleaded, and under said law became liable, and said judgment was recovered, upon proof of such waiver, without any evidence of proof or adjustment.

Held, on demurrer, replication bad, for as the same defence could have been pleaded in the original suit, it might, under 23 Vic., ch. 24, be set up here; and whether the condition was waived or performed, was a matter of evidence only, on which our law must prevail.

The plaintiffs sued on a judgment alleged to have been recovered by them in the Supreme Court of the State of New York, on 9th of May, 1860, against the defendants, for the sum of $2,947 08c., for their damages which they had sustained on occasion of the breach of a certain covenant then lately made by the defendants, as also the sum of $181 18c. for their costs and charges by them about their suit in that behalf expended. They alleged that the judgment still remained in full force and unpaid, and that defendants promised to pay the same, but had not done so.

Second Plea—That the said judgment in the declaration mentioned was recovered by the plaintiffs against the defendants in the said Supreme Court on a certain policy of insurance made by the defendants on the 21st of November, 1854, to one Joseph Buckman, for losses alleged to have been sustained on the subject assured by the said policy, and which contained the following, amongst other provisions, namely, that the said policy should and would be void in case of its being assigned, transferred, or pledged, without the previous consent in writing of the defendants; and the defendants say that they never made or entered into any covenant with the plaintiffs in respect of the said policy, or the subject assured thereby, nor did they give any consent in writing at any time to the assignment of the said policy by the said Joseph Buckman to the plaintiffs, nor did they become liable in any manner to the plaintiffs upon or in respect of the said policy, or the subject matter assured thereby, nor can the plaintiffs sue thereon, but only said Joseph Buckman, if any one, under any circumstances.

Fifth plea.—The defendants say, that another provision of said policy was and is, that in case of loss under said policy the same would be paid within sixty days after proof and adjustment thereof; and that proof of loss under the said policy of insurance in the said first plea mentioned, on which the said judgment was recovered, was not made to the defendants at any time before the commencement of the said suit in the said Supreme Court in which the said judgment was recovered, nor was said law ever adjusted as required by said policy.

Replication to the second plea, that after the losses mentioned in the said plea had been sustained, the said Joseph Buckman in the plea mentioned assigned to the plaintiffs his right of action for the recovery of the said moneys payable after said loss by said defendants, in pursuance of said policy. And the said Joseph Buckman not being at the time of the said assignment, nor during all the time thereafter until nor at the time of the commencement of the action in which said judgment was obtained, a resident of or residing in said State of New York, in which said action was brought, the plaintiffs did, under and by virtue of, and in pursuance of, the said laws of the State of New York, one of the United States of North America, commence an action in the said Supreme Court in the said State, in their own name as such assignees, for the recovery of the said moneys; and in said action, as such assignees, and by virtue of their rights under said assignment, recovered judgment against the plaintiffs, as by the laws of the said State of New York they were permitted and had a right to do.

Replication to the fifth plea, that the defendants, when called upon after the said loss to pay the said moneys, and before the commencement of said suit in said Supreme Court, did not refuse to pay the same for want of or on account of the absence of said proof and adjustment, but for other and different reasons by them, the defendants, then in writing alleged. And the plaintiffs further say, that the defendants thereby, under and according to the said laws of the said State of New York, and of the said United States, waived the said condition of said policy in said fifth plea mentioned, and discharged the plaintiffs from the necessity of fulfilling the same; and the plaintiffs say that under and according to the said laws by the said Supreme Court administered, and by which it was governed, the said defendants were liable upon proof of such waiver to pay said moneys, without any evidence of said proof or adjustment, and that the said judgment was accordingly recovered by the said plaintiffs against said defendants upon proper evidence of said waiver.

Demurrer to the replication of the second plea—that the said policy of insurance having been made in Upper Canada, the laws of Upper Canada must guide the nature and form of and parties to actions, and that, as the plaintiffs would have no right of action in their own names under said policy, the defendants are entitled to set up that fact as a defence; and that it is not averred nor shewn that the said assignment in the replication mentioned was made with the knowledge or consent of the defendants.

Demurrer to the replication to the fifth plea—that the defendants are by law permitted to offer any defence to an action on a foreign judgment which they might avail themselves of in an action upon the original cause of action; that the facts stated in the fifth plea constitute a good defence to an action on the policy therein mentioned, and the omission to plead that defence to the action in the foreign country cannot prejudice the right of the defendants to plead that defence to this action on the judgment.

Burns for the plaintiffs, cited *Beemer* v. *The Anchor Insurance Co.*, 16 U. C. R. 485; Ellis on Insurance 143; *Brown* v. *Hudson*, Tay. Rep. 537; *Dascomb* v. *Heacocks*, Ib. 606; *Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend. 401; *Lumley* v. *Gye*, 14 Eng. Rep. 442; *Morgan* v. *Couchman*, 24 Eng. Rep. 321; *Outram* v. *Morewood*, 3 East 346; *Carter* v. *James*, 13 M. & W. 137.

McMichael, contra, cited 18 Vic., ch. 213, sec. 9; *O'Callaghan* v. *Marchioness Thomond*, 3 Taunt. 82, 84.

MCLEAN, J.—In setting forth grounds of demurrer to the second plea, the defendants appear to assume that the policy of insurance was made in Upper Canada, and that on that account no ction c an be brought upon it except such as is sustainable under

the laws of Upper Canada, and therefore no action is sustainable by the plaintiffs in their own names, or in the name of any person but Joseph Buckman, to whom the policy was issued. Now it is no where stated in the pleadings where the policy was made or issued. The declaration and plea and replication are equally silent on that head, and if it were intended to rely on any ground of defence arising from the fact of the policy having been made in Upper Canada, it should certainly appear in the pleadings somewhere, but we cannot, I think, assume, as the defendants do, that it was made or issued in Upper Canada.

The 17th section of the charter of the defendants, 12 Vic., ch. 167, requires that all policies or contracts of insurance issued or entered into by the defendants shall be executed in a particular manner under the seal of the company, and being so executed, shall be deemed valid and binding upon the company, according to the tenor and meaning thereof. Then, in the 16th Vic. ch. 69, amending the charter by sec. 6, it is provided that all parties effecting insurance with the said company through any accredited agent in Lower Canada may proceed at law against the company for the recovery of the amount insured, or in any matter in relation to the said insurance, in any court of competent jurisdiction in Lower Canada; and that service at the office of such agent of any writ, process, or proceeding in any such case, or on the agent personally, shall to all intents and purposes be taken and considered to be legal service upon the said company.

Then, again, by the 9th section of the Act 18 Vic., ch. 213, further to amend the charter, it is stated that doubts may arise as to the liability of the said company on policies issued by them out of the Province of Canada, either in the United States of America or elsewhere; and it is declared that the said policies, wheresoever issued, shall have a like force and effect as if issued in this Province, and shall be to all intents and purposes as binding on the said company. Then last, though not least, is the provision in the same act, sec. 14, declaring that the provisions of the 6th section of the 16 Vic., ch. 69, (facilitating proceedings in all cases in Lower Canada,) shall be extended to all parties having, or claiming to have, any right of action against the said company for any cause or on any account whatever, and to any writ, process, or proceeding at the suit of any such person or persons against the said company.

Now when the defendents in the use of these enactments choose to issue policies in Lower Canada and in the United States, or are at liberty to do so at any time they may think proper, and declare such policies wheresoever issued to have the same force and effect as if issued in this Province, and moreover confer on all parties claiming a right of action against them for any cause whatever the right to sue in any court of competent jurisdiction, and to serve any writ, process, or proceeding, at the office of the agent, or on the agent personally, it can scarcely be safe to assume that the policy issued to Joseph Buckman, on which the plaintiffs' cause of action has arisen, was in fact made in Upper Canada. The presumption, from all that appears, is to the contrary; and if so, and the plaintiffs are in fact assignees of the money payable by defendants on the loss insured against by it, they had a right to proceed in the State of New York, according to the laws of that State, to recover the amount; and when the defendants undertake to confer upon parties a right to sue in any court of competent jurisdiction, it must be taken that the suit and proceedings must be according to the laws of the state or country in which such suit may be pending. Then when a judgment is obtained in a foreign court, it does not require the sanction of the defendants to enable the parties to sue upon such judgment in Upper Canada.

The replication appears to be a sufficient answer as to the right of the plaintiffs to maintain this action on the judgment recovered by them in the State of New York, under the laws of that State, and the demurrer on the ground that the action can only be sustained in the name of Joseph Buckman I think must fail.

Then the defendants demur to the plaintiffs' replication to the fifth plea. That plea alleges that another provision of the policy on which the loss has arisen was and is, that in case of loss arising under the said policy, the same would be paid within sixty days after proof and adjustment thereof, and that proof of loss under the said policy of insurance in the first plea mentioned, and on which the said judgment was recovered, was not made to the defendants at any time before the commencement of the suit in the said Supreme Court, in which the judgment was recovered, nor was the said loss ever adjusted, as required by the said policy.

The replication to this plea, which is demurred to, sets up that defendants, after the loss had occurred, when called upon for payment did not refuse to pay on account of the absence of such proof and adjustment, but for other and different reasons by defendants in writing alleged, and that the defendants thereby, according to the law of the State of New York, and of the United States, waived the said condition of the said policy in the fifth plea mentioned, and discharged the plaintiffs from the necessity of fulfilling the same, and that under the laws of the State of New York by the said Supreme Court administered, the defendants were held liable upon proof of such waiver to pay the said moneys, without any evidence of such proof or adjustment, and the judgment was accordingly recovered by the plaintiffs against defendants upon proper evidence of such waiver.

This replication to the fifth plea shows the grounds on which the court proceeded in the State of New York in giving judgment for the plaintiffs without any proof or adjustment of the loss according to one of the conditions of the loss, but, under our 23 Vic., ch. 24, sec. 2, that proceeding cannot exclude the defendants from pleading any defence set up or that might have been set up to the original suit. There is no doubt that the defendants might have pleaded in the original suit in the State of New York, just as they have pleaded here, that the policy granted to Joseph Buckman contained a certain condition, that proof of loss and adjustment of such loss must be made before payment of such loss could be demanded, and that no such proof had ever been given to the defendants, nor had any adjustment taken place; and if such plea had been pleaded, the court in the State of New York would scarcely have accepted evidence of a waiver by such proof as they seem to have done. But if they had done so, that alone would be a strong ground of objection to the judgment, and afford ample justification of the clause of the statute to which I have referred, giving a right to any defendant sued upon a foreign judgment or decree to make any defence which he could have made in the original action. The replication is no answer to the defendants' plea, and judgment must be for the defendants.

HAGARTY, J.—Before our Act of 1860, I conceive it to have been clearly settled that in general a foreign judgment by a court of competent jurisdiction was not liable to be questioned on the merits: that at all events, when it was not shewn that it was obtained against defendant without any notice to him, or was not contrary to what is called "natural justice," or against the positive law or policy of this country, it was conclusive between the parties. The statute 23 Vic., ch. 24, sec. 2, enacts that in any suit upon a foreign decree or judgment, "any defence set up or that might have been set up to the original suit may be pleaded to the suit on the judgment or decree." It is most important that we should understand if possible where the contract sued upon in New York was made. The plaintiffs merely set out the judgment. The defendants say nothing thereupon in their pleas. But in their demurrer they assume (as their counsel on the argument urged us to assume) that it must have been made in Upper Canada.

We are bound to know judicially that defendants are a chartered company in Canada. The preamble of their charter, 12 Vic., ch. 167, recites the petition to be incorporated "to enable such institution to conduct and extend the business of fire, marine and life assurance, and for granting annuities and sums of money payable at future periods within her Majesty's dominions in North America and other places abroad." And by a subsequent Act, 18 Vic. ch. 213, sec 9, it is declared that whereas doubts may arise as to the liability of the company on policies issued by them out of Canada, either in the United States or elsewhere, and it is declared and enacted that the said policies, wheresoever issued, shall have a like force and effect as if issued within this Province, and shall be to all intents and purposes as binding on the said company. And section 14 of the same act refers to a section in a previous act, 16 Vic., ch. 69, allowing parties effecting insurance with the company through any accredited agent in Lower Canada, proceed at law against them in Lower Canada, and providing that service at the office of such agent or personally on him should be

legal service on the company; and declares that the provisions of such section shall extend to all parties having or claiming to have any right of action against the company for any cause or on any account whatsoever, and to any writ, process, or proceeding, at the suit of any such person or persons against the company.

We have here a chartered company established in Canada, evidently designing to carry on business abroad, and obtaining legislative declarations of their liability in their corporate capacity therefor, and facilitating proceedings against them in law suits.

The silence of the defendants in their pleas as to the place where the contract was made is significant, and on the best consideration I can give the case, I think that I cannot assume that the contract on which the judgment was obtained in New York was necessarily created within this Province. For any thing disclosed by the pleadings these defendants may have obtained power to act in their corporate capacity abroad, or at all events they are recognised by the foreign state, and allowed to appear as plaintiffs or defendants in the foreign courts. We may assume that they duly appeared and submitted to the jurisdiction of the New York court. If this view be correct, we may further assume the law of the place of contract must govern the proceedings in such place.

It is stated by the plaintiffs, and admitted on this demurrer, that the New York law permits the recovery by the plaintiffs in their own names, as assignees of the right of action of Buckman, the person insured. I therefore consider that the replication disposes of the objection, which would be fatal in our courts, to the right to recover in any name but that of the party to the original contract.

But the defendants further urge that any assignment was prohibited by the express terms of the contract, without their written consent. If such unauthorised assignment appears to have taken place, I have no doubt but that we must admit it here as a good plea to the present action.

The condition is to avoid the policy "in case of its being assigned, transferred or pledged," without previous written consent. The replication admits that after the loss Buckman assigned "his right of action for the recovery of the moneys," to the plaintiffs, who recovered judgment in their own names "as assignees for the recovery of the said moneys." The contention of the plaintiffs is this:—that the condition set out is merely to prevent the defendants being made insurers against their will of any person but the one named—in other words, that they contract to insure him from loss, but not to insure any other person to whom he may please to assign his claim: that this provision has never been violated: that no other person but Buckman was ever insured by defendants: that a cause of action by the happening of the loss insured against, vested completely in Buckman, and that all he did was to assign to the plaintiffs the right to obtain the sum insured from defendants.

Defendants say that an assignment to the plaintiffs is admitted, and is clearly within the condition.

If the action were originally brought in this court in Buckman's name, and it appeared just as stated in the replication, that after the loss he had assigned his right of action to the plaintiffs, who were beneficially the real plaintiffs, I do not think the defendants' plea would be held to be proved. I cannot see how the parties ever contemplated any assignment except while the policy continued as an indemnity against a possible future loss. The written consent provided for could hardly have been looked to as applying after the contingency had happened, and the right of action vested in the assured.

From the held statement of the condition in the pleadings, I have felt hesitation in arriving at a certain decision on this point, but on the whole I am of opinion that the plaintiffs' position on this head is correct, that there was no violation of the condition.

I also think that the defendants cannot now plead the inability of the plaintiffs to sue in their own names. They could not have pleaded it successfully in the foreign court, and I do not think that our act of 1860 permits the urging of such a defence, as it would necessarily be fatal to every action on a foreign judgment, which, though correct according to the *lex loci contractus*, might be open to objections on the law of the Canadian tribunal.

I consider that our law now provides for full defence on the merits, allowing every plea which had been or might have been pleaded in the foreign court; but this, I think, falls short of allowing an objection to the *status* of the plaintiffs—to their right to being in the position of plaintiffs at all—when the law of the foreign court clearly allowed them such right and position on a contract reasonably assumed to be governed by such foreign law.

I therefore think the plaintiffs entitled to judgment on the first demurrer.

The second demurrer raises this question. Defendants plead a plea which I gather from the case, though not very clearly, was urged as a defence in New York, namely, the non-delivery of proof of loss; and the plaintiffs answer this by averring certain facts which they say by the law of the New York court amount to a waiver of their right to such proof, and "the judgment was accordingly recovered against the defendants upon proper evidence of such waiver."

Now it seems to me that this was a question of procedure, a question arising on the law of evidence as administered by the foreign court.

The rule seems clearly stated in the books. "The distinction," says Tindal, C. J., in *Huber* v. *Steiner*, (2 Bing. N. C. 202, 2 Scott 304,) "between that part of the law of a foreign country where a personal contract is made which is adopted, and that which is not adopted by our English courts of law is well known and established; namely, that so much of the law as affects the rights and merits of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of the country where the action is brought." This is the view taken in Story's Conflict of Laws, in Westlake's International Law, and in *Leroux* v. *Brown*, (12 C. B. 801,) and *Thompson* v. *Bell*, (3 E & B. 236.)

It seems clear to me that, admitting defendants' right to plead the non-delivery of proof of loss, &c., in the original suit, it was a matter of evidence, and of the law of evidence, whether certain acts done either proved such delivery or shewed a waiver thereof. I think such a matter related, in Sir N. Tindal's words, *ad litis ordinationem*, and has to be governed by the *lex fori:* that the defendants have a right, as the law now stands here, to have that question raised; and when raised it must be decided by the law of evidence as administered here.

I therefore think the plaintiffs fail on their replication to the fifth plea.

My view of the law is shortly this:—the plaintiffs establish their right to sue on a judgment of a court, which I think conclusively shews their right to hold that position by the law governing the contract there made between the parties, although they could not acquire such a position in our courts of law.

I think the defendants, since our late statute, have the right to plead any breach of the conditions of the policy which would avoid its effect—for example, that the plaintiffs acquired their interest by an assignment forbidden by the contract. I think they have also the right to set up again any defence urged or that might have been urged in the former suit, whatever the fate of such defence may have been according to the doctrines as to evidence, &c., of the foreign court.

I think the plaintiffs should have judgment on demurrer to the replication to the second plea, and defendants have judgment on demurrer to the replication to the fifth plea.

I also refer to *DeCosse Brissac* v. *Rathbone*, 6 H. & N. 301; *Cammell* v. *Sewell*, 5 H. & N. 728; *Cope* v. *Doherty*, 4 K. & J. 367; *Simian* v. *Miller*, 1 C. B. N. S. 684; *Hope* v. *Hope*, 3 Jur. N. S. 454; *Gould* v. *Webb*, 4 E. & B. 933; *The Bank of Australasia* v. *Nias*, 16 Q. B. 717.

Burns, J., took no part in the judgment.

Judgment for plaintiffs on demurrer to the replication to the second plea, and for defendants on demurrer to the replication to the fifth plea.

FRASER ET AL V. ANDERSON ET AL.

Judgment—Registration—Priority.

Plaintiffs recovered a judgment on the 12th, and registered it on the 15th of February, 1859. A *ven. ex.* against lands issued upon it was received by the sheriff on the 30th October, 1860, under which, on the 27th November following, he sold and conveyed the land in question to the plaintiffs. Defendants claimed under a deed from one of the judgment debtors, dated and registered on the 27th June, 1859.

Held (following *Thirkell* v. *Patterson*, 18 U. C. R. 75, and *Wales* v. *Bullock*, 10 C.P. 155), that defendants' title must prevail over the plaintiffs'.

Remarks by Burns, J., on *The Bank of Montreal* v. *Thompson* (9 Grant's Ch. R. 51).

Ejectment for the west half of lot No. 2, in the 11th concession of the township of Douro.

The case was tried before Burns, J., at the last assizes held at Peterborough, and the plaintiffs' title was as follows:

The registrar of the county produced a book, which he proved had been transmitted to the registry office at Peterborough from the government of the province, and certified by the proper officer, showing what lands in the county of Peterborough had been granted to individuals. By this book it appeared that the land in question in this suit had been granted and patented on the 1st of July, 1846, to one Wheeler C. Armstrong, the same person against whom the judgment hereafter mentioned was obtained.

The certificate from the Crown Lands Department was in these words:

"I hereby certify that this volume, ending with page 499, contains a list of the names of all persons in whose favor letters patent for land within the county of Peterborough were completed and recorded previously to the 1st of January, 1847, as required by the 9 Vic. cap. 34, sec. 31, embracing also the lands thereby granted. Crown Lands Department, Montreal, December 28th, 1847."

This mode of proving that the land in question had been patented by the Crown, was objected to on the part of the defendants.

Then an exemplification of judgment was produced from the Court of Common Pleas of these plaintiffs against Robert Carew Armstrong and Wheeler Armstrong (admitted to be Wheeler C. Armstrong) for £264 19s. 5d. damages, and £14 11s. 10d. costs, entered up on the 12th of February, 1859. This judgment was registered in the county registry on the 15th of February, 1859.

The date of the issuing the writ of *fi. fa.* against lands was not shown, nor when the same was placed in the hands of the sheriff. The *venditioni exponas*, which issued upon the sheriff's return to the former writ of lands on hand for want of buyers, was tested the 26th October, 1860, and was received by the sheriff on the 30th October, 1860. Under this writ the sheriff sold the land in question on the 27th November, 1860, to the plaintiffs as the highest bidders, and on the same day executed a conveyance to them of it.

This closed the plaintiffs' case.

On the part of the defendants, a deed was produced and proved from Wheeler C. Armstrong, the judgment debtor, to the defendant Rebecca Anderson, dated the 27th of June, 1859, and registered on the same day. The consideration expressed in that deed was £1000, paid by her to Wheeler C. Armstrong. Evidence was gone into to show the consideration for that conveyance, and it was satisfactorily established to be as follows:—Wheeler C. Armstrong, in the year 1855, borrowed from Peter Anderson, the husband of the defendant Rebecca, the sum of £262 10s., for which he was to have secured Anderson by mortgage in his life-time, but it was never done. No interest upon that sum had ever been paid by Wheeler C. Armstrong. The defendant Rebecca was the personal representative of her deceased husband's estate. Wheeler C. Armstrong, after Peter Anderson's death, got from the estate the further sum of £212 10s., which was not repaid. The land in question was mortgaged by Wheeler C. Armstrong to Mr. Conger, and there was past interest due upon that; and it was proved that the defendant had undertaken to pay off that mortgage and interest, which indeed she would have to do before the land would be any security to her for the other moneys.

The defendant Rebecca received the rents and profits of the land from the date of the conveyance, the 27th of June, 1859. The other defendants were the tenants.

The learned judge, on these facts, in accordance with *Thirkell* v. *Patterson* (18 U. C. R. 75), and *Wales* v. *Bullock* (10 C.P. 155), directed a verdict to be entered for the defendants, with leave to the plaintiffs to move the court to enter a verdict for the plaintiffs if the sheriff's deed to them passed the legal estate in the land.

McMichael obtained a rule accordingly; to which

Read, Q. C., showed cause.

It was admitted that the cases referred to at the trial were in point in defendants' favor, and the case was not argued at length, the object being to carry it to the Court of Appeal.

MCLEAN, C. J.—The same question is involved in this case as in the cases of *Thirkell* v. *Patterson* (18 U. C. R. 75), and *Wales* v. *Bullock* (10 C. P. 155), and of course we must be guided by the decisions in these cases till they are reversed by a Court of Error and Appeal. The only difference between this case and that of *Thirkell* v. *Patterson* is, that there the judgment debtor conveyed his land *after* the recovery of the judgment against him, and before the registration of that judgment, while in the present case the judgment debtor did not convey until after the recovery and registration of the judgment. It is precisely the same in that respect as the case of *Wales* v. *Bullock*, in which the Court of Common Pleas, in deference to the former decision in the Court of Queen's Bench, gave judgment in favor of the defendant.

BURNS, J.—I have considered the judgment given by Mr. Vice-Chancellor Esten, in *The Bank of Montreal* v. *Thompson* (9 Grant Chy. Rep. 51), taking a different view of the construction of the Registry Act 13 & 14 Vic. cap. 63, from what I did in the case of *Thirkell* v. *Patterson*.

He seems to have supposed that it was my intention to overrule the cases of *Doe Dougall* v. *Funning* (8 U. C. R. 166) and *Doe Dempsey* v. *Boulton* (9 U. C. R. 532). I entertained no such idea. Those cases were decided upon the construction and effect of the statute 9 Vic. cap. 34, sec. 13, and I was myself one of the judges who took part in the judgments. When *Thirkell* v. *Patterson* came to be decided, we then had the subsequent statute, 13 & 14 Vic., cap. 63, sec. 2, which made a provision for the registration of judgments entered up after the 1st of January, 1851, operating as a charge upon the lands. The first section of this last act remedied the defect made by the 9 Vic. cap. 34, about the registration of a certificate having the same effect as the docketting of a judgment in England. The judgment sought to be enforced by a sheriff's sale of the lands in the case of *Thirkell* v. *Patterson*, was one entered up long after the 1st of January, 1851; and the provisions of the second section of 13 & 14 Vic. cap. 63, might have been brought to bear and be made available.

The Vice-Chancellor treats that provision in the last statute as cumulative to the other provisions; that is, as to the effect of registration operating in the same manner as the docketting of a judgment did in England. That may be the proper construction to give those provisions, but the question is, whether it was intended by the Legislature to have that effect.

The provisions of the second section of our act, 13 & 14 Vic. cap. 63, are copied from the English act, 1 & 2 Vic. cap. 110, sec. 13; and at the time the English Act was passed there can be no question made about the provision operating as a cumulative one, for then the provisions of the statute of 4 & 5 Wm. & M., cap. 20, applying to the docketing of judgments, were in full force. It was in the following year the statute 2 & 3 Vic. cap. 11, entitled, "An Act for the better protection of purchasers against judgments, Crown debts, Lis Pendens, and Fiats in Bankruptcy," was passed. This I think shows that the Legislature of England did not mean that the provisions of the statute 1 & 2 Vic. cap. 110—for there were many others besides those contained in section 13—should remain cumulative to the effect of those of the act of 4 & 5 Wm. & M., cap. 20, respecting the docketing of judgments.

If that be so, then what was the meaning and the effect of the statute 13 & 14 Vic. cap. 63? We can easily understand what our Legislature meant by the 9 Vic. cap. 34, sec. 13, and the two decisions of *Doe Dougal* v. *Funning* and *Doe Dempsey* v. *Boulton*, were the carrying out of that meaning, because it was plain enough that the Legislature, when it passed the 9 Vic. cap. 34, was ignorant that the Legislature of England had passed the act 2 & 3 Vic. cap. 11. Now, we must assume that when our own Legislature passed the 13 & 14 Vic. cap. 63, it was quite well known what the decisions of our courts were with respect to the effect of the 5 Geo. II. cap. 7, in selling lands upon writs of *fi. fa.*, and as to extending them by *elegit*, and that they were legislating upon the law as de-

clared by the courts. If they were legislating with a view to the provisions of the second section of the act being cumulative to the first, as the Vice-Chancellor has held, it looks very like legislating in the contrary direction from what they were doing in England, and instead of progressing forward we have been returning back as it were.

I do not mean to say that the Vice-Chancellor's view is wrong. Very likely my own view, taken in *Thirkell* v. *Patterson*, is incorrect. The two sections 48 & 49 of cap. 89 of the Consolidated Statutes of Upper Canada, have now to be considered in connexion with the subject. This action was brought, as I was informed at the trial, with a view of testing the soundness of my view in *Thirkell* v. *Patterson*, and the effect of *Wales* v. *Bullock*, in the Common Pleas; and as this point is of the utmost importance to the landed interests of the country, it cannot be too soon decided upon by the Court of Appeal, and therefore I shall reserve any opinion at the present further than is necessary to bring the case there.

HAGARTY, J., said he had concurred in the decision of the Common Pleas, of which he was then a judge, in *Wales* v. *Bullock*, but that the question was one of great importance, and subject to grave doubts, which he trusted would soon be settled by the Court of Appeal.

Rule discharged.(*a*)

COMMON PLEAS.

(*Reported by* R. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

COLBY ET AL. V. WALL.

Ejectment—Tenancy—Notice of Title—Admission of tenancy therein—Estoppel—Written receipt—Parol evidence.

Ejectment for lots 15, 13, and north half of 12, in the 2nd concession of Sandwich The defendant, in his notice of title, besides denying the claimants title, claimed title in himself as their tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debarred from disputing their title as landlord, and proved a receipt for rent in full to the 31st of March, 1861. This action was commenced on the 12th of October, 1861. The defendant, in reply, proved his tenancy commenced in May, and that one of the plaintiffs in April, 1861, while visiting the farm, expressed his satisfaction as to its state, and told him he wished him to remain on.

The jury having found for the plaintiffs, and that the defendant was their agent on the premises, on motion for a new trial.

Held, that the direct evidence of the commencement of the tenancy in May was entitled to greater weight than a receipt dated the 30th of March, for rent up to date, and that the case of *Cartwright* v. *McPherson* (20 U. C. Q. B. 251) upon which the plaintiffs relied, did not relieve the plaintiffs from the proof of the determination of defendant's tenancy, although it was evidence to estopp defendant from denying that he was plaintiffs' tenant.

(H. T., 25 Vic., 1862.)

Ejectment for Nos. 15, 13, and the north half of 12, 2nd concession of the town of Sandwich. Defence for the whole. The claimants set up title under the last will of Charles Arthur Smith, deceased, who was owner in fee. The defendant, besides denying the title of the claimants, asserted title as yearly tenant to them, not having received six months' notice to quit. The summons was issued on the 12th of October, 1861.

The trial took place at Sandwich before Sir J. B. Robinson, C. J. The plaintiffs' case was chiefly rested on shewing that one of the plaintiffs distrained for rent upon defendant early in March, 1861, for two years' rent, and the bailiff proved the following receipt:

"Windsor, March 30, 1861.

"Received from William H. Wall, the sum of $107.80, being the amount of three years' rent due George W. Colby, by me, for the north half of lot 12, and the whole of lot No. 13, in the 2nd concession of the township of Sandwich west, in the county of Essex, up to date, together with the costs of distress, warrant, &c. Signed by the bailiff."

It was further proved that on the settlement of the rent a notice was served on defendant as follows: "To William H. Wall, of the township of Sandwich west, in the county of Essex. I hereby, as your landlord, give you notice to quit, and deliver up possession of the house, land and premises, with the appurtenances, situate in the township of Sandwich west, aforesaid, in the county of Essex, and being the north half of lot number twelve, and the whole of lot number thirteen, in the 2nd concession of the township aforesaid, which you hold of me as tenant thereof, on the 1st day of October next, or at the expiration of the current year of your tenancy, which shall expire next after the end of one half year from the date of this notice. Dated this thirteenth day of March, A.D., 1861. Signed, GEORGE W. COLBY."

The plaintiffs also gave evidence that upwards of forty years ago one Thomas Smith was in possession of the premises occupied by defendant, and was, at his death, succeeded by his only son Charles, who died about twelve years before the trial, but he did not go on to connect the plaintiffs with Charles or Thomas Smith, nor did he prove the will mentioned in his notice of title.

On the defence, evidence was given that some short time after the distress above mentioned, early in April, 1861, the plaintiff, George W. Colby visited the premises, and after expressing his satisfaction with their condition left word with the defendant's wife, as the defendant was from home, that he (Colby) wanted defendant to remain on the place, according to one witness, "as his tenant," and also according to another to look after the timber. Colby also said that he would be back in the fall and would then settle with defendant for repairing the place, and for his trouble in looking after the timber on the lands. The former of these witnesses also swore, that defendant went upon the place about three years ago last May; that defendant rented the place from Mrs. Charles Smith, daughter-in-law of Thomas Smith, after old Mr. Smith's death, and the other, who was the bailiff who distrained, swore the notice to quit was served after the money was paid, which, according to the receipt was on the 30th of March, 1861.

It was contended for defendant, that upon this evidence it appeared he entered in May; that the six months notice to quit being given in March, would not oblige defendant to give up possession before May, 1862, and that if it were otherwise, the notice to quit was clearly waived by Colby's request that defendant would remain in possession as tenant.

For the plaintiffs it was insisted that the defendant's notice prevented his disputing his landlord's title.

The learned Chief Justice said he should rule in favour of the defendant if the jury found that the notice to quit was waived, reserving leave to plaintiff to move to enter a verdict in his favour. The jury were asked to say whether Colby did express his wish that defendant should continue on the place as tenant, or merely as agent to take care of the place. They found the latter, and gave a verdict for the plaintiff. The learned Chief Justice reserved leave to defendant to move to enter a verdict for him if the court should be of opinion the defendant was entitled to notice to quit.

In Michaelmas Term, Alexander Cameron obtained a rule *nisi* to enter a verdict for the defendant on the leave reserved or for a new trial, the verdict being contrary to law and evidence, and upon affidavits shewing that defendant had further evidence of the waiver of the notice given by Colby, and explaining that it was not produced because one witness was accidentally absent, and another was in the United States. The defendant's own affidavit set forth that relying on what Colby had said, he had put in fall crops, as well as made other improvements, and that Colby, who resides at Chicago, was not, as defendant believes, aware of this.

A. Prince, in Hilary Term, shewed cause.—He relied upon *Cartwright* v. *McPherson*, 20 U. C. Q. B. 251, as establishing that the defendant having put in as his notice stating, that besides denying the title of the claimants, he asserted title in himself as their yearly tenant, not having received six month's notice to quit, was not at liberty to insist upon a right to notice to quit, because he denied the title of his landlords. He also contended that the evidence of the bailiff and of his receipt, shewed that the year ended on the 30th March, as it is acknowleged the receipt of rent for three years up to date, and lastly, that however the case stood as to Colby, as to the other two claimants there was no defence and they should recover.

A. Cameron supported the rule.

DRAPER, C. J.—Conceding, for the moment, that we ought to avoid the inconvenience that might result from not following the decision of the Court of Queen's Bench in the case of *Cartwright* v. *McPherson*, I think it right to reserve to myself on any future occasion the opportunity of expressing my regret that I cannot concur in some of the views expressed as the opinion of the ma-

(*a*) See also *Brogden* v. *Collens et al.*, 7 C. P., 61.

jority of the judges in that case, for at present I think there is great force in the observations of Burns, J., who dissented from that judgment.

The legislature have substituted an appearance to the writ in ejectment for any plea by way of denial of the claimants right, and have enacted that upon the entry of such appearance an issue may be made up "by setting forth the writ and the fact of the appearance with its date, and the notice limiting the defence, if any," with the direction to the sheriff to form a jury; and it is further provided that, with certain exceptions, (not applicable in this instance,) the question at the trial shall be whether the statement in the writ of the title of the claimants is true or false.

The object of the notice of the nature of the title intended to be set up by the claimant or defendant at the trial seems to have been to prevent expense on either side in obtaining and producing evidence to prove matter, which, but for such notice, they might apprehend their opponent's case rendered necessary. The appearance, in effect, operates as a general denial of the claimant's right to possession, and it may be well argued, that when the defendant files his notice of the special ground on which he asserts his own right to retain possession, the statement, "besides denying the title of the claimant," means no more than that he does not waive the legal consequence of his appearance, namely, that he shall not be put out of his possession until the statement in the writ of the claimant's title to possession of the premises is established, that these words are of no greater effect than in an action on the old form of ejectment, a plea of not guilty would be. Whether, if the claimant's notice of title had asserted a right to possession as landlord of defendant, the term or tenancy being at an end, a different effect to the appearance and to the "denying the title of the claimant," would not be given, is another question.

To apply this to the present case. If the defendant's notice of title had been admitted that the claimants were his landlords, it would at least be questionable whether the latter would not have been bound to prove that they were entitled "under the last will of Charles Arthur Smith," for the statute requires that the claimant shall be confined to proof of the title set up in his notice. But the defendant, though denying the claimant's right to possession sets up as the sole ground of that denial his alleged right to six months' notice to quit, and thereby either waives the proof of the particular title set up in the claimant's notice, or may be taken to admit it; and his notice being put in evidence becomes, for the purposes of the trial, proof of the alleged title of the claimants to recover, but it is consistent with this that he should deny their right to eject him until they prove his tenancy is at an end. There seems some difficulty in holding, that by following the words of the statute in giving notice of the sole answer on which the defendant relies to the claim, he deprives himself of the power o setting up such answer, though true and otherwise conclusive.

It would seem peculiarly hard, thut the defendant, whose notice of title is used by the claimants, to save themselves from giving proof, otherwise indispensable, should, by the same notice, be debarred from requiring proof, that his tenancy is at an end, in other words, that the claimants should use the admission in his notice as the sole proof of their title to recover as landlords, and yet should deny its operation to protect the defendant's rights as their tenant. To this application of the decision in *Cartwright* v. *McPherson*, I cannot accede, nor do I think the judgment of the Court of Queen's Bench can be taken to go that length.

Upon the evidence and the affidavits for defendant which are unanswered, I think there should be a new trial. It was positively sworn, that the defendant entered in May, and I do not think the receipt dated 30th March, 1861, though worded for three years' rent *up to date*, (which three last words are interlined,) necessarily imports that the tenancy commenced at that day was due, the distress warrant was not produced, and it must have been issued some days before the date of this receipt according to the evidence of the bailiff. The question non-waiver, rather than of the commencement of the year of the tenancy, seems to have occupied the attention of the jury.

But as in any view the year will expire next May, it can scarcely be necessary that there should another trial take place. The interest of both parties would point to an arrangement by which the costs of another trial may be saved.

So far as this motion is concerned, I think there should be a new trial, costs to abide the the event.

Per cur.—Rule absolute.

PRACTICE COURT.

(*Reported by* THOMAS HODGINS, ESQ., LL.B., *Barrister-at-Law*).

SCOTT V. MCRAE.

A vessel seized for breach of the revenue laws having been replevied from the collector, the writ of replevin was set aside.

[Chambers, 31st Jan., 1861.]

Mr. Justice Hagarty, on the 15th of January, 1861, granted a summons on the sheriff of the County of Haldimand, and on the plaintiff, or his attorney, &c., to shew cause why the property replevied in this case should not be delivered up to the defendant; and on the 19th of January, 1861, he granted a summons on the plaintiff to shew cause why the writ of replevin, and the copy and service, and the execution of the said writ, and all proceedings thereon, should not be set aside with costs, on the ground that the property replevied was seized for a breach of the revenue laws of this Province, and was at the time it was replevied in possession of the defendant, as collector of customs for the port of Dunnville, and was claimed and held as forfeited, and therefore could not be replevied.

ROBINSON, C. J.—Upon the affidavits I make the summons absolute. The Replevin Act cannot, I think, be applied to take a vessel or goods seized for breach of the revenue laws out of the custody of the collector; and upon the facts stated on the part of the collector it would be proper at any rate to set aside the writ under the late statute of 1860, 23 Vic., ch. 45, and by an order properly drawn up under the fourth section of that Act.

KERR ET AL. V. FULLARTON ET AL.—CORNWALL ET AL., GARNISHEES.

Garnishment—Interpleader.

Where proceedings are taken to garnish a debt, which is claimed by a third party as assignee, there is no power to direct an interpleader issue between such third person and the judgment creditor, to try the validity of the alleged assignment.

In Easter Term *McBride* obtained a rule *nisi* to rescind and set aside an order of MCLEAN, J., made in this cause, which ordered an issue to be tried between the above-named judgment creditors and Alexander Gillespie and others, on the ground that the said order was not authorised by the statute in that behalf, and on grounds disclosed in affidavits and papers filed. The rule was granted on the application of counsel for defendant McCollum, and for Gillespie, Moffatt & Co.

The order of Mr. Justice MCLEAN was made on the 17th of May, 1861, and ordered that the claimants, Alexander Gillespie and others named, and the said judgment creditors, do proceed to the trial of an issue in the Court of Common Pleas, in which the claimants should be plaintiffs and the judgment creditors defendants, and the question to be tried should be whether the assignment alleged to have been made by the said Thomas McCollum (one of the judgment debtors) of the judgment recovered by him in the Court of Queen's Bench against the garnishees, was null and void as against the creditors of the said Thomas McCollum, on the ground that the same was made either with intent of giving one or more of the creditors of McCollum a preference, while he was in insolvent circumstances, or unable to pay his debts in full, or knew himself to be in a state of insolvency. The order further directed how the issue should be made up, and when and where tried, and as to the costs, and enlarged a summons, dated the 13th of April, 1861, calling on the garnishees to shew cause why they should not pay the debt due by them to McCollum to the judgment creditors.

There was no dispute as to the right of the judgment creditors against the judgment debtors, and they obtained an attaching order, which was served on McCollum, one of the debtors, and also upon the garnishees, against whom McCollum had recovered a judgment. The summons on which the attaching order was made bore date on the 6th of April, 1861.

It appeared, however, that on the 20th March, 1861, McCollum made an assignment of the judgment so recovered against him by the garnishees, to Alexander Gillespie and others, composing the firm of Gillespie, Moffatt & Co. It was sworn that this assignment was absolute and *bonâ fide*, and made for a valuable consideration, being for an amount equal to the judgment. It was further sworn that Gillespie, Moffatt & Co. had a large judgment against the judgment debtors, and a *fi. fa.* against the goods of the judgment debtors in the hands of the sheriff of Kent.

On behalf of the judgment creditors, it was sworn that previous to August, 1860, Thomas McCollum was insolvent, and had made an assignment of all his effects for the benefit of certain creditors, which assignment was declared void: that Gillespie, Moffatt & Co. were well aware that McCollum was insolvent and unable to pay his debts in full: that he was insolvent when he made the assignment to them, which they well knew; that such assignment was made with intent to give Gillespie, Moffatt & Co. a preference over the above-named judgment creditors.

J. Read shewed cause on behalf of the judgment creditors. He referred to *Wise* v. *Birkenshaw*, (29 L. J. Ex. 240;) *Wintle* v. *Williams*, (3 H. & N. 288.)

Draper, C. J.—The order in question is not drawn up on the consent of Gillespie, Moffatt & Co., who are directed to be made plaintiffs in the feigned issue, and it is not urged on the argument of this rule that they did consent, though it appears the agent of their attorney was heard before McLean, J., when he granted the order.

It is plain the garnishees have no objection to pay the money to the judgment creditors. I rather conclude they are desirous that the money should be so disposed of. But it seems there is an execution at McCollum's suit in the hands of the sheriff against them, and the money will come into *his* hands, and he *primâ facie* should pay McCollum, and he has notice of the assignment by McCollum to Gillespie & Co., and also of the attaching order. But he was no party in applying for this interpleader order, nor is he in any way directly affected by its result. The order is not and does not profess to be made under the statute for affording relief to sheriffs in cases of conflicting claims to the property seized by them.

Neither will this order fall within the first section of the statute respecting interpleading, for that enables the court or a judge to make the interpleader order in case a defendant, after declaration and before plea, in any action of assumpsit, debt, detinue, or trover, applies in manner pointed out by the act.

No previous summons was issued, calling on any party to shew cause why such an order as that in question should not be granted. The order was drawn up on reading the summons of the 13th of April, 1861, but that summons only called upon the garnishees and Thomas McCollum, and the attorney of McCollum in the suit of McCollum against the garnishees, to shew cause why the garnishees should not pay to the judgment creditors the amount due from the garnishees, or either of them, to McCollum, or so much thereof as would be sufficient to satisfy the debt due to the judgment creditors. The only ground for the intervention of the agent of the attorney for Gillespie, Moffatt & Co., was to shew that they held an assignment of that judgment.

The Common Law Procedure Act authorises the court or a judge to call the garnishee before them to shew cause why he should not pay the judgment creditor the debt due to the judgment debtor. If he does not appear, or does not dispute the debt, or pay the money into court, execution may be issued against him. If he appears, and does not dispute his liability, the judgment creditor may be authorised to issue a writ against him. But the statute goes no further, and certainly makes no provision for the intervention of a third party, or for calling any other parties, except the judgment creditors, the judgment debtor, and the garnishees, before the court or a judge, or for making any rule or order to bind or otherwise affect the interests of any such other parties.

But the English courts have held that when the debt sought to be attached has been already assigned by the debtor, the 60th and 61st sections of their Common Law Procedure Act of 1854, do not apply. According to the judgment in the case of *Hirsch* v. *Coates*, (18 C. B. 757,) the only course was to try any question of the liability of the garnishee to pay the judgment creditor by writ, under the 64th section of the English act, of which sec. 291 of our Consol. Stats. U. C., ch. 22, is a copy.

The decision in *Hirsch* v. *Coates* has probably made the want of a power felt to deal with third parties having, or claiming to have, a right to a debt which the judgment creditor is desirous of obtaining an order upon a garnishee to pay. And an act has been passed, 23 & 24 Vic., ch. 126, by sec. 29 of which it is provided, that when it is suggested by the garnishee that the debt sought to be attached belongs to some third person, who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debt. I presume that under this and the former acts, the judge having heard the third party, as well as the garnishees and the original parties to the cause, will in his discretion grant or withhold an order on the garnishee to pay. But this act gives no power to direct a feigned issue between any of the parties.

We have not any act containing the provisions of the English statute just cited, and I have not been able to find any legal ground on which to support the order.

In my opinion the rule must be absolute, but without costs.

Per cur.—Rule absolute.

MONTHLY REPERTORY.

CHANCERY.

V. C. S. Douglas v. Culverwell. *Nov.* 4, 5, 6, *Dec.* 4.

Fraud and pressure—Surprise—Sale or mortgage—Undervalue.

Where a person in pecuniary difficulties executed a deed of sale on the assurance that, notwithstanding the form of the instrument, he might redeem at any time, and it appeared that he had been induced to execute the instrument hastily in favour of a perfect stranger, by a solicitor who acted for both parties, and that the consideration money was much less than the market value of the property, the Court set aside the transaction as an absolute sale.

L. J. Hughes v. Jones. *Nov.* 9, 11, 12, 25.

Vendor and purchaser—Specific performance—Land subject to leases—Waiver—Compensation.

Where the particulars and conditions of sale purport to offer an estate in fee simple or possession, the existence of leases for lives over a part of the estate will entitle the purchaser either to rescind the contract or to compensation, according to circumstances.

A statement in the conditions of sale that the purchaser is to be let into the receipt of the "rents and profits" from a certain day, must be construed to mean ordinary rents and profits, and not rents reserved on leases for lives.

Though the conduct of a purchaser, after the discovery of circumstances entitling him to rescind a contract, may be such as to preclude him from so doing, it does not necessarily follow that he is not entitled to compensation.

It is the duty of a vendor to qualify upon the face of the particulars the interest they intend to sell, if they do not intend to sell an unqualified estate in fee.

V. C. K. Harley v. Moon. *Dec.* 13.

Will—Construction—Residue—Aliquot shares—Abatement.

A testatrix being entitled to an annuity represented by a principal sum, by voluntary settlement, vests £600, part thereof, in trustees upon trust to pay the income to herself for life, with a power of appointment to her by deed or will amongst her issue, children or grandchildren, and in default to pay £250, part thereof, to her daughter C.; and £200, further part thereof, to her daughter E.; and £150, the residue thereof, to her granddaughter. She then, by her will, directs and appoints, in pursuance of her power, that the trustees of the settlement shall convert the £600, and after paying debts, funeral and testamentary expenses, pay £75 to each of her daughters, and the residue of the

£600 to S. C. on trust to invest, and apply the dividends and interest for the benefit of the grand-daughter, in his (C. S's.) absolute direction, until she attains seventeen, then to pay the further sum of £100 out of the sum which might then be in his hands, to each of her daughters, with a like trust to S. C. to invest the residue, and any the interest to her grand-daughter until she attains twenty-one, had then to her absolutely. But in case of her dying under twenty-one, to S. C. absolutely, whom she appoints her executor and the guardian of her grand-daughter, to whom she gives her personalty.

Held, that the gift to her grand-daughter was not a gift of a specific sum, but of what should remain after making the payments directed by the will.

Held, also, that an assignee of the daughter's legacies, the fund being insufficient, was not entitled to take in priority to S. C., to whom they had handed over a portion.

V. C. K. LEYLAND v. LEYLAND. *Dec.* 16.

Practice—Parties—Child of plaintiff born since bill filed—Objection on the hearing.

Where a suit involves a question in which the children of the plaintiff are interested, and a child is born after the bill is filed, the Court will, on the objection taken at the hearing, order the cause to stand over, with liberty to amend by bringing the child born since the institution of the suit before the Court.

V. C. K. MATTHEWS v. GOODDAY. *Dec.* 16.

Equitable mortgage by deposit—Agreement to execute a legal mortgage.

An agreement in writing, accompanying a deposit of deeds, to charge land with a sum of money, is nothing more than an equitable charge enforceable in equity by having the money raised by sale or mortgage, and gives no right to foreclose, nor to ask for a legal mortgage.

An agreement to give a legal mortgage, superadded upon an agreement to charge land, gives a right to have that contract enforced in equity, and by the same decree to foreclose, unless the money is paid.

A simple deposit of deeds is a charge enforceable in equity, but gives no right to have a legal mortgage, although in the view of a Court of Equity it is a contract to charge the land, and the remedies are the same.

A contract to charge land, and also, if required, to give a legal mortgage, accompanied by a deposit of deeds, gives a right to a sale, but does not not compel the mortgagee to take a legal mortgage.

V. C. S. DEFRIES v. SMITH. *Jan.* 13.

Principal and surety—Separate contract by surety in consideration of extension of time.

S. S. accepted a bill of exchange as surety for C. S., and subsequently, in consideration of further time given him (S. S.) for payment, covenanted by deed to pay what was due on the bill with interest, and at the same time assigned a policy as futher security.

Held, that an "entire acquittal" of debts given to C. S. by all his creditors did not release S. S.

L. J. DUKE OF BEAUFORT v. BATES. *Jan.* 11, 13.

Injunction—Landlord and tenant—Execution creditor—Right of landlord to fixtures.

Where the lessee of a coal mine had covenanted at the end of the term to yield up the works and mines, &c.; and all ways and roads in such good repair, order, and condition so that the works might be continued and carried on by the lessor.

Held, (reversing the judgment of Vice-Chancellor STUART), that such covenant did not include wooden sleepers or iron tram plates fastened to such wooden sleepers used for the purpose of a railway.

Quære, whether such covenant would have included stone sleepers and iron tram plates fastened to stone sleepers.

L. C. *Nov.* 14, 15, 18, *Dec.* 8.

HUNTER v. STEWART.

Defence of res Judicata—*Delay—Public company—Speculative business.*

If a bill is filed in the Court of Chancery in England, praying the same relief as a bill previously filed by the plaintiff in a colonial Court of concurrant Jurisdiction, an adverse decree in the former suit cannot be pleaded as a defence, unless the grounds on which the subsequent claim is made, are indentical with those alleged in the former suit.

When the allegations and equity of the one bill are different from the allegations and equity of the other bill, the plea of *res Judicata* cannot be sustained.

The question whether a plaintiff in seeking relief against a company, after a considerable lapse of time, is debarred of his remedy by reason of the supposed speculative nature of the company considered.

REVIEW.

THE UPPER CANADA LAW LIST, 1862, compiled by Rordans & Finch. 4th Edition. Toronto: W. C. Chewett & Co.

We hail with pleasure this new edition of our Law List—not only as a manual of useful information, but as the indispensable book of reference for every legal practitioner. In fact, it has now become as much a necessity in a lawyer's office as Chitty's Forms. The edition before us contains full information for students in respect to all matters affecting their interests at Osgoode Hall, the Law School, &c., and is prefaced by most useful introductory observations. We also notice with pleasure that the compilers have taken the suggestion formerly made by us, and have given separate columns for the names of the Common Law Agents and Chancery Agents in Toronto of the country practitioners. We cordially recommend the work to the profession.

APPOINTMENTS TO OFFICE, &c.

COUNTY COURT JUDGES.

HENRY B. BEARD, of Osgoode Hall, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of and for the County of Oxford.—(Gazetted 28th June, 1862.)

EPHRAIM JONES PARKER, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court in and for the County of Middlesex.—(Gazetted 26th July, 1862.)

CLERK OF THE PEACE AND COUNTY ATTORNEY.

JOHN McNAB, of the City of Toronto, Esquire, Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney in and for the United Counties of York and Peel.—(Gazetted 26th July, 1862.)

REGISTRAR.

PETER DUNCAN McKELLAR, Esquire, to be Registrar of the County of Kent, in the room and stead of EDWIN LARWILL, Esquire, resigned.—(Gazetted 12th July, 1862.)

NOTARIES PUBLIC.

JAMES BENSON, of Saint Catharines, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 28th June, 1862.)

JOHN HARPER, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 28th June, 1862.)

JAMES GRAHAM VANSITTART, of Ottawa, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 12th July, 1862.)

DAVID WILLIAM DUMBLE, of Cobourg, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 12th July, 1862.)

CORONERS.

EZRA FOOTE, Esquire, M.D., Associate Coroner County of Elgin.—(Gazetted 28th June, 1862.)

JOHN PHELAN, Esquire, M.D., Associate Coroner County of Norfolk.—(Gazetted 12th July, 1862.)

JOHN BEESLEY TWEEDALE, Esquire, M.D., Associate Coroner County of Norfolk.—(Gazetted 19th July, 1862.)

TO CORRESPONDENTS.

"EDWARD STONEHOUSE, SOLICITOR"—Under "Division Courts."

DIARY FOR AUGUST.

1. Monday.....Paper Day, Q. B. Last day for notice of Trial County Court.
2. Tuesday.....Paper Day, C. P. Chancery Ex. Term Toronto commences.
3. Wednesday...Paper Day, Q. B. Last day for notice for Sandwich & Whitby.
4. Thursday .....Paper Day, C. P.
6. Saturday.....TRINITY TERM ends.
7. SUNDAY.....*12th Sunday after Trinity.*
9. Tuesday.....Quar. Sess. & Co. Ct. Sitt. in each Co. Last day for notice Ch.
14. SUNDAY .....*13th Sunday after Trinity.* [Ex. Chat. and Cobourg.
16. Tuesday .....Chan. Ex. Term Sandwich & Whitby commences. Last day for
21. SUNDAY.....*14th Sunday after Trinity.* [ser. of Writ for York & Peel As.
23. Tuesday .....Chan. Ex. Term Chatham and Cobourg com. Last day for notice
26. Friday.....Declare for York and Peel Assizes. [London and Belleville.
28. SUNDAY.....*15th Sunday after Trinity.*
30. Tuesday.....Last day for notice for Chan. Ex. Brantford and Kingston.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

SEPTEMBER, 1862.

FEES TO PUBLIC OFFICERS CONCERNED IN THE ADMINISTRATION OF JUSTICE.

It is a general principle that every fee to a public officer must have a legal origin.

It is an express provision of the Statute of Westminster (3 Ed. I. cap. 26), that no sheriff or other the king's officer shall take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth shall yield twice as much, and shall be punished at the king's pleasure.

Lord Coke, in his commentary on this statute, says that under the words "other king's officer" are classed escheaters, coroners, bailiffs, gaolers, and other inferior ministers and officers of the king, whose offices in any way concern the administration or execution of justice, or the common good of the subject, and that they can none of them take any reward for any matter touching their offices, but of the king.

The meaning of this commentary is that, unless when an Act of Parliament gives to the public officers indicated a right to look for a recompense in any other quarter, they can take nothing for any service rendered by them in their office, except of the king.

It is a general rule, when a duty is cast upon any one by Act of Parliament, and no remuneration is provided for the doing of it, that the party is to perform the duty without remuneration. (*Askin* v. *The London District Council*, 1 U. C. Q. B. 292.)

On 29th March, 1845, an act was passed by the Legislature of Canada, entitled "An Act to regulate the fees of certain district officers in that part of this Province called Upper Canada." (8 Vic. cap. 38.) It recited that certain officers connected with the administration of justice in the several districts of Upper Canada were required to perform many services for which no fees were fixed by law, and that it was only necessary and proper to establish reasonable fees and allowances for the same, and to provide for the payment thereof.

It thereupon enacted that it should be the duty of the several justices of the peace of the several districts of Upper Canada, in the General Quarter Sessions of the Peace to be holden in July, 1845, to frame a table of fees for all services then rendered in the administration of justice, and for other district purposes, by any sheriff, coroner, clerk of the peace, constable and crier, which services were not remunerated by any law then in force, and that the several clerks of the peace should forthwith transmit such table to the Clerk of the Crown in Toronto, to be by him laid before the Judges of the Court of Queen's Bench at Toronto; and that it should be lawful for the judges, in term time, by any rule or rules to be by them made from time to time, as occasion might require, to appoint the fee which should be taken by and received by such sheriff, coroner, clerk of the peace, constable or crier, for such services. (s. 1).

It also enacted, that if at any time any such officer should wilfully and knowingly demand or receive any other or greater fee or allowance than the fee and allowance established by that act, for any or all the services performed by them respectively, the offender should for every such offence forfeit and pay the sum of ten pounds to any person who should sue for the same by action of debt, bill, plaint or information, in any court having competent jurisdiction to hear and determine the same. (s. 4, Con. Stat. U. C. cap. 119, s. 8.)

It made it the duty of the treasurer of every district to pay the amount of such fees, which are payable out of district funds, when duly allowed by the Magistrates in Quarter Sessions assembled. (s. 5, Con. Stat. U. C., cap. 119, s. 7.)

On 15th November, 1845, the Judges of the Queen's Bench, under the powers conferred by the statute, made and promulgated a tariff of fees to be taken and received by sheriffs, coroners, clerks of the peace, constables and criers.

Up to this time most of the fees payable to sheriffs and other subordinate officers connected with the administration or execution of justice were paid by the local district municipalities, through local taxation.

On 9th June, 1846, the legislature passed an act "For defraying the expenses of the administration of justice in criminal matters, in that part of the Province of Canada formerly Upper Canada." (9 Vic. cap. 18, Con. Stat. U. C., cap. 120.)

It recited that it was expedient to provide that the expenses of the administration of criminal justice in Upper Canada, then paid by local taxation, should in time to come be paid out of the public funds of the Province; and after making special provision for the years 1846 and 1847, declared "that for and during each year thereafter, the whole of the expenses of the administration of criminal justice in Upper Canada should be paid out of the consolidated revenue fund of the Province." It, in a schedule annexed to the act, gave several heads of expense which, together with all other charges relating to criminal justice payable to the officers mentioned specially authorised by an act of the legislature and theretofore payable out of district funds, should be deemed expenses of the administration of criminal justice within the meaning of the act.

As the law now stands, there are some fees still payable to officers connected with the administration of justice out of municipal funds, while all, connected with the administration of criminal justice in Upper Canada ought to be defrayed out of the consolidated revenue fund. We say *ought*, because it is notorious that successive Canadian governments have given to the 9 Vic. cap. 58 (Con. Stat. U. C., cap. 120), the most niggard interpretation; and, instead of advancing the object of the act by transferring *all* expenses connected with the administration of criminal justice to the provincial revenue, endeavour to throw as much as possible upon the local municipalities. This is a course alike disgraceful to the government guilty of it and injurious to the municipalities affected by it. It is moreover opposed to the act of parliament itself and the construction which the courts of law have put upon it.

The law officers of the Crown read the schedule appended to the 9 Vic. cap. 58, as containing all the items of expenditure for the administration of criminal justice chargeable to the Province. They ignore the concluding sentence of the schedule, "Together with all other charges relating to criminal justice payable to the foregoing officers, specially authorised by an act of the legislature and heretofore payable out of district funds." They ignore the enacting part of the act, which is that "the *whole* of the said expenses" shall be paid out of the consolidated revenue fund.

The President of the Court of Appeal, when Chief Justice of Upper Canada, referring to this statute, is reported to have said "I do not think that the schedule appended to chapter 120 was intended by the legislature to embrace all the expenses of criminal justice that were to be charged against the government, but only to point out that all the charges specified in it were to be deemed within the act, and thus to remove all doubt as to such charges. (*Corporation of Lambton* v. *Poussett*, 21 U. C. Q. B. 485.)

We are informed that, notwithstanding this exposition of the act by the highest legal authority in Upper Canada, the government officials pursue their old course and refuse to pay respect to a solemn decision pronounced by one of the superior courts of law in Upper Canada. We are grieved to receive such information. We would feign distrust it. The government should pay respect to the laws as administered and interpreted by the lawfully constituted tribunals of the country. The example is pernicious. We cannot think that the present Attorney General has had his attention directed to the matter. It is more than likely that the decision of such matters is left to subordinates, who are not professional men. If so, the sooner a change takes place the better.

It has been made a question whether fees which come within the Con. Stat. Can. cap. 126, are to be paid out of county funds in the first instance, to be afterwards included in a general account against the government, or whether the County Council can refuse to entertain such charges, and refer the officer to the government, as the party from whom he is to receive compensation.

Some, suppose that a middle course ought to be taken, that is, that the officer should make out his account of fees for services connected with the administration of criminal justice against the county; which account with vouchers and report should be sent to the government to await audit and payment by the government to the municipality.

It would seem very inconvenient if the county were to pay the accounts before audit by the government auditors and final allowance by the government, for then occasions might be constantly arising for reclaiming from the officers any sums that the government County Auditors or the Inspector General may have rejected.

In any case the intention and effect of the statute is that the counties shall be paid or reimbursed by the government all such expenses as come within the statute and have been audited by the proper auditors, according to the regulations of the government, and not that the several officers are to make out their accounts against the government for such services (per Robinson, C. J., in *Corporation of Lambton* v. *Poussett*, 21 U. C. Q. B. 485).

If the County Council pay charges on the expectation that they will be reimbursed by the government, and if such charges be rejected, then a question will arise whether the Council having paid them under the sanction of their own auditors, and upon their own judgment, can sue to

recover them back because the government has declined to reimburse them.

If reclaimed not as illegal charges and if not in fact illegal charges, but reclaimed because not in the opinion of the government chargeable against the provincial revenue, then it is apprehended that no action could be supported by the county against the officer to recover them back, whether in point of law the Inspector General or the Government Auditors have or have not erred. The question would seem to be one to be settled between the county and the government, and not between the county and the officer. (*Ib.*)

The right of a municipality under any circumstances to recover from a public officer fees which he has received from the municipality by virtue of his office, and for which there is no legal sanction, is involved in some doubt. Most of the public officers of which we have made mention are remunerated by fees. In that case, if services be required of the officer for which no fees are allowed him by law, and which he is not bound to render under any statute or as necessarily belonging to his office, he is no more bound than a stranger to render the services. If he do render them at the call of the justices in session, or in compliance with the request of the municipality or of the county auditors, he has at least an equitable claim to receive a fair compensation for the act done. Though he may not be able to sustain an action at law for compensation for the particular services, yet when the justices or the County Council have audited and allowed the charges which are paid under no misunderstanding of facts—under no misrepresentation of the officer—the municipality would seem not to have any legal right of action to sue for them back. It is not like the case of a public officer concerned in the administration of justice demanding a fee from an individual for a service rendered in the course of the administration of justice, or charging against and receiving from the government or municipality fees for services not rendered, or for which charges were made not conforming to those authorised by law. (*Ib.*)

It must however be borne in mind that Con. Stat. U. C. cap. 119, s. 8, makes it a penal offence in the public officers affected by it, to receive any other or greater fee or allowance for any of the services performed by them than such as should be (and were) established under the authority contained in that act, unless such fees as might be allowed by some other act of parliament for other services. That clause does not apply to services rendered by the officer which services do not properly belong to this office. Where the statute applies the penalty is not all that the officer is subject to. He must refund the illegal fee or allowance. Fees received contrary to the express provisions of that clause are moneys which the officer cannot be said either in equity or good conscience to be entitled to hold (per Robinson, C. J., in *Corporation of Lambton* v. *Poussett*, 21 U.C.Q.B. 491; see also *Corporation of Haldimand* v. *Martin*, 19 U. C. Q. B. 178).

FALL ASSIZES, 1862.

EASTERN CIRCUIT.

Hon. Mr. JUSTICE HAGARTY.

OTTAWA	Tuesday	30th September.
L'ORIGNAL	Monday	6th October.
CORNWALL	Friday	10th "
BROCKVILLE	Thursday	16th "
PERTH	Thursday	23rd "

MIDLAND CIRCUIT.

Hon. Mr. CHIEF JUSTICE DRAPER, C.B.

KINGSTON	Monday	29th September.
PICTON	Thursday	9th October
BELLEVILLE	Monday	13th "
WHITBY	Thursday	23rd "
COBOURG	Tuesday	28th "
PETERBOROUGH	Thursday	6th November

HOME CIRCUIT.

Hon. Mr. JUSTICE BURNS.

OWEN'S SOUND	Tuesday	30th September.
MILTON	Monday	6th October.
BARRIE	Thursday	9th "
WELLAND	Wednesday	15th "
NIAGARA	Monday	20th "
HAMILTON	Monday	27th "

OXFORD CIRCUIT.

Hon. Mr. JUSTICE RICHARDS.

BRANTFORD	Tuesday	30th September.
CAYUGA	Wednesday	8th October.
SIMCOE	Tuesday	14th "
WOODSTOCK	Tuesday	21st "
BERLIN	Monday	27th "
STRATFORD	Thursday	30th "
GUELPH	Tuesday	4th November

WESTERN CIRCUIT.

Hon. The CHIEF JUSTICE OF UPPER CANADA.

SARNIA	Wednesday	1st October.
LONDON	Tuesday	7th "
ST. THOMAS	Thursday	16th "
CHATHAM	Tuesday	21st "
SANDWICH	Monday	27th "
GODERICH	Tuesday	4th November.

Hon. Mr. JUSTICE MORRISON.

CITY OF TORONTO	Tuesdy	30th September.
YORK AND PEEL	Monday	13th October.

SELECTIONS.

THE FRENCH SYSTEM OF CRIMINAL PROCEDURE.

In France, a criminal trial is nothing else than the last stage of an elaborate public enquiry, carried on by an organized public department, of which the tribunal which ultimately tries the prisoner is in some degree the head. The general principle upon which the system rests is embodied in the first article of the Code d' Instruction Criminelle. Its terms are, "L'action

pour l' application des peines n' appartient qu' aux functionnaires auxquels elle est confiée par la loi" the nature of the machinery provided for the purpose of discovering and punishing crimes is as follows:—There are in France twenty seven Cours Impériales. At each of these there is a Procureur Général, who has various deputies and substitutes. In every arrondissement there is a Juge d' Instruction (chosen for three years, from the Judges of the Civil Tribunal), and in every Tribunal de premiére instance there is a Procureur de l' Empereur. The commissaries of police, the agents of police, the gendarmerie, and other inferior officers, are under the orders of these authorities, who form, as the French phrase is, a "hierarchy," extending from the gendarmes to the Procureur Général. The Procureur Général himself is a sort of judge advocate, being so far a member of the Cour Impériale that he sits on the bench during trials, and interferes *ex officio* on many occasions in the course of them. The functions of these various officers (who constantly correspond with each other, and stand in the closest official relation) are almost entirely inquisitorial. They receive and collect evidence of every kind in reference to any crime that has been committed, and constantly interrogate the accused upon every point of the charge, and confront him from time to time with the witnesses. They have it in their power to place the accused in solitary confinement (au secret), and constantly exercise it, the object being to prevent him from communicating with his friends, and from forming any systematic defence. They keep him in ignorance of the depositions which may have been made for and against him, and then question him on the facts to which they refer. By comparing together these various sources of information, they gradually elaborate a theory on the subject, which, in complicated cases, has often innumerable ramifications, and is supported not only by arguments of a most refined character, but also by considerations drawn from the manner in which the witnesses give their evidence, the degree of frankness shown by the accused in his answers, and many other circumstances. This is called "instructing the process;" and the final results of the "instruction" are embodied in an acte d' accusation,—a document which not only recapitulates all the grounds from which the Ministére Public infers the guilt of the accused, but also frequently states and refutes by anticipation the arguments for the defence. An intimate connection exists between the officers who "instruct" the process, and the Cour Impériale, which finally tries the case. A committee of that body, consisting of three judges, form a sort of grand jury, called the Chambre des Mises en Accusation. This body, after hearing the Procureur Général, determine whether or not there is ground enough to put the accused person on his trial, and they may if they please cause additional evidence to be collected, on the same terms as the inferior magistrates. The Cours Impériales have also the right of instituting proceedings in the first instance. When the question of the mise en accusation is under accusation, the person accused, or the party civile (*i. e.*, any one who seeks to recover damages for injury done him by the crime), may lay mémoires before the judges, who must hear them read before they decide. If, to use our own phrase, the chamber finds a true bill, the affair is sent before the Cour d' Assises of the department, a sort of circuit court, in which one of the judges of the Cour Impériale sits as President; or if the department be that in which the Cour Impériale itself is situated, the case is tried before a committee of that body, sitting as a Cour d' Assizes. After the opening of the assises, the prisoner is interrogated in private by the President. The witnesses are cited by the Procureur Général or the prisoner, and the President has a discretionary power of calling in any additional witnesses whom he thinks it desirable to hear. The trial begins by the reading of the acte d' accusation; the Procureur Général then presses the case against the prisoner, speaking generally with far more warmth, and expressing a much more decided opinion than would be thought becoming in this country. The President then interrogates first the accused, and then the witnesses, the Procureur Général deciding on the order in which they are to be called. There are no rules of evidence; and in the first instance the witnesses tell their own story in their own words, and without any interruption whatever, the effect of which often is that they make long speeches not very material to the question. After the deposition is completed, the President cross-examines; and after his cross examination is over, the counsel for the prisoner may put any further questions if he pleases, but he can only do so through the President. This privilege is hardly ever exercised, and this in itself forms a broad distinction between a French and an English trial; for in the latter the cross-examination of witnesses is one of the most important and most characteristic parts of the proceedings. After the examination of the witnesses, the advocate for the partie civile, the Procureur Général, and finaly the advocate for the prisoner, address the jury; lastly, the President sums up. But this part of the proceedings has less importance in France than in England, and the resumé is as often as not confined almost entirely to a recapitulation of the arguments of the counsel.

It is obvious from this short sketch of French procedure, that hardly any discretion or independent action is allowed to the prisoner from the very first. He cannot manage his defence in his own way, but on the contrary the Ministére Public manages it for him, counterchecking it as the proceedings go on, and too often concluding in favor of his guilt from any confusion or falsehood on the part of witnesses favourable to him. The issue of the trial is virtually almost decided before it begins, because it is only the last act of a continuous process; and thus it is hardly an exaggeration to say that the jury in a French court is an anomalous excrescence. As its introduction into France is no older than the Revolution, and as the greater part of the Code Napoleon is a mere recast of laws which existed long before that time, it may very probably be the case that the whole scheme of French criminal procedure may have been adapted to the ancient system, in which the object was to convince the minds of the court; and it must always be remembered that the Tribunaux Correctionnels, which can imprison for ten years, and deprive men of civil rights, and before which nearly nineteen-twentieths of the French criminal trials take place, try causes without juries.

In order to understand the difference between the English and French systems of procedure, and the character of the French system, we must suppose the attorney for the prosecution, the committing magistrate, and the counsel for the crown, to stand to each other in the relation of official superiors and inferiors, and we must further suppose the counsel for the crown to be a sort of assessor to the judges of assize. To complete the system we must substitute for the fifteen judges a much more numerous body, scattered over the country in threes and fours, each group having under their official authority all the committing magistrates and all the prosecuting counsel and attorneys within a wide district, and discharging themselves the functions of grand jurymen. We must also suppose the procedure to be secret until the day of trial, and the accused to be liable to close confinement, varied only by as many interrogatories and private confrontations with witnesses as the judge "instructing the process" might think advisable. If a prosecution is to be considered as a public investigation, it is obvious that those who are to conduct it must stand in some relation of this sort to each other. A system in which the prosecuting attorney who collects the evidence; the committing magistrate, who weighs it; the grand jury, who keep a sort of nominal check upon it; the counsel for the crown, who exercises an absolute discretion, not only as to the order in which the witnesses are produced, but as to their being called or not, and as to the questions which shall be put to them; and finally, the judge and jury, who decide the case, are all absolutely independent of each other, is fitted only for the purpose

of ascertaining, by a series of successive tests, the weight of the prosecutor's assertion that the prisoner is guilty. The result of the French system, on the contrary, is the gradual elaboration of a theory on the subject of the crime, supported by a mass of evidence which has been collected and arranged by a set of public functionaries intimately connected together, and bound by all the ties of official espirit de corps and personal vanity, to maintain the accuracy of the conclusions at which they have arived.

It is difficult by mere generalities to convey an adequate notion of the differences of the English and French systems of procedure. In order to show how the French system works, we will proceed to examine with some minuteness a case which excited great interest in France some years back—the trial of the monk Leotade, for rape and murder.

The case, told as an English or an American lawyer would tell it, is as follows:—On the 16th of April, 1847, at half-past six o'clock in the morning, the body of a girl of fourteen, called Cecile Combettes, was found in the corner of a cemetery, at Toulouse, close to the wall of the garden of a monastry, and rather further from another wall which separated the cemetery from a street called the Rue Riquet. The body rested on its knees, toes, and elbows, and the left cheek and temple were on the ground and were covered with mud. The ground was wet, but there were no footsteps upon it. A patch of moss, with the earth to which it adhered, had been detached from the convent wall, and some fragments of it were found in the hair of the body. This moss appeared to have been loosened by the rubbing of certain branches of cypress which overhung the wall of the Rue Riquet, and reached that of the monastery. On the top of the monastery wall were several broken plants, and especially a geranium, which had lost all its petals. A petal of geranium and some sprigs of cypress were found in the hair of the body. On the garden side of the monastry wall there were also one or two plants which had been disturbed. There was found in the garden itself a piece of cord, and in the hair of the body a thread of tow. There were also some footsteps in the garden, and marks of the feet of a ladder. Of several ladders found in the monastery, one corresponded to the marks in width, but not in the form of the extremity—but there had been rain in the night, which would alter the shape of the marks. On the other hand, there was a lamp in the Rue Riquet itself, which threw its light on the wall of the cemetery, and a sentinel was stationed further up the street. From these circumstances it was suggested that the body must have been, in some manner or other, dropped over the monastery wall into the place where it was found.

The last time when the deceased was seen alive was on the morning of the 15th of April, soon after nine, when she went with her master, a bookbinder named Conte, to the convent. He went up stairs to the director on business, leaving her with orders to wait for him to bring back some empty baskets. He also gave her his umbrella to hold. When he came back she was gone, and the umbrella was leaning against the wall. From the testimony of several witnesses, it was proved that she had left the passage where her master had stationed her within a few minutes after his departure, and by about a quarter-past nine. Suspicion fell in the first instance on Conte, who was arrested. When under arrest, he said that he had seen Leotade and another monk, called Jubrien, talking together in the passage when he entered it; and to a certain extent he was corroborated as to Jubrien by Jubrien's own statement. Leotade slept, on the night after the murder, in a room from which he could have reached the garden by the help of a key found in his possession; and on the day after the murder, on hearing that a girl in Conte's service had been found dead in the cemetery, but before the cause or the circumstances of her death were known, he used expressions which certainly might be construed into an imputation on Conte. The deceased, on a medical examination, appeared to have died of a blow on the head which broke the skull, and had obviously been subjected before her death to great violence of another kind. From the state of the contents of the stomach it was proved that her death must have taken place within a short time after her last meal, and consequently not long after she was last seen alive. A feather, some grains of corn, and stalks of hay were found on the body, in a position which, to a certain degree, indicated that they had been brought from the scene of the crime; and in the monastery garden, near the corner formed by the two walls, were several barns, in one of which was a heap of corn, and in another some hay, but there was no evidence that they bore any marks of disturbance. To these buildings Leotade's occupation in the convent gave him access, and in one of them he kept rabbits and pigeons.

This was the whole case against Leotade, as it would have stood according to our rules of evidence. No one would maintain that, upon that evidence alone, it would have been desirable to convict him. Since, however, he was convicted, it will furnish some light on the expediency of our rules of evidence, to see what in this case was the character of the testimony which they would have excluded, and which did, in fact, produce a conviction. It consists of two great divisions—the prisoner's own answers when interrogated, and the detection, or supposed detection, of efforts made by the other monks to suppress evidence and to suborn false witnesses. The arrests of Conte, of Leotade, and of Jubrien (who was at one time suspected), took place in April, 1847, and the trial began on the 7th and lasted till the 26th of February, 1848. It was then broken off on account of the Revolution, and was begun again on the 16th of March and ended on the 4th of April, the seventeenth day of the inquiry. During great part of the time that the prisoners were in confinement, they were constantly interrogated. Conte, whose imprisonment was comparatively short, had to repeat no less than thirty times the statement he made as to having seen Leotade and Jubrien together. Leotade himself was examined and re-examined continually about the way in which he had passed his time on the day in question. He was questioned, for example, on the 18th, 23rd, and the 26th of April, on the 3rd and 6th of May, and on the 17th of December; and on his trial he was taxed with all the inconsistencies which could be discovered between his statements on these different occasions, and with any discrepancies which existed between any of them and his statement in court. By these means a good deal of confusion was detected, or said to be detected, on several points, the most important of which were, first, that in his earlier statements, he did not mention his having passed part of the morning on which the crime was committed in writing his compte de conscience, whereas at his trial, and on one preceding occasion, he did; and secondly, that he failed to give a satisfactory account of the shirt which he had worn on the day in question. All the convent linen was used in common, each monk having a clean shirt supplied to him from the common stock every Saturday. Certain marks were found on one of the dirty shirts which had been worn during the week in question which seemed to indicate that it had been worn by the murderer, though the indications were far from being conclusive. There were about one hundred and eighty monks, some of whom—and amongst them Leotade—belonged to the "Pensionnat," and others to the "Novicial." The shirts of the two classes were differently marked, though they were occasionally mixed. The shirt in question belonged to the "Noviciat," so that it was unlikely, though possible, that Leotade might have worn it. There was not a shadow of evidence that he had actually worn it, except the fact that he maintained that he had not changed his shirt on the Saturday after the murder, and that the reason which he gave for not having done so was apparently false. It was also stated, in the acte d' accusation, that all the rest of the monks had accounted for their shirts, and that none of them owned to have

worn the shirt in question; but no independent evidence of this vital assertion was given to the jury.

The second division of the evidence is infinitely more voluminous than the first, and consists almost entirely of what, under the English system of procedure, would have been the cross examination of the prisoner's witnesses. The principal objects of the defence, as we should have them arranged, were, in the first place, to prove that the deceased left the convent alive; and secondly, to establish an alibi on behalf of the prisoner. To this the prosecution replied by charging all the witnesses on both points with systematic perjury and subornation of perjury. It would be wearisome to enter into a minute examination of the merits of these conflicting statements. It is sufficient to say that the general nature of the argument, founded on this part of the evidence, was, that Leotade must be guilty, inasmuch as much false testimony was given on his behalf; and that in order to make out that the testimony was false, such a mass of collateral matter was gone into, as to what various people said to each other, as to the letters which they wrote, and as to the expressions which they had dropped in casual conversation, that it is hardly possible to understand or to follow the discussion. The most trifling gossip was not excluded. One man, for example, was permitted to inform the court that he had told somebody else, on hearing of the news, that he felt sure that if the girl had entered the convent she would never leave it alive; and the President told him, with great gravity, that if the fact was so, his remark was "une appréciation quelque peu prophétique." Still more singular is the observation of the acte d' accusation itself, that the place in which the crime was conjectured to have been committed "semble predestiné pour une crime." But the strangest of all these supplementary articles of evidence was supplied by the Judge d' Instruction himself, who said that, on one occasion during the course of his examination of Leotade, he thought from his manner that he was about to confess, and though he had certainly explicity denied the crime, still "s' il faut dire tout ma pensée j' ai cru et je crois encore que Leotade a été au moment de me faire un aveu." Moreover, continued the magistrate, "en interrogeant Leotade pour la premiére fois son trouble était extréme et comme à la fin on lui disait retirez vous, il manifesta une joie *qui pour moi trahit la possibilitié de sa culpabilitié*, et sans l'intervention de M. le Procureur Général je le mettais immediatement an arrestation." Such is the kind of evidence which, in a case of this importance, is admitted under the French system. That it is admitted at all, is a consequence of the whole character of the proceedings, which far more resemble the proceedings before English Commissioners of Inquiry than the proceedings before an English Court of Criminal Law. The members of the Cour Imperiale, including the Procureur-Général, the Juge d' Instruction, and the Procureurs du Roi, jointly and severally devote all their energies to the collection of every sort of information or suggestion in any way bearing on the case in hand. The mass of matter thus collected is enough to bewilder any jury, and must virtually make them almost entirely dependent on the direction of the Court.

The manner in which the evidence is laid before the jury is not less illustrative of the principle of the whole trial than the character of the evidence itself. As has been already observed, the "Instruction" does not leave, or even permit, the prisoner to frame his own defence in his own way, but takes that business out of his hands, and draws unfavourable conclusions from the shortcomings of his witnesses. If an alibi is relied upon in England, the prisoner's attorney sees the witnesses, prepares the proofs, and instructs his counsel of their character, and it is at the trial that they are for the first time judicially considered. In France, the prisoner is interrogated as to where he went, what he did, and whom he saw, from the very first; and any person whom he mentions is immediately called before the Juge d' Instruction, and examined upon the subject, apart from the prisoner. That a prosecutor, public or private, wishes to convict the prisoner upon the same principle which makes a sportsman desirous to bag his game, is a matter of perfect notoriety; the consequence is, that this system, which, at first sight, appears so humane, in reality has a constant tendency to resolve itself into duels between the authorities, the prisoner, and his witnesses. In Leotade's trial more than sixty witnesses were called, and the trial occupied nearly three weeks, to say nothing of the *instruction*, which was spread over seven or eight months. More than half of these witnesses were called literally for the sake of contradicting each other. Thus, for example, an old women, called Sabatier, said that she had seen the murdered girl under circumstances which would show that she had left the monastery alive. No less than ten witnesses were called to refute her, yet her evidence upon the subject was given, and its falsehood proved, months before the trial; and the whole matter might, therefore, have been safely laid out of account. In an English court she would, of course, have been called, if at all for the prisoner; and if his advisers had seen reason to distrust her—as they probably would, for she was a mere foolish gossip—she would not have been called at all. Another illustration of the same thing occurred in respect of the evidence of the different monks. The acte d' accusation is divided into two parts, of which the first is occupied by arguments to show that the crime was committed in the monastery, and the second by arguments to show that it was committed by Leotade. According to our principles, the first of these questions would be utterly immaterial except in so far as it bore upon the second; but the French court so managed matters as to make the question of Leotade's guilt almost subordinate to the question of the guilt of some one member of the convent. Four-fifths of the evidence given at the trial consists of refutations by the prosecution of rumors circulated, or supposed to have been circulated, on behalf of the monks, and of exposures of the falsehoods told upon various isolated parts of the case by other monks not shown to have been connected with the prisoner. A single illustration will show the endless confusion which such a mode of proceeding is calculated to produce. Evidence, says the acte d' accusation, which would give a different turn to the procedure, had been announced by the newspapers. It was said by the lad Vidal (who was in the parloir when the girl entered the passage), had seen the girl leave the monastery. The Juge d' Instruction "prepared to receive this evidence, and, at the same time, took measures to check it" (de la contrôler). After much enquiry he found out Vidal was in communication with the principal members of the monastery; and the lad himself gave his evidence with many qualifications, and much hesitation. In consequence of these inquiries, the acte d' accusation expressly declares that "la cour n'a-t-elle pas hésité à déclarer que la déposition de Vidal ne meritait pas la confiance de la justice." Notwithstanding this, he was one of the principal witnesses against the prisoner, for he stated that he had been present at a sort of meeting in which various influential members of the monastery took part, and at which they concocted evidence tending to prove that the girl had left their establishment. Upon this subject many witnesses were examined, and a great deal of contradictory assertion and very violent language passed between all parties. It does not seem to have occurred to any one that the whole debate was quite beside the question. That Vidal could not prove that the girl had gone out alive, was admitted by himself in his very answer; and if that point failed it was perfectly immaterial to show that any amount of perjury and subornation of perjury had been employed to establish it. That such a state of things should exist would, no doubt, be very discreditable to a religious establishment, but it is absurd to say that it would tend to prove Leotade's guilt. If he personally had suborned false witnesses it would have been very different, but as he was in close custody, that was out of the question; and it was surely most unjust to make him respon-

sible for what, at most, was the criminal conduct of most unwise partizans.

Perhaps the most curious feature in French procedure is the narrowness of the sphere within which the functions of the jury are confined. They are frequently obliged to take for granted, on the authority of the court, the most important part of the evidence. In the case of Leotade, the strongest facts against him were the imperfect and conflicting accounts which he gave of the employment of his time on the day in question. The fact that this was so, was proved solely by the procès verbaux taken at the different interrogations. Although Leotade urged repeatedly that he had been so tormented by questions, so intimidated and brow-beaten, that he was quite confused, and did not know what he said, no evidence appears to have been produced to disprove his assertion. It seems to have been assumed that official acts were not to be questioned, and that official assertions must be true. It is a slight but significent illustration of this temper, that when a brigadier of gendarme and a monk differed, the President told the latter that the former had a right to the confidence of justice both as a witness and a "functionary." Nothing is more common than to hear English judges warn the jury to be very careful about believing too easily the evidence of policemen, or skilled witnesses. An even stronger illustration is to be found in the fact, that the jury who tried Leotade were each supplied with a copy of the acte d' accusation,—a document which closely resembles, in its style, length, and objects, the opening speech of an English prosecuting counsel. As the evidence swelled to a size altogether unmanageable, this was almost equivalent to prejudging the case.—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

SPLITTING THE PLAINTIFF'S DEMAND.

(*Continued from page* 203.)

The point expressly decided in *Grimbley* v. *Aykroyd*, was that a tradesman's bill cannot be split for the purpose of bringing it within the jurisdiction of the County Court, the demand forming but one cause of action.

This principle was again affirmed in *Wood* v. *Perry* (18 L. J. 161; 12 Jur. 129; 3 Ex. 442). The plaintiff, a tailor, dwelt and carried on business within the District of Court *C.*, and within 20 miles of the defendant, who lived in the District of Court *B.* The action was on a bill which consisted of 21 items. All the work had been done at the plaintiff's residence, the orders for the different items were given at different places, and the goods were delivered at different times and places, but one bill sent in for the whole. The question as to the right to divide the cause of action came up on motion to enter a suggestion to deprive plaintiff of his costs, and the Court held that there was no concurrent jurisdiction in the Superior Court to entertain the suit under the 128th section of the English Act, and that the different items were so connected together as to form but one cause of action, and therefore that the plaintiff, who sued in the Division Court, was not entitled to the costs of the suit.

The case of *Bousy* v. *Wordsworth* (25 L. J. 205; 18 C. B. 325) is to the same effect, one part of the plaintiff's claim being for butcher's meat supplied at various times.

But in illustration of the principle that demands distinct in their nature need not be joined in the same action *Wickham* v. *Lee* (18 L. J. 628; 12 Q. B. 521; Cox & Macrea, 119) is a leading case. This question was reduced to this—there were two actions against the defendant,—one for £19 8s. 4d. rent in arrear, the other for £9 14s. 2d. for double value for holding over after notice to quit under Stat. 4 Geo. II. cap. 68, sec. 1, and it was held that these were distinct causes of action within the meaning of the terms in the act, and might be made the subject o separate suits in the County Court.

In support of the rule for prohibition, it was argued that the principle of the decision in *Grimbley* v. *Aykroyd* applies to all arrears of a running account, and therefore to arrears of rent; that the action for double value was not a distinct cause of action; that a count for double value might be always joined with a count for use and occupation: to which Coleridge, J., said (*interloc.*) "an action for double value does not admit a tenancy; on the contrary, the landlord, having given notice to determine the tenancy, may bring ejectment concurrently with an action for double value, and it may be maintained after judgment recovered in ejectment." In deciding for the plaintiff, Patterson, J., said, "it is true that a count for double value may be joined with a count for debt for use and occupation, but I do not understand the Court of Exchequer has gone the length of saying that whenever causes of action *may* be joined they *must* be joined; to me it seems that this is quite a different cause of action."

Erle, J., said, "I collect from the decision of the Court of Exchequer that the plaintiff is not open to the objection of splitting his demand, if in an action in the Superior Courts two counts would have been indispensable. If they must have had two counts, they may have two plaints in the County Court."

In *Kimpton* v. *Willey* (19 L. J., C. P.; 1 Cox & Macrea, 350), the plaintiff entered two actions in the County Court, one was for money lent and advanced, the other was for work and labor and goods. Some of the items in the two actions were contemporaneous, but there were no items in any way connected. The defendant objected that the subject of the two actions formed but one cause of action, and applied to the Court of Common Pleas for a prohibition.

The Court held that the particulars of the two actions did not form one cause of action within 9 & 10 Vic. cap. 95, sec. 63, and that this was not a case of splitting demands. Wilde, J., said, "The demand is for money lent. We are told that it must be considered as part of the larger demand, —and why? The larger demand is for work and labor, for certain services, and for goods sold and delivered; and it is said these two demands must be considered as forming one entire demand. Why? Has any account ever been delivered, in which the plaintiff put together the two in the form of one. Have the parties ever treated them as one demand. Of that there is no evidence. Are the sums lent at all connected with the sums claimed in the other plaint? The question is this; whether you can say, in the absence of all evidence, that the parties have ever treated these sums as forming one entire demand; in the absence of all circumstances which can tend to show that they ever intended that they should constitute one demand. We know there is a demand for money lent; we know there is a demand for work and labor; but there are no circumstances to show that they were ever intended to be treated as one account."

Williams, J., said, "I am of opinion that a prohibition ought not to go in this case, unless it clearly appears that the Court below has acted without jurisdiction. The onus of showing this lies on the applicant. With respect to the application, so far as it is founded on a supposed division of the cause of action, it is enough for me to say that I am not at all satisfied that the subject of the two claims constituted 'one cause of action' in any reasonable construction of that expression in the Act of Parliament." And Talfourd, J., added, "I am entirely of the same opinion. With regard to the main question, namely, whether the two demands constitute one entire claim, the case is essentially different from *Grimbley* v. *Aykroyd*. There is nothing to connect the various parts together, nothing in them of a common character, except that they may be recovered in the same declaration in the same form of action; whereas in *Grimbley* v. *Aykroyd*, the defendant carried on the business of a shopkeeper, where he was in the habit of paying his workmen, and there was one entire system of dealing; at all events there was a demand arising out of one state of things which does not appear in the present case; therefore that case does not decide this."

CORRESPONDENCE.

(*To the Editors of the Law Journal.*)

GENTLEMEN,—There are three questions upon which I beg to ask your opinion in the next number of your *Journal* for the information of those interested in the Division Courts.

1. A contracts a debt with B amounting to a sum within the jurisdiction of the Division Courts; then removes to the United States. Can B. bring his action in the Division Court, the Division Court Law making no provision for service out of the jurisdiction?

2. Can the Judge of a Division Court swear both parties to a suit *on their own behalf* where the amount in dispute exceeds eight dollars? (See sect. 102 Con. Stat., U. C., page 153.)

3. Can a clerk of the Division Court charge any fees except those mentioned in the Tariff?

I ask the last question from the fact that, the clerk of the First Division Court of this county, having a rather poetical turn of mind, renders his accounts, containing many charges for *imaginary* services. For example, in a suit brought in his Court in which the plaintiff recovered a verdict for $100—a new trial being granted to the defendant and the case removed by *certiorari*—the clerk insisted upon the plaintiff paying the following items in addition to the ordinary costs in the suit, before the case was finally decided, which I think he had no right to do, as they are not allowed by the tariff; but if so, they should have been paid by the defendant in the first instance:—

"Costs on application for new trial	$0 50
Service of summons	0 20
Affidavit	0 20
Making out (clerk's) account	0 25
	$1 15"

I do not give this instance for the purpose of exposing our clerk, but do so believing that a little castigation and notoriety will make him more cautious about his charges, and more obliging and civil to those who come in contact with him in an official capacity.

Your obedient servant,
Sarnia, 4th August, 1862. S. P. Y.

[1. If the action be brought in the Division in which the debt was contracted, and the summons be personally served; the Court has jurisdiction. Or, if the defendant has absconded to parts unknown, a proceeding by attachment will enable substitution service in the suit to follow attachment, and thus give the Court power to deal with the case.

2. He can; but the power should be sparingly exercised by the Judge, so long as the policy of the law affirms the general rule that parties are not admissible on their own behalf.

3. We do not see why the costs specified should have been charged against the plaintiff, unless expressly ordered in the rule for new trial. We have not the particulars of the services before us, and therefore cannot say whether or not the charges made are allowable: but on the other hand, we cannot say they are unauthorised, for an order or judgment, and entering same is chargeable in applications for new trial; and the service of summons, *or other proceeding*, (which would include the papers necessary to be served on applications for new trial and affidavits,) are expressly mentioned in the tariff of fees. The last item we see no authority for.

As to the indirect charge of want of civility, &c., in the officer, we have only to say: that civility is an article that costs nothing and should be freely accorded by all whose official position brings them in contact with the profession or the public. Men habitually uncivil or disobliging are unfit for the office of clerk; but our correspondent may expect more suavity of manner than the ordinary run of men in "this Canada of ours" (as a worthy Judge, now a northern light, delighted to call the country) can boast of possessing.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH—PRACTICE CASES.

Reported by C. Robinson, Esq., *Barrister-at-Law, Reporter to the Court.*

McCrimmon v. McLeod.

Judgment of non pros.—Penal action.

A judgment of *non pros.* regularly signed in an action by a common informer for a penalty will not be set aside.

Adam Crooks obtained a rule on the defendant to shew cause why the judgment of *non pros.* signed for want of a replication should not be set aside, and all subsequent proceedings, on the ground that the plaintiff had a good cause of action, on such terms as the court might think fit.

The plaintiff's attorney swore that the plaintiff had a good cause of action, as he was instructed and believed. This application was made in the Practice Court, and referred to the full court. It was admitted on the plaintiff's part that the judgment was regularly signed, and not by any sharp practice in the defendant; and he asked only to be allowed to proceed in his action on the footing of indulgence, and on the terms of paying costs, if the court should think it right to insist upon it.

The defendant resisted his application only on the ground that the plaintiff was suing for a penalty as a common informer, and that it was against the general practice to facilitate his proceedings by such an indulgence.

The action was brought on the statute 20 Vic., ch. 22, sec. 5, for a penalty for sitting in the Legislative Assembly, being a person disqualified from sitting or voting by reason of his alleged interest in a contract with the government.

Prince shewed cause, and cited *Bennet qui tam* v. *Smith*, 1 Burr. 401; S. C., 2 Ld. Kenyon's Rep. 82.

Crooks, contra, cited Ch. Arch. Prac. 1411; *Cortessos* v. *Hume*, 2 Dowl. 134; *Wood* v. *Cleveland*, 2 Salk. 518; *Messiter* v. *Rose*, 18 C. B. 162.

Robinson, C. J., delivered the judgment of the court.

We do not find that the case of *Bennet qui tam* v. *Smith* (1 Burr. 401, S. C. 2 Ld. Kenyon's Rep. 82,) has been overruled, and we think we are bound by it to decline to relieve the plaintiff from a judgment of *non pros.* regularly signed against him, and not obtained by any sharp practice.

Rule discharged.

Cumberland and Storm v. Ridout et al., Executors of Radenhurst.

Verdict by consent—Certificate for costs—Rule of Court, No. 155.

Where an action was brought in an open account, and a verdict entered by consent for the amount claimed, which was within the jurisdiction of the county court: *Held* (dissenting from *Bonter* v. *Pretty*, 9 C. P. 273), that it was a case in which, under the rule of court, No. 155, a judge in chambers could make an order for full costs.

Action on common counts, for services as architects.

Pleas.—Never indebted, and payment. Verdict for the plaintiffs £70 10s. 6d.

The plaintiffs' attorney made an application to a judge in chambers for an order under our rule of court to tax Queen's Bench costs, notwithstanding the amount of the verdict was within the jurisdiction of the county court. He stated in his affidavit that the action was brought for the plaintiffs' services as architects in preparing plans and specifications and superintending a building, and that the sum claimed was a sum beyond the jurisdiction of the county court: (the sum claimed was just what was allowed, £70 10s. 6d., it included £5 10s. 6d. for interest:) that the plaintiffs delayed the trial of the cause to give the defendants an opportunity of settling it: that at length, when the plaintiffs' attorney was about to call on the case, one of the defendants (the acting executor) came to him in court, and being told by him that the case was coming on signed a consent that a verdict might be entered for the amount claimed; that a certificate was not applied for, from the fact that the case could not be brought in the inferior court: that the demand was upon an open account for services, and not liquidated or ascertained by the signature of the defendants. The plaintiffs both made affidavits to the same effect.

The particulars delivered were a charge of 5 per cent. commission on a contract for £1,300, £65, and the interest added.

The motion being refused in chambers, *Harman* moved in full court on the same affidavits.

Robinson, C. J., delivered the judgment of the court.

The question is whether this is a case in which the court or a judge could make an order for full costs under our rule of court, No. 155, as being "an action of the proper competence of the county court, in which final judgment was obtained without a trial."

In our opinion it does come within the intention and spirit of that provision, for there was no trial, no evidence received, nothing said or done that could give the judge who signed the verdict any more means of knowing whether it was proper to bring the action in the higher court than if he had never heard of the cause.

A judge in chambers can conveniently receive affidavits and make an order, and it would be most inconvenient to compel a judge at *nisi prius* to receive evidence for no other cause than to entitle the plaintiff to a certificate.

The Court of Common Pleas in *Bonter* v. *Pretty* (9 C. P. 273) have, however, decided otherwise.

McGee v. Baird and Cunningham.

Judgment—Consol. Stats. U. C., chap. 26, sec. 17.

A judgment obtained contrary to the Consol. Stats. U. C., chap. 26, sec. 17, was, upon the application of other judgment creditors of the debtor, postponed to their judgment.

Helliwell obtained a rule on the plaintiff to shew cause why the judgment in this cause, and the confession on which it was founded, should not be set aside with costs; or why the execution, with all proceedings upon it, should not be set aside with costs; or why the execution should not be postponed, as to the satisfaction thereof, by the sheriff of the county of Carlton, till after the other executions had been satisfied, which had issued against the goods of the same defendants, at the respective suits of Andrew Watrous, and of Thomas Hunter, and William Hunter: on the ground that the said confession (in this suit) was void as against creditors of the defendants, under the Consolidated Statutes of Upper Canada, ch. 26, sec. 17. He cited *Armour* v. *Carruthers*, (2 P. R. 217;) *Brent* v. *Perry*, (5 U. C. Q. B. 538.)

C. S. Patterson shewed cause, and cited *Young* v. *Christie*, (7 Grant Chy. Rep. 312;) *McMaster* v. *Clare*, (Ib. 550;) *Loader* v. *Hiscock*, (1 F. & F. 182.)

The Court held that the affidavits shewed the case to be within the statute both in regard to the defendants being insolvent at the time they gave the confession of judgment to McGee, and to the purpose and intent with which they gave it; and that it was competent to the other judgment creditors of the defendants to move in this case to set the judgment and other proceedings aside; and they directed the rule to issue according to the second alternative, for *postponing* merely, and not setting it totally aside, thus leaving the execution still in force as between the parties to that suit.

Ashton v. McMillan.

Replevin—Costs—Certificate.

A certificate is necessary to obtain full costs in replevin as in other actions, though the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts.

The plaintiff replevied a quantity of timber, which he claimed to be his, and which was in defendant's possession. He swore that it was worth £52 10s. in the affidavit made when he took out the writ. In the declaration he complained of a wrongful taking as well as detention. It was not upon any distress that had been made. The action was brought to determine the right to the property.

The plaintiff obtained a verdict, which, as usual, was for 20s.

No certificate for costs was obtained or moved for at the trial. Judgment was entered in the county, and the deputy clerk of the Crown who taxed the costs taxed Queen's Bench costs. On application to the master he confirmed the taxation.

The learned Chief Justice of this court was applied to in chambers for an order to revise taxation, and referred the parties, as it was a question of practice, often arising, to the full court.

A rule was accordingly obtained by *Eccles, Q. C.*, against which *Hector Cameron* shewed cause in the first instance.

For the plaintiff, it was contended that the verdict being for 20s. signified nothing, since that was well known to be a mere nominal verdict, having no reference to the value of the goods in litigation, and that the affidavit of value and the replevin bond should govern, which in this case shewed that the case could only be brought in one of the superior courts.

For the defendant, it was argued that the plaintiff could not be allowed by his own affidavit to fix the value of the goods in dispute, and that the bond merely conformed to the affidavit: that at the trial it often turned out that the plaintiff limited his claim to part of the property replevied, or gave no evidence of right to a large portion of the goods, and in such cases it would have appeared to the judge that there was no pretence for suing in a higher court: that the judge at the trial had almost invariably the means of forming a judgment of the real value that was in contest, and that the plaintiff could always shew it if he pleased, so that the judge could as well certify in these cases as in others; and by that means only could it be known to the master whether full costs should be allowed or not.

ROBINSON, C. J., delivered the judgment of the Court.

In point of practice there is no doubt that in replevin certificates for costs are often applied for at the trial and granted.

In this case it is stated that the timber replevied was not worth more than £35.

As there was a trial in this case, the rule of court is not available to the plaintiff, which provides for the judge receiving an application for full costs on affidavit in all cases where judgment has been obtained without a trial.

We have spoken with the judges of the other court on this point of practice, and we are of opinion that full costs should not be taxed without a certificate in cases of replevin more than in other cases where, for all that the verdict or the determination shews the action might as well have been brought in the lower court as in the higher.

We therefore make the order for revising taxation, with a view to confine the costs to those of the county court.

Rule absolute.

CARRALL, SHERIFF OF THE COUNTY OF OXFORD, v. POTTER.

Money paid into court—Fees.

No percentage can be claimed upon money paid into court except under a plea. Where money was paid in under a judge's order, to abide the result of another suit, *held*, that the only charge allowable to the clerk was 20s., under the tariff of costs.

R. A. Harrison obtained a rule *nisi* on the clerk of this court, to shew cause why he should not re-fund to the defendant £7 15s., the amount of per-centage paid to him on paying money into court under an order made by the Chief Justice of this court in this cause, or so much thereof as the court might think fit; and why he should not pay the costs of this application; on the ground that the statute only applies to payment of money into court under a plea; and on the ground that the tariff of costs established by the courts covers all that should be charged, either under the statute or otherwise.

On the 26th of April, 1860, the Chief Justice of this court made an order in chambers that upon payment by defendant into court within ten days of the amount of the judgment debt and costs in this action, execution should be stayed till the determination of a cause in which the defendant was plaintiff and the now plaintiff was defendant, then pending in error and appeal, the amount so to be paid into court to abide the event of the last mentioned cause, and to be then dealt with as should be directed by this court.

Under that order the defendant's attorney paid into court $3068 68c.

The clerk of the court charged one per cent. on the amount as under the statute, and £1 under the table of costs, in all £8 15s., considering that he was bound to exact that on account of the fee fund, and he refused to receive the money without.

The defendant's attorney questioned his right to charge more than the £1, but paid it under protest, and now reclaimed it, having given notice to the clerk at the time that he would do so.

Hodgins shewed cause, and cited 2 Geo. IV., chap. 2, secs. 25, 26; Consol. Stats. U. C., chap. 22, secs. 99, 100; Consol. Stats. U. C., chap. 10, sec. 29; In re *Willman*, 4 Des. & Ch. 810; *Ex parte Allen*, 8 McN. & G. 360; *Bloor* v. *Husten*, 1 Jur. N. S. 256.

ROBINSON, C. J., delivered the judgment of the court.

No fee can be exacted for anything done in the course of administering justice which is not expressly given by law. We see no allowance made of a per-centage on money paid into court by any existing law, except under the 99th and 100th sections of the Common Law Procedure Act, Consol. Stats. U. C., chap. 22, and that only relates to money paid into court in a cause by way of amends, or as so much acknowledged to be due, which is not exactly this case, and so that provision does not apply; and besides this, there is our tariff of costs, which allows 20s. on all sums paid into court not under £100. This we think is all that can be claimed, and that can be claimed because this allowance is not restricted to money paid in upon a plea.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

REID V. INGLIS ET AL.

Assault—Right of a stranger to use a church—Member of a congregation—Disturbance by—Pleading—Imp. stat. 1 *Wm. & M., ch.* 18—*Can. stat of Can., ch.* 92.

Action for assault and battery against fourteen defendants. Two of them, W. W. and R. G., pleaded. 1st not guilty. 2ndly. As to the seizing, laying hold of and dragging and pulling plaintiff about, that plaintiff had been informed that a certain pew in a church which he had previously occupied had been allocated to another person, and that he would be allowed to occupy another which would be shewn to him, when he should attend; and that just before the committing, &c., the plaintiff came into the church, and being shewn another pew refused to occupy it, but insisted upon sitting in the aisle on a camp-stool during the service, and disturbed the congregation thereby, whereupon three others of the defendants A S., R. H. and W. D., being deacons of the church, requested plaintiff to desist and occupy a pew, which he refused, and the said deacons, with the said W. W. and R. G. being constables in aid of the said deacons, and at their request, and for preserving due decorum, &c., *molliter manus.*

Eleven others pleaded, 1st, not guilty,

2ndly. As to seizing and assaulting plaintiff, that S. and H. (two of the defendants) were lawfully possessed of certain lands and tenements in Hamilton, whereon stood a building called the McNab Street Presbyterian Church, and being so possessed, plaintiff just before the time when, &c., was unlawfully in the said church, misbehaving himself, without the license of the said S. and H., whereupon the defendants requested plaintiff to behave and go out of the church, which plaintiff refused to do, whereupon said S. & H. and the other defendants at their request, *molliter manus.*

3rd. S. and H. pleaded that they were office-bearers in the said church, and as such it was their duty to allocate the seats, and to preserve order during divine service; that service was intended to be held on a certain Sunday at a certain hour; that just before the time appointed for the commencement of service the plaintiff on that day came into the church, bringing with him a camp-stool, with the intention of occupying it, &c., whereupon the defendants shewed plaintiff a seat in one of the pews, and requested him to sit therein, and forbad him to sit in the aisle, but plaintiff refused and insisted on occupying the seat previously allocated (to other persons) against their will, or of sitting in the aisle, whereupon to prevent disturbance, and to preserve order, *molliter manus*, &c. The 2nd & 3rd pleas were all demurred to.

Held, that the demurrer to the 2nd plea of W. W. and R. G. admitted that the plaintiff committed a disturbance in the church, and that three of the defendants requested him to desist, which he refused, and he was therefore offending against the statute 1 Wm. & M., ch. 18, and our Statute of Can., ch. 92, the former of which is in force in this province, and not superseded by the latter, and therefore the congregation, or its authorised agents, might put out the offender, and that the plea admitting him (indirectly) to be a member of the congregation, shews a wrongful disturbance under the statutes above referred to, which the plaintiff cannot justify, and therefore the three defendants under whom W. W. and R. G. justify, had authority to move him, this plea was therefore good.

Held, that the 2nd plea of the other eleven defendants was good

Held, that the third plea admitted the plaintiffs right to be in the church during divine service, and to occupy some seat or pew, and it not being shewn that the plaintiff committed any disturbance, or committed any breach, or violated any regulation of the church; or that he was requested or refused to go out, and was therefore bad.

The declaration charged the fourteen defendants with a violent assault and battery, *per quod*, &c.

David Inglis, William West, and Robert Graham, by *Burton*, their attorney, pleaded—1st. Not guilty.

2nd. William West and Robert Graham, also, as to the seizing and laying hold of the plaintiff, and pulling and dragging him about, say that before the committing, &c., plaintiff had been

informed that a particular pew in a certain church which plaintiff had previously occupied, had been allocated to another person, and that he would not be allowed to occupy it, but that the authorities of the church would find some other pew for him whenever he should attend; and that just before the said time when, &c., the plaintiff with such notice came into the said church carrying with him a camp-stool and a heavy stick, while the congregation were sitting in the church waiting for the celebration of divine worship, and insisted on obtruding himself into the said pew, or sitting in the aisle upon the said camp-stool during the service, although he was shewn other pews which were unoccupied, and told he might occupy any of them, and plaintiff then committed a disturbance in the church, and disturbed the congregation thereby, wrongfully endeavouring to force his way along the aisle, and seating himself upon the camp-stool, and otherwise conducting himself in an irreverent manner, whereupon three other of the defendants, A. S., R. H., and W. D., then being deacons of the church, for preserving due decorum in the church, and preventing the disturbance of the congregation during divine service, requested plaintiff to desist, and to occupy one of the pews pointed out, which plaintiff refused, and continued in the church, disturbing the same and preventing the commencement of servic, whereupon the said deacons, and the said West and Graham being constables, in aid of the said deacons, and at their request, and for preserving due decorum, &c., and preventing the said interruption and disturbances, and because they could not otherwise preserve decorum and prevent interruption, *molliter manus*, &c.

Andrew Skinner, Robert Hopkins, William Davidson, George Morrison, James Dingwall, Daniel McIntosh, Maitland Young, William Chisholm, Peter Bridge, William Mowat, and Angus Sutherland, by *McDonald*, their attorney, pleaded—1st. Not guilty.

2nd. As to the assaulting, seizing, and laying hold of and pulling and dragging plaintiff about, these eleven defendants say, that Skinner and Hopkins were lawfully possessed of certain lands and tenements in the city of Hamilton, being composed of, &c., whereon stood a building called NcNab Street Presbyterian Church, and being so possessed, plaintiff just before the time when, &c., was unlawfully in the church misbehaving himself without the license of the said Skinner and Hopkins, and thereupon defendants requested plaintiff to conduct himself properly, and go out of the church, which plaintiff refused to do, whereupon defendants Skinner and Hopkins in defence of their possession, and the other defendants, at the request of S. & H., *molliter manus*, &c.

3rd. The last named defendants pleaded, that immediately before the committing the trespasses, they were office-bearers of the congregation of the said church, and members of the congregation; that as such office-bearers it was their duty to allocate the seats, and to preserve order during divine service; that service was intended to be held in said church on Sunday, the 6th of May, 1861, commencing at 11 a.m.; that defendants had reason to believe that plaintiff would on that day enter the church with a camp-stool in his hand, and would insist on occupying a certain pew which had been allocated to other persons, members of the congregation, or sitting in the aisle on the camp-stool during divine service, unless permitted to enter such pew; that plaintiff (in consequence of previous conduct) had been notified by defendants that he would not be permitted to sit in the aisle during divine service, but would be permitted to sit in a pew to which he should be shewn by defendants; that just before the time appointed for the commencement of divine service, the plaintiff, on that day, came into the church bringing with him a camp-stool with the intention of occupying the said seat, which, &c., (as before,) or sitting in the aisle, &c., (as before,) whereupon defendants shewed plaintiff a seat in one of the pews, and requested him to sit therein and forbad him to sit in the aisle, but plaintiff refused, and insisted on occupying the seat previously allocated to F. L. and W. M., against their will, or of sitting in the aisle upon the camp-stool, and the time for service having arrived, and the congregation having a long time awaited the commencement, defendants, in order that it might be commenced, and to preserve order and decorum, *molliter manus*, &c.

Plaintiff demurred to the second plea of West and Graham and to the second and third pleas of the other defendants.

Read, Q.C., for the demurrer, cited *Worth* v. *Terrington*, 13 M. & W. 781; Con. Stat. of Can., ch. 92, sec. 18; *Timothy* v. *Simpson* 1 C. M. & R. 757; *Seymour* v. *Maddox*, 15 Jur. 724; *Wright* v. *Court*, 4 B. & C. 596; *Ingle* v. *Bell*, 1 M. & W 516; 3 Vic., ch. 74, Church Temp. Act; *Hartley* v. *Cooke*, 9 Bing. 735; *Williams* v. *Glemister*, 2 B. & C. 699.

Burton, contra, cited *Reynolds* v. *Monkton*, 2 Moody & Robin, 384; *Burton* v. *Henson*, 10 M. & W 105; *Howell* v. *Jackson*, 6 C. & P. 723; *Bosanquet* v. *Heath*, 3. L. T. N. S. 290.

Draper, C. J.—A great many of the objections taken on these demurrers are very trifling, and could be no more than grounds of special demurrer, if sustainable even for that purpose.

The real question raised on each plea is, whether the facts stated justify the defendants who plead them, either as office-bearers, or as acting under the authority of office-bearers, or as simply members of a congregation assembled for the celebration of public worship, to put the plaintiff out of the church.

The plaintiff, *possibly*, has no more right to enter this church than any person who casually coming to the door of a church which is open on a Sunday for divine service, and just at or before the time such service is about to commence, would have to enter, I assume that no person entering a church under such circumstances and for the purpose of joining in public worship, could be deemed a tresspasser, and probably would not be liable to be expelled so long as he acted with decorum, and in compliance with whatever regulations he found in use and practice therein.

The first plea is pleaded by two defendants who state themselves to be constables. It shews that the congregation were assembled in the church in question waiting the commencement of divine service; that the plaintiff "committed a disturbance in the said church, and disturbed the congregation by then wrongfully endeavouring to force his way along the aisle," and seating himself upon a camp-stool which he had brought with him, and by otherwise behaving in an indecent, irreverent, and unbecoming manner, whereupon three others of the defendants, Skinner, Hopkins, and Davidson, "then being deacons of the said church," to preserve decorum and to prevent the disturbance of the congregation during service, *requested plaintiff to desist*, and to occupy a pew shewn to him, which he refused, and continued in the church while the congregation were waiting the commencement of divine service, disturbing the same, whereupon the deacons, and these two defendants, in their aid, and at their request, and because they could not otherwise preserve decorum, or prevent interruption, removed plaintiff.

The statute 1 W. & M., ch. 18, sec. 18, enacts that if any person shall wilfully, maliciously, and contemptuously, come into any cathedral or parish church, chapel or other congregation, by this act permitted, and disquiet or disturb the same, he shall find two sureties in the sum of £50 each, and in default thereof shall be committed to prison till the next general or quarter sessions, and on conviction thereat shall suffer the penalty of £20.

The Consol. Stat. of Canada, ch. 92, sec. 18, enacts that any person who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship by profane discourse, by rude or indecent behaviour, &c., shall, upon a conviction before a justice of the peace on the oath of one or more more credible witnesses, forfeit and pay such sum of money not exceeding $20, as the justice may think fit, and costs.

I see no reason for holding that the former of these enactments is not in force in Upper Canada, or that it has been superseded by the latter, so that a person who wilfully disturbed a congregation lawfully assembled for religious worship might not be indicted.

The demurrer admits that the plaintiff committed a disturbance in the church; that three of the defendants requested him to desist, and to occupy a pew, which he refused, and contiaued in the church, while the congregation was waiting the commencement of service, so disturbing the same and preventing the commencement of the service. He was therefore offending against either or both of the statutes above mentioned, and it is clear to me, the congregation or its authorised officers might put out a person so offending.

If the plea simply shewed a trespass on plaintiff's part as a mere stranger who having come into the church, and being asked *to*

retire, refused to go, the defendants would, I think, have been under a necessity of shewing strictly a right in those under whose command they attempt to justify to expel him; but they assert a wrongful act of *disturbance* committed by the plaintiff against the provisions of both these statutes. This the plaintiff cannot justify, even though he were a member of the congregation, as, I incline to think, the plea indirectly admits him to be.

Still the defendants justify exclusively on an authority derived from the "deacons." It is not averred that the deacons had the possession, or the care and management of the church; or that they were officers whose duty it was to preserve order; nor can the court judicially take notice of their powers. From the manner in which the term "authorities of the church" is used in the earlier part of the plea, the deacons may only be subordinate officers to those authorities. The plea does not assert that the three defendants were deacons either of this church or of the congregation, or had any authority or any duty. They are not, as "deacons," shewn to be connected with the McNab Street Church; nor is it averred by what denomination of professing Christians that church was occupied.

It is the want of any such avernment that creates a difficulty in regard to this plea, and it is not without hesitation and doubt that I have brought myself to the conclusion that the three defendants, Skinner, Hopkins, and Davidson were members of the congregation there assembled. I mean persons belonging to that church, gathered together for divine worship, and that being so, they had a legal right to remove or direct the removal of any person creating a disturbance, as the plea charges the defendant with doing. The difficulty is in the former part of the proposition. A good deal is stated that encumbers, but does help; being matter of evidence, but not of the essence of the defence, which resolves itself into two propositions, first, that plaintiff was disturbing the congregation, and preventing the commencement of divine service; second, that the person under whose command the two defendants, West and Graham, justify, had lawful authority to remove the plaintiff.

The plaintiff's counsel did not press the demurrer to the second plea of the other eleven defendants, and, so far as I can judge, the plea is good.

In my opinion the last plea is bad. It apparently admits, for it does not in any way question or deny that the plaintiff had a right to be in the church during the time of public worship, and to have a seat in some pew, and if so, he was not a trespasser by entering the church, though he did so with the wish and intention, if not hindered, of sitting in a particular pew; or if hindered, of sitting in the aisle, on a camp-stool. It is not averred that he made any disturbance, or prevented the commencing of divine service; nor that, if he had sat on a camp-stool in the aisle it would have infringed any rule, or would have disturbed the solemnity of the proceedings, or have necessarily distracted the minds of the congregation. All that is asserted is, that he insisted but no specific act is stated, as sitting in a particular pew, or on a camp-stool in the aisle. To sit thus in the aisle, when he might have sat in a pew, appears a very absurd thing in itself, but it would be very easy to suppose a case in which it would be neither unreasonable or absurd, and taken simply by itself, it does not appear to me to justify the expulsion from the church, by force, a person whose right to enter and remain in the church during the celebration of the service is thus admitted. Before the expulsion could be justified, under these circumstances, I think it must be made to appear that the plaintiff insisted on doing something either prohibited by regulations in force, or which was of a character to disturb or prevent, and would have disturbed or prevented public worship; that he was requested to desist or to go out, and refusing to do either, it became necessary to expel him. There are allegations in the plea, which no doubt have reference to matters well understood by both parties, but of which the court knew nothing. We can deal only with the question whether the matters pleaded justify the assault stated in the declaration and in the introductory part of the plea, and in my opinion they do not.

I think, therefore, the judgment of the court should be for the plaintiff on the last plea, and for the defendants on the other two.

Per cur.—Judgment accordingly.

RYLAND V. KING ET AL.

Replevin—Sold title—Trustees—Arbitration—Award—Blanks filled in after execution—Rendered invalid thereby.

Replevin—Two defendants avowed; the third pleaded the convening of a special meeting of the freeholders and householders of a certain school section to procure a school site, when it was agreed to procure a certain piece of ground and erect a school house thereon, which was done. That plaintiff was a resident freeholder when the meeting was held and when his goods were seized, and was assessed $30 for building said school-house, &c.

The plaintiff pleaded that the meeting above set forth was null and void, because, before the said meeting another meeting had been convened according to law, when a difference of opinion existed between a majority of the freeholders and householders as to choosing a school site, and arbitrators were appointed, who decided upon a certain site, which decision remains in force, and the defendants in contravention thereof wrongfully purchased the site mentioned in their plea, and wrongfully destrained. &c.

Upon demurrer, *held*, that the second meeting pleaded by the defendants was a violation of the provisions of the statute, and that the plaintiff was entitled to judgment.

The arbitrators to whom a reference in this cause was made under the school act executed an award, the description of the lot not being fully inserted, but a blank being left therefor, which was afterwards filled in and the word lot altered into gore.

Held, that the award was insufficient. *Held*, also, that school trustees who executed a warrant as such trustees under the seal of the trustee corporation were not personally responsible.

REPLEVIN for a horse and mare.

The defendants Smith and Richards avowed and the defendant King acknowledged the taking, pleading in effect as follows: that on the 30th of October, 1858, a special meeting of freeholders and householders of school section No 1, township of Hallowell, was convened according to law for the purpose of procuring a school site, and erecting a school thereon, and it was agreed then by the inhabitant freeholders and householders and a majority of the trustees to procure as a school site a certain piece of land, (described,) and to erect a school house thereon; that such school site was procured and school house erected thereon. That plaintiff was a resident freeholder when his goods were seized, and when the said meeting was held and was assessed for procuring the school site and building the school-house $30. The defendants Richards and Smith avowed as school trustees, and King cognized as collector under a warrant from the avowants to levy by way of distress $30. To this the plaintiff pleaded that the meeting above stated to have been held was null and void, because, on the 3rd of July, 1858, and before the said meeting, a special meeting of the freeholders and householders of the said section No. 1, was called and held according to law for the purpose of choosing a school site for the said school section, at which last-mentioned meeting a majority of the school trustees differed from a majority of the freeholders and householders with regard to choosing the site, and in consequence the said freeholders and householders appointed James Cavan an arbitrator on their behalf, and the trustees appointed Wm. A. Gilbert an arbitrator on their behalf, and the local superintendent apointed Absalom Greely an arbitrator on his behalf, to decide the question in difference, and they finally decided that the site for the school-house should be on, &c., (describing the place,) which decision remains in force and is final and conclusive. That defendants Smith and Richards in contravention of the said decision wrongfully purchased the site stated in the avowry and wrongfully distrained, &c.

The defendants demurred to the plea—1st, because the reference and award would not render the subsequent meeting stated in the avowry illegal, or the proceedings at such meeting void. 2nd, because it is not shewn what interval took place between the two meetings, or that the arbitrators acted within a reasonable time. 3rd, because it is not shewn when the award was made. 4th, because the description of the premises in the award is so uncertain and vague that the award is null and void. They replied also *nul tiel agard*, which replication was demurred to because the question having been duly referred to arbitration according to law, there could not legally be any such proceedings as those relied upon in the avowry and cognizance. Exceptions were also taken to the avowry and cognizance. 1st, that it was not shewn that Smith and Richards were trustees of the school section and had authority to issue a warrant to distrain, or 2nd, that the school house was erected on the site chosen by the meeting, or where that site was. 3rd. That it alleged only that the collector was authorised by the warrant to levy, &c., from the plaintiff, and not from all liable to pay the tax imposed and in arrear. 4th,

that it did not distinguish the amount required to buy the site, or that required to build the school-house. 5th, that it did not allege plaintiff's property was distrained within the school section. 6th, that it did not shew the rate was legally imposed or established prior to issuing the warrant. 7th, that it did not shew that King, the cognizor, was collector of the rate for section No. 1.

Richards, Q. C., supported the demurrer to the plea to the avowry. He argued that the disagreement stated in the plea is about the choosing a school site—not about the choice. He cited 16 Vic., ch. 185, section 6; *Beaver* v. *the Mayor, &c. of Manchester*, 8 E. & B. 44.

C. S. Patterson supported the plea. He contended that the trustees were bound to shew everything to justify taking plaintiff's property; *Haacke* v. *Marr*, U. C. 8 C. P. 441; *Orr* v. *Ranney*, 12 U. C. Q. B. 377.

The issues in fact were tried at the Picton fall assizes, 1860, before *Burns*, J.

It appeared that during the year 1857, there was much discussion and difference of opinion between the inhabitants of the school section as to the site of the school house, and meetings were held and an award was made, though for some reason or other it was not acted upon. The same difference existed among the people in 1858, and the three school trustees were not unanimous. On the 29th of March, 1858, the defendants Smith and Richards, two of the trustees, obtained a conveyance of half an acre, being part of the west part of No. 15, in the township of Hallowell, for a school site. On the 29th of May, 1858, a meeting was held at which the inhabitants named arbitrators, and an award was made, but the inhabitants were not yet satisfied, and then a meeting was called and held on the 3rd of July, 1858, when the two trustees, Smith and Richards, desired to establish the site on the land conveyed by the deed of the 29th of March, 1858, from which a majority of the freeholders and householders then present dissented, and the arbitrators named in the plaintiff's plea to the avowry were appointed to settle the dispute. Pending these discussions the foundation of the school house was actually laid on the land conveyed, and about a quarter of a mile from the exact centre of the school section. The arbitrators personally examined the ground they meant to select and put stakes at a place which they designated for the site, which differed from the land mentioned in the deed. This was done on the 4th of September, 1858, on which day they made the following award:

"Know all men by these presents that we, W. H Gilbert, James Cavan and A. Greely, having been appointed arbitrators to decide on a school site in school section No 1, in the township of Hallowell, in the county of Prince Edward, and having heard the statements of the trustees and also of the opposing parties, and having taken upon ourselves the burden of the said matter, do determine that the school-house site in said section shall be a part *of the gore lying between sixteen and seventeen*, now in the tenure of John Landon, situated on the south west of the road, and on the westerly limit of the said *gore*. In testimony," &c.

The words, "the gore lying between sixteen and seventeen, were not in the award as signed by the arbitrators on the 4th of September, but there was a blank space left which remained until May, 1859, and the word "gore" at the end was originally "lot," and so remained until the blank was filled up. It seemed generally known what piece of ground the arbitrators had looked at, and had determined to designate in the award, but still the inhabitants were dissatisfied. Many would have agreed, if the school-house could have been built by subscription, but that fell through. Another meeting was held on the 8th of October, though not regularly called, and then it was resolved to go on and build on the land mentioned, in the deed, if it could be done by subscription. That also failed.

On the 22nd of October, 1858, the two trustees (defendants) regularly called a meeting for the 30th October, for the purpose, as the notice expressed, of settling finally on a site whereon to build a school-house. The meeting was held, not more than half the electors of the section attending. The resolution adopted by the majority of the meeting agreed with the opinion of the majority of the trusteess, fixing upon the land mentioned in the deed, as the school-house site.

After this meeting the trustees contracted for the erection of the school-house, and it was built. The defendants Smith and Richards were trustees for 1859, and a different person from the former dissenting trustee was elected as a third, on the 25th of April, 1859. The defendants Smith and Richards met for the purpose of assessing the section for the cost of the school-house. The third trustee was then out of the province, and did not return until the fall of the year. Smith and Richards verbally resolved what the assessment should be, and the clerk inserted in the roll at once the proper amounts, and the roll with a warrant signed by Smith and Richards, and under the corporate seal, dated the 25th of April, 1859, was delivered to the defendant King, to collect the amounts from the several persons named in the roll, among whom was the plaintiff assessed for $80. The clerk stated that he copied into the minute book of the trustees a resolution to correspond with what had been determined by Smith and Richards on the 25th of April. Under this warrant defendant King seized plaintiff's horse and mare. Then reference was made to the award of the 4th of September, 1858; it was still in blank. Two of the arbitrators met, and one with the consent of the other filled in the words, "gore lying between sixteen and seventeen," but it could not be ascertained who altered the word "lot" into "gore," or when it was done. The arbitrators stated that the reason why the blank was left in the award, was that they did not know the precise description of Landon's land, but it was understood among them, that when that was ascertained the blank should be filled up.

It was proved that the gore between lots Nos. 16 and 17 contained 200 acres, and the road divided it into nearly equal parts, and the westerly limit of the gore south-west of the road, would be a point down on the water's edge of the bay of Quinté, a distance of between 60 and 80 rods from the road.

Upon these facts the following questions were raised:

On the part of the defendants, 1st. That Smith and Richards were not liable to this action in their individual capacities, for the warrant they gave was under the seal of the trustee corporation, and the corporation thereof was alone liable.

2nd. The award pleaded was not proved, and was bad on the face of it, for it was incomplete when signed by the arbitrators on the 4th of September, 1858, and was no award then, and did not become an award afterwards, for two of the arbitrators had no authority in the absence of the third to complete it by filling up the blank, and, that if the award was otherwise good, the altering it by substituting the word "gore" for "lot," would avoid it. 3rd. That if the award could be filled up after it was signed, the description of the site was partial and imperfect, and left it uncertain what part of the gore, and how much of it was intended for the school site.

For the plaintiff, it was objected, that the defendants had not made a good rate to support the warrant; that a rate could not be verbally imposed or levied, as was proved to have been attempted here.

The learned judge directed a verdict to be entered for the plaintiff, with leave to the defendants to move to enter the verdict for them, in order to settle the questions raised.

In Michaelmas Term, *S. Richards*, Q. C., obtained a rule *nisi* to enter a nonsuit, or a verdict for the defendants Smith and Richards, pursuant to leave reserved; or for a new trial on the ground that the verdict was against law and evidence, and for misdirection.

In Hilary Term *C. S. Patterson* shewed cause.

Judgment on demurrer delivered by.

Draper, C. J.—By Consolidated Stat. U. C., ch. 64, sec. 30, it is enacted that no steps shall be taken by the trustees of any school section for procuring a school site on which to erect a new school house, or for changing the site of an established school-house without calling a special meeting of the freeholders and householders of their section to consider the matter, and in case of a difference as to the site of a school-house between the majority of the trustees and the majority of the freeholders and householders at such meeting, each party shall choose an arbitrator, and the local superintendent, or in case of his inability to attend, any person appointed by him to act on his behalf shall be a third arbitrator, and such three arbitrators, or a majority of them, shall finally decide the matter.

Upon the general question I need do little more than refer to the

judgment of this court in *Williams* v. *The Trustees of School Section No. 8, of Plympton*, (7 U. C. C. P. 559). If I understand these pleadings, they allege that the school trustees of section No. 1, of the township of Hallowell, or two out of the three trustees, differed from a majority of the freeholders and householders of that section assembled at a special meeting duly convened for the particular purpose as to the site of a school house, which it was proposed to procure, and thereupon the question was referred to arbitration pursuant to the statute, and the arbitrators decided the matter; notwithstanding which the trustees, or two of them, between three and four months after such meeting and reference, and during the same year, called another meeting, ignoring all the previous proceedings, and made a different determination of the very question referred to arbitration, levied a rate in pursuance thereof, and have distrained the plaintiff's property to satisfy the portion of the rate imposed on him. On this state of facts I consider the second meeting and every thing done under colour of its authority to be in flagrant violation of the plain letter and equally plain spirit of the act. The plea demurred to expressly asserts that the purchase of the school site and the erection of the school house was in contravention of the award. A reference under the statute is previously stated, and that an award alleged to be still in full force had been made. Unless, therefore, the submission had been revoked, I do not understand how the avowry can be good. A different question would have been raised if the defendants had replied that after the reference and before the making of the award a majority of the freeholders and householders had revoked the submission; whether that would have sustained the avowry I am not called upon to decide, though I think the difference between an ordinary reference by two individuals of matters in dispute relative to their own affairs, and a reference, which is the creature of the statute, of a *quasi* public question, and which is authorised for the settlement of a question of a *quasi* public character, is sufficiently obvious. The power and the will to refer are inherent in the individuals, but in this case the power is conferred by the statute, and the reference, *i.e.*, the exercise of the power is commanded, if the difference between the trustees and the majority of the householders and freeholders arises.

This opinion disposes of the first objection to the plaintiff's plea. The second is, that it is not shewn what interval of time elapsed between the meeting stated in the plea, and the meeting stated in the avowry, nor that the award was made within a reasonable time. But it cannot be necessary for the plaintiff's case to shew what was the interval between the two meetings. He says that the proceedings on which the avowants rely are alleged to have taken place at a special school meeting of this school section, but he also says those proceedings are void, for the question as to the site of the school house had been finally decided or referred to arbitrators for final decision at a meeting held before this meeting, which defendants set up as conferring authority for their acts, and having been thus disposed of at the first meeting all proceedings with regard to it at the second were inoperative. The avowants by their demurrer admit the reference, and the decision of this question as pleaded. If they mean to rely on *ex post facto* matter to avoid this decision, or on any want of finality in those proceedings, they should have replied it. I think the third objection equally untenable. If there ever was an award finally deciding the question, the defendants must, if they can, avoid it by new matter. The plaintiff shews a complete *primâ facie* answer to their avowry. The fourth objection was not sustained in argument, nor do I see that it amounts to any thing when the plea is examined. The objection as to time, is I think, of no weight. Both parties assert their respective meetings to have taken place in the same year, *i.e.*, 1858, and so the court must, upon these pleadings, assume, and the plaintiff asserts that the meeting referred to by him was prior to that set up by them. If the avowants meant to deny this, the allegation of a different time should have come from them. And as to the objection that the plaintiff's plea states the difference to have been about the choosing the site, and not about the choice, I am not prepared to construe the word "choosing a site" to mean whether they should choose or no. It might certainly have been more accurately expressed, but the difference was not about *procuring* the site. The language fairly excludes that. They could not well have differed about the choosing until they had resolved to procure, and then to choose is to exercise the power of choice, and so this verbal criticism is answered.

The defendants have also replied to this plea that there is on such award, and the plaintiff has demurred. This replication admits the previous parts of the plea, viz., that there was a meeting duly convened, and held on the 3rd of July, 1858, to dispose of the question of purchasing a new school site, at which meeting the question was referred to arbitrators. Now unless the fact that up to the 30th October, 1858, no award had been made revokes the reference and prevents the referees from deciding the question, this replication does not answer the plea. The statute limits no time within which the award shall be made, and does not apparently contemplate a revocation of the reference. There is nothing to shew that the arbitrators have not taken on themselves the burden of deciding the question, though they had not at the time this action was brought made an award. If the reference continued in force when the second meeting was held the plea is not answered, though an award was not then made.

As I consider the plea good, it is not necessary to consider the objections to the avowry. So far as the plaintiff or collector is concerned, excepting the traverse of the avowry and cognizance by the general replication *de injuria*, his defence is passed over without notice. The plaintiff has to get rid of whatever difficulty, if any, may arise from this.

Per cur.—Judgment for plaintiff on the demurrer, with leave to defendants to apply within one month to a judge in Chambers to amend.

(*Judgment on the rule Nisi.*)

DRAPER, C. J.—Whatever opinion I might have formed as to the liability of the trustees, under the circumstances. to have a verdict found against them on the plea of *non cepernnt*, I think when, in order to commence at *nisi prius*, they admitted a *primâ facie* right in the plaintiff to recover, they must be taken to have admitted they took the goods, and meant to rely on the avowry, and agree therefore that this plea is for the purposes of this application out of question. As to the permitting pleas so inconsistent as *non cepit*, and an avowry, which not only admits, but asserts the taking, and claims for the defendants a return of the goods taken and replevied by the plaintiff, with (possibly) damages, and costs at all events, I need not now say any thing more than that I think it open to grave doubt.

I entertained some doubt whether the defendants should not have given further evidence to establish the plaintiff's legal liability to pay the sum at which he was rated; and I am not even now quite clear whether, when the trustees are avowing, they should not shew a title, and that it is not enough merely to shew a compliance with the School Act, Consol. Stat. U. C., ch. 64, sec. 27, which by sub-sec. 11, makes it the duty of the trustees "to make out a list of the names of all persons rated by them for the school purposes of such section, and the amount payable by each, and to annex to such list a warrant directed to the collector of the school section for the collection of the several sums;" or whether they should not have proved the plaintiff's liability by reason of the valuation of his taxable property, under the 12th sub-section of the same section. My brothers, I believe, entertain no doubt on this point, and the opinion of the court is in favour of the sufficiency of the evidence to that extent. It is true that in the avowry it is stated that the plaintiff was at the times when, &c., duly assessed on the assessor's or collector's roll for the township of Hallowell, and that according to the valuation of his taxable property as assessed on that roll, he was legally liable to pay for procuring the school site and erecting the school house the sum of $80, but this is traversed by the general answer, *de injuriâ*.

We have already determined the second plea to the avowry to be good, in accordance with the previous judgment of this court in *Williams* v. *the School Trustees of Plympton*, (7 U. C. C. P. 559,) but the award pleaded by the plaintiff is put in issue by the defendants' replication.

On this particular question the defendants are entitled to a verdict; the award was not duly made and executed. No answer is, however, given to the residue of the plea. The previous meeting of the 3rd of July, 1858, the difference of opinion be-

tween a majority of the school trustees, and of the inhabitants, and the reference of that difference to arbitration, according to the statute, are not denied. But it seems on the 22nd of October, 1858, the same trustees called another meeting, at which they succeeded in obtaining the consent of a majority of the inhabitant freeholders and householders in favour of their own views, upon which they had in fact previously acted, by laying the foundation stone of the school house on a spot not then approved by the inhabitants, and not then or since sanctioned by an award under the reference.

I adhere to the opinion expressed in *Williams* v. *the School Trustees of Plympton*, though it is to be observed in that case an award had been given to which no legal exception had been taken. Here the meeting in October, 1858, was called in reality to revoke the submission to arbitration legally made in the month of July preceding. Conceding that no award had *then* been made, the power of the arbitrators to make one was in existence, and I cannot think it right so to construe the statute as to enable trustees who have a point to carry, to call successive school meetings, to defeat a previous reference which they may learn is likely to decide against them, or by the casual non-attendance of those opposing their view; or even by trick, as seemed to be the case in *Williams* v. *the School Trustees of Plympton*; or by wearying out their opponents by repeated meetings, finally to obtain an apparent majority, when of course they will take care to have no subsequent meeting to review the vote. For these opinions I am alone responsible.

The proper conclusion in this case in the judgment of the court is, that the rule to enter a verdict for the defendants, Smith and Richards, should be made absolute, but that the plaintiff should have leave to take out a rule *nisi* for judgment *non obstante veredicto*. This course appears warranted by what was done in *Merry* v. *Chapman*, (10 A. & E. 824.)

Per cur.—Rule accordingly.

Dollery v. Whaley et al.

Division court—Trespass—Notice of action—Venue—Writ of prohibition—Con. Stats. of Can., ch. 19, secs. 192, 193.

Held, that a plaintiff in a division court suit who, on an attachment against the goods of A., indemnified the bailiff for seizing and subsequently on an execution in the same suit, for selling the goods of B., was not entitled to claim the protection of the statute (Con. Stat. Can., ch. 19, secs, 192, and 193) in an action of trespass, either as to venue or notice of action, and that he was not entitled to a writ of prohibition.

(H. T, 25 Vic.)

Read, Q. C., obtained a rule *nisi* for a writ of prohibition to prohibit the county court from further proceedings in this cause.

It appeared that this was an action of trespass brought by the plaintiff against the clerk and bailiff of a division court in the county of Perth, and an execution creditor, in a suit in the same division court, against one Isaac Dollery, which suit was commenced by the issuing an attachment out of the division court, and the thrashing machine, the subject of this county court suit, was seized under that attachment in the county of Perth, and placed in the hands of the clerk of the division court, and afterwards sold on an execution out of the same court.

The record of the proceedings in the county court shewed that the declaration contained two counts, one in trespass, and the other in trover, for this thrashing machine. The defendant, Whaley, (the clerk,) pleaded, 1st, not guilty by statute, referring to Consol. Stat., U. C., ch. 19, secs. 193-4-5, and ch. 126, secs. 10, 11, & 20; and 2nd, that the thrashing machine was not plaintiff's property. The defendant, Moss, (the bailiff,) pleaded two similar pleas. The defendant Somerville, (the plaintiff in the division court suit,) pleaded not guilty, and not possessed.

By an affidavit it appeared that upon the seizure of this property by the bailiff, he was notified of the plaintiff's claim, and that Somerville indemnified him. That at the trial of this cause in the county court, there was a verdict for the plaintiff against Somerville, and a nonsuit as to the clerk and bailiff. The nonsuit was taken in consequence of the judge ruling that as to the clerk and bailiff the action was local under the statutes. Leave was reserved to the defendant Somerville to move to enter a nonsuit as to him, on the ground that he was entitled to notice of action, and that the venue as to him was local. The application was made but in order to obtain the opinion of this court the parties agreed that this motion should be made on behalf of the defendant Somerville to prevent any further proceedings being taken in the county court against him.

Durand, shewing cause, citing *Staight* v. *Gee*, 2 Stark, N. P. C., 445; *Hopkins* v. *Crowe*, 4 A. & E. 774.

Read, Q. C., referred to *Brown* v. *Shea*, 5 U. C., Q. B., 141; *Shatwell* v. *Hall*, 10 M. & W., 522; *Mellor* v. *Leather*, 1 E. & B., 619.

Draper, C. J.—It does not appear to us that the plaintiff in a division court suit, who on an attachment against the goods of A., indemnifies the bailiff for seizing, and afterwards on execution in the same suit, for selling the goods of B., can claim in an action of trespass the protection of the statute, (Consol. Stat. U. C., ch. 19, secs. 192 and 193) either as to venue or notice of action; and that as to the action proceeding against him, there should be no prohibition. The plaintiff, for all we see in the present state of the record, is entitled to recover.

Per cur.—Rule refused.

Smith v. Spencer.

Railway—Mismomer—Stock-book—Shareholder—Scrip—Evidence—Nonsuit—Fi. fa.—Director—Sheriff becoming one after issue of fi. fa., but before its return—Amendment—Statutes 16 Vic., 241—18 Vic., 36.

Held that the subscription to a stock-book of a railway company was sufficient evidence of the party subscribing being a shareholder under the definition of that term in the Railway Clauses Consolidation Act, and that it was not necessary that scrip should be issued for the stock to constitute such subscriber a shareholder.

2. That the Port Hope, Lindsay, and Beaverton Railway Company is an established corporation, it being recognised as such by the statutes 16 Vic., ch. 241, and 18 Vic., ch. 36.

3. A party having signed his name in a stock-book of a railway company, the number of shares subscribed for being filled in by another person, who, being called as a witness, swore that he did it with the sanction of the subscriber, and the jury upon the evidence having found the subscription sufficient, *held*, that it was a point for their decision, (the jury's,) and could not be made a ground of nonsuit afterwards.

4. That a writ of *fi. fa.* against a railway company, which was directed to a sheriff, before he became a director in the company, was properly directed and returnable by him, and his becoming a director before the return of the writ did not invalidate it.

5. That the naming of a railway, "railroad," at the heading of the page of a stock-book did not vitiate the subscription.

6. A stock-book for a railway company having been opened and signed and a new one substituted therefor, with a provision that any subscriber to the old one might withdraw by giving notice to the president of the company, *held*, that a subscriber who omitted to avail himself of the provision by giving such notice, was not relieved of his responsibility upon the original subscription.

The defendant having moved in arrest of judgment on the ground that the declaration claimed the amount of the judgment against a railway company, instead of the amount of stock subscribed by the defendant, the court in the exercise of its discretion allowed the plaintiff to amend.

The declaration stated that on the 28th of May, 1861, the plaintiff recovered judgment against the Port Hope, Lindsay, and Beaverton Railway Company, for £3768 9s. 3d. damages, and £25 16s. 7d. costs, and thereupon sued out a *fi. fa*, to the sheriff of Northumberland and Durham, commanding him &c., to which the said sheriff returned *nulla bona*. Averment, that the judgment is still unsatisfied: that before the judgment, an act was passed to incorporate the Peterboro' and Port Hope Railway Company, in which company defendant became a shareholder of fifteen shares, of £10 each. Several statutes were stated by which the name of the Peterboro' and Port Hope Railway Company was changed, and it was styled the Port Hope, Lindsay, and Beaverton Railway Company. Averment, that defendant has not paid up his stock, or any part thereof, or the interest payable thereon, although defendant is still a shareholder, and that the whole amount of the stock and interest thereon is due, whereby an action hath accrued to plaintiff to demand and have from defendant the amount due on the said execution, and plaintiff claimed £4500.

Pleas.—1st. Never indebted. 2nd. That defendant did not become nor is he a shareholder in the said company as alleged.

The trial took place at the winter assizes, at Toronto, in January, 1862. An exemplification of the judgment against the company was put in, on which were issued two writs of *fi. fa.* one directed to the sheriff of Northumberland and Durham, issued the 28th of May, 1861, the other to the sheriff of Victoria, issued the 16th of August, 1861. The first writ was received by the sheriff on the

28th of May, 1861, and was returned on the 16th of August following, *nulla bona*. The second was received on the 17th of August, 1861, was returned on the 19th of the same month, *nulla bona*. This action was commenced on the 31st August, 1861. The sheriff of Northumberland and Durham became a director of this company in June, 1861. Evidence was given that in 1859 all the chattel property of the company had been sold upon writs of *fi. fa.*

William Millard was examined, and swore that in 1847 and 1848 he was secretary of the company. He proved the stock-book in which the defendant's name was entered as a subscriber for fifteen shares; this witness stated that the word "fifteen" was in his own hand writing, but that he would not have put it there but by defendant's authority. The signature of the defendant following the word "fifteen," in the same line of the book, was sworn to distinctly. The defendant never made any payment on his stock, and Millard swore that scrip was only issued to parties who paid calls.

A nonsuit was moved for on the following grounds:

1st. That the stock-book was only one side of the contract, and that it should be proved that scrip was granted or payement made, or something done on defendant's part.

2nd. That it was not shewn the company had complied with the terms of their first charter, so as to bring them into legal existence.

3rd. The filling up of the word "fifteen" should be positively shown to be defendant's act.

4th. The sheriff was a director at the date of the return of the *fi. fa.*, and therefore there was no proper return to it.

5th. The heading of the page of the stock-book whereon defendant's signature appeared, was for stock in the Peterboro' and Port Hope "Railroad Company," the incorporation was of the "Railway Company."

6th. A subscriber under the first act should be shewn to have adopted the undertaking after the other acts, in order to render him liable.

The learned judge over-ruled all the objections, reserving leave to the defendant to move for a nonsuit upon them.

The defendant then went into evidence to show that a new stock-book was opened after the later acts, amending the act of incorporation, were passed. That the directors and officers of the company treated as shareholders only those whose names appeared in the new book, giving them notices to attend general meetings, elections of directors, &c. That defendant's name did not appear in the new book, or in any list of shareholders entitled to vote, and no notices were addressed to him. It did not however appear that defendant had given any notice of withdrawal or abandonment of his subscription for stock as others were proved to have done. The plaintiff had been president of the company, he loaned certain municipal bonds to the company for three months, and the directors pledged to him £4000 in harbour bonds, which it was expected would be saleable, and then plaintiff would have been paid. Plaintiff still holds the harbour bonds and has recovered this judgment for the debt thus arising. In reply the defendant was examined. He admitted his signature to the stock-book, stating that he had no recollection of authorising Millard or any one to put down the word "fifteen." He said he was not aware of any provision of law by which he could have been released from his original subscription until the day of the trial, and therefore he had given no notice availing himself of it; that he received no notices, attended no meetings, never paid any thing, and was never asked to pay, and never supposed he was a shareholder until sued in this cause.

The learned judge left it to the jury to say whether defendant authorised Millard or any one to write the word "fifteen" opposite his name. If so he directed a verdict for the plaintiff, as all other questions that arose were matters for the court.

The defendant's counsel objected, that it should be left *at large* to the jury to find whether defendant was a shareholder or not.

The jury found for the plaintiff.

In Hilary Term *Spencer* obtained a rule *nisi* to enter a nonsuit on the leave reserved, on the following grounds:

1st. That defendant was not shewn to be a stock-holder, the books only containing an agreement to take stock.

2nd. That the company was not shewn to be legally established.

3rd. The alteration in the stock-book was not sufficiently or satisfactorily explained.

4th. That the sheriff, by whom the writ of *fi. fa.* against the company was returned, was a director at the time of the return, that the return was insufficient, the writ should have been addressed to the coroner.

5th. The defendant did not subscribe to the company in question, but to a Railroad Company, and the company was not properly named in the stock-book.

6th. That as a subscriber under the old act he was not liable under the new act without some act done by him. Or for a new trial for misdirection, in not ruiling that the fact of defendant being a stockholder should be strictly proved, and that this question should have been left at large to the jury on the evidence, and not restricted to this, that if he signed the stock-book, and authorised the insertion of the number of shares put opposite his name, he should be deemed a stockholder. Or to arrest the judgment because, at the conclusion of the declaration, the plaintiff asserts a right to recover against the defendant the amount of his execution against the company, and not the amount of stock subscribed for by the defendant.

In Easter Term, *R. A. Harrison* shewed cause, citing Birmingham, &c., *Ry. Co.* v. *Locke*, 1 Q. B. 256; *Moore* v. *Murphy*, 11 U. C. C. P. 447; *Doe* v. *Catomore*, 16 Q. B. 745; *Moore* v. *Kirkland*, 5 U. C. C. P. 457; *Henderson* v. *Royal British Bank*, 7 E. & B. 356; *Daniell* v. *Royal British Bank*, 1 H. & N. 681; *Powis* v. *Harding*, 1 C. B. N. S. 533; *Toronto & Lake Huron Ry. Co.* v. *Crookshank*, 4 Q. B. U. C. 309, 316; *Wilkinson* v. *Sharland*, 11 Exch. 83; *Parsons* v. *Alexander*, 5 E. & B. 263; *Jordan* v. *Marr*, 4 U. C. Q. B. 53; *Thomas* v. *Hilmer*, 4 U. C. Q. B. 527; *Duppa* v. *Mayo*, 1 Saund. 285, n 5.

C. S Patterson and *Spencer*, *contra*, cited *Columbine* v. *Chichester*, 2 Phil. 27; *Duke* v. *Andrews* 2 Exch 290; *Wontner* v. *Sharp*, 4 C. B. 404; *Oriental Inland Steam Co.* v. *Briggs*, 8 Jur. N. S. 201; *New Brunswick Ry. Co.* v. *Muggeridge*, 4 H. & N. 160, and in Error 580; *Ness* v. *Angas*, 8 Exch. 805; *Ness* v. *Armstrong*, 4 Exch. 21.

DRAPER, C. J.—The rule asks to enter a nonsuit on leave reserved, for a new trial, and to arrest the judgment.

As to the first objection, I think there was sufficient evidence to shew that defendant was a shareholder, according to the definition of that term contained in the Railway Clauses Consolidation Act, which is incorporated with one of the acts constituting the charter of this company. The very first act under which the defendant became a subscriber incorporates certain named persons and all such others as shall become stockholders. Nothing more than subscribing stock seems to have been requisite, as the calls could only be made by the directors, and they had to be elected by the stockholders. The first call was limited to five per cent. on each share which they or any of them might respectively *subscribe* for. The directors were required to hold 25 shares as a qualification, and there seems to have been no other mode of obtaining such qualification but by subscribing. The numerous cases cited as to the necessity of a contract binding on both sides in order to constitute a party a shareholder are easily distinguishable. In many the company was only projected, not incorporated, in some the charter or act of incorporation expressly required certain acts or formalities, but in none that I have seen are the circumstances like, or even analogous to this case.

The second objection is, I think, clearly untenable. The 16 Vic., ch. 241, and the 18 Vic., ch. 36, recognise the company as an existing corporation.

As to the third objection, that which was called an alteration in the insertion of the word "fifteen," opposite to the defendant's name, designating the number of shares for which he subscribed, there was evidence of his authority to insert this word—it was left to the jury, and they have found it an act directly sanctioned by defendant. After this, it affords no ground for a nonsuit.

The fourth objection also fails in my opinion, when the *fi. fa.* was issued and delivered to the sheriff, it did not appear that he was connected with this company. If he was not, the writ was properly directed to him and could not have been directed to the coroner. Having received the writ the sheriff was bound to return it. It is not pretended the return was untrue, and I do not per-

ceive why, because a sheriff may be a member of a corporation, he cannot perform ministerial acts, for or against it, in his official character. Mr. Patterson fairly said he could cite no authority to sustain the objection.

The fifth objection loses all its weight when the stock-book is examined. The heading on the first page is correct, and so is the heading on some other pages. On that on which defendant subscribed for shares, the word "Railroad" is used instead of "Railway," and the same variance exists in the heading of several other pages. There are many authorities which shew that a greater variance than this in the name of a corporation is insufficient to defeat a grant to them, or to avoid acts done by or to them.

The statute 16 Vic., ch. 241, sec. 4, contains an answer to the sixth objection. By providing that no subscriber to the stock-book under the original act shall be held to be a stockholder, or be responsible as such under the act passed in the same year amending the same, *if* within a limited time he signified in writing to the president of the company *his intention to withdraw therefrom*. The inference is obvious that if he does not signify such intention he remains a stockholder.

I conclude therefore that none of the objections taken are sufficient to entitle the defendant to a judgment of nonsuit.

Then as to the new trial, I do not perhaps understand what is meant by leaving a question "at large" to a jury. I should think the absence of a specific direction much more likely to furnish a ground for complaint against a charge, than the pointing out specifically what fact or facts, if found, would legally entitle one or other party to succeed. In the present case the only question was, whether defendant was a subscriber. He admitted his handwriting on oath, and the sole doubt was if the word "fifteen" was written by his direction and authority. If it was, then whether that signature and subscription constituted him a shareholder was a question of law, and certainly not one to be left "at large" to a jury. I think the learned judge exercised a sound discretion in the mode in which he left the matter to the jury, and that the application for a new trial must fail also.

As to the arrest of judgment, it is met by an application to amend. Without referring to other authorities I think the case of *Parsons* v. *Alexander*, (See *Webb* v. *Ross*, 5 Jur. N. S. 126,) justifies the amendment, while the note to 1 Saund. 285, points out its necessity. It does not affect the merits of the dispute between the parties, nor alter the application of either the law or the facts of the case. We can see, from what is before us, that if the amendment had been applied for and granted either before or at the trial, it would not have varied the defence, or altered the evidence which the plaintiff was under the necessity of giving in order to entitle him to recover. I think, therefore, the application to amend should be granted upon the payment of twenty-five shillings costs. It certainly cannot be considered to affect the costs of the trial, nor yet the costs of the proceedings, since the trial was upon points wholly unconnected with the objection in arrest of judgment, and as the master might find an apportionment almost impossible, we think it better ourselves to fix the sum.

Per cur.—Rule discharged.

THE TRUSTEES OF SCHOOL SECTION NO. 3, OF THE TOWNSHIP OF CALEDON, V. THE CORPORATION OF THE TOWNSHIP OF CALEDON.

School Trustees—Money collected for.

Held, that a demand or order from a majority of the school trustees of a school section is necessary to sustain an action for money collected under a by-law passed under the authority of sec. 34 of Consol. Stat. U. C. ch. 64.

Declaration for money payable by the defendats to the plaintiffs; for money received by the defendants for the use of the plaintiffs.

The defendants pleaded that the plaintiffs heretofore made application to the township council of the township of Caledon for the leviyng and collecting by rate according to the valuation of taxable property as expressed on the assessment roll of the said township for the year 1861, certain moneys required by the plaintiffs for the erection of a school house in school section number three, in the said township, the said moneys to be collected according to law from the freeholders and householders of such section; that thereupon the council of the said township, as the plaintiffs well knew, passed a by-law which provided, among other things, that there be raised, levied, and collected on all the ratable property in said school section number three of the township of Caledon the said moneys, that the same when collected should be paid to the treasurer of the said township, and that the said treasurer should pay the said moneys to the order of a majority of the trustees of said school section number three in said township, and the defendants aver that before action the said moneys, which are the identical moneys in the declaration mentioned, were in the hands of the said township treasurer, who was at all times and still is ready and willing to pay to the order of the trustees of said school section, or a majority of them, as the plaintiffs well knew, yet that no such order or demand of any kind was ever made upon the said treasurer for payment thereof.

To which the plaintiffs demurred on the ground that the plea confessed the plaintiff's cause of action without showing any good or sufficient matter of avoidance, and that the want of a demand or order by the plaintiffs is no answer in law.

Eccles, Q. C., supported the demurrer.

Harrison, contra, referred to Municipal Act, ch. 54, Con. Stat. U.C., secs. 1-4-6; *Smith* v. *The Corporation of Collingwood*, 19 U. C. Q. B. 259; *Munson* v. *The Municipality of Collingwood*, 9 U. C. C. P. 497; *Topham* v. *Braddick*, 1 Taunt. 572.

MORRISON, J.—This case comes before us on demurrer, and the only question to be determined is whether a demand was necessary before bringing the action. This is not like an ordinary case of debtor and creditor to which we can apply the principle of the general rule, that it is the legal duty of the one to find out and pay the other; nor is it a case of misapplication, or wrongful withholding by the defendants of the moneys in question.

The money sought to be recovered in this action was collected in the exercise of a duty imposed upon the defendants by the legislature, and in obedience to an application of the plaintiffs, made under the authority of the 34th clause of the Common School Act, Con. Stat. U. C., ch. 64. The statute is silent as to the mode of levying the assessment, and to whom and when and in what manner the moneys are to be paid over. Under the 187th section of the Municipal Act, Con. Stat. U. C. ch. 54, the defendants are required, when not otherwise authorised or provided, to exercise their powers by by-law. The defendants passed a by-law for the levying of the assessment, and they provided by it that the moneys when collected should be paid to the treasurer of the township, and that the treasurer should pay them to the order of a majority of the trustees, the plaintiffs in this suit, and it is averred that the plaintiffs had notice of the by-law, and that the moneys were in the hands of the treasurer, and that the treasurer was ever ready and willing to pay the moneys to the order of the trustees, the plaintiffs, or a majority of them, but that no order or demand was ever made on the treasurer for payment thereof. The 160th clause of the Municipal Act defines the duty of the treasurer to be, to pay all moneys to such persons and in such manner as the lawful by-laws or resolutions of the council direct. It is contended that the defendants had no authority to make any such provision as this by-law contains; but in the absence of any legislative enactment directing in what manner these moneys when collected, are to be paid to the plaintiffs, and considering that the defendants are a municipal corporation, and that the school trustees individually, as well as their officer are likely to be changed, I take it that the township council, upon the levying the assessment is cast, have an implied right, and were exercising a wise discretion in providing by their by-law for the securing of the due payment of the moneys into the hands of the proper persons as well as for a discharge to themselves and their officer. I cannot say that the mode adopted is unwarranted, nor do I think it is unreasonable. The giving of an order signed by any two of the trustees cannot be said to entail trouble on them, or to impede them or to interfere in the exercise of their duties, nor is it inconsistent with any thing in the statute.

It appears to me that the by-law was rather framed in the interest of, and for the protection of, the rights of the plaintiffs, and the reasonable presumption is that they acquiesced in it. Upon this view of the case I am of opinion that before the defendants could be rendered liable as for money had and received, that the presentation of an order or demand upon the treasurer of the defendants was necessary.

I cannot agree with Mr. Eccles, the plaintiffs counsel, that the only demand necessary was the issuing of a writ, or what in the old books is termed a demand in law, which probably originated from the writ being formerly held not to be the commencement of the action, and when it was also held that the cause of the action might accrue after the issuing of the writ and before the filing of the declaration.

I have looked into many of the reported cases of moneys had and received, but I have found none except cases against sheriffs in which the question of a demand arose. The particular circumstances of each case avoiding or implying a formal demand, but in several cases I could see from the statements reported that a demand was made before commencing proceedings. I confess that after a good deal of investigation, I have failed to discover satisfactory authority to guide me one way or the other, and I can only account for the absence of decisions, that when money was in the hands of a gratuitous holder, as in this case, it would seldom happen that so vexatious a proceeding would be had as the beginning of an action without a request or demand of payment, or to use the expression of a learned judge, "without trying to obtain the object in the way in which men acting with each other ought first to ask their rights."

The nearest class of cases is that against sheriffs for the non-payment of moneys levied under writs of execution, and after a return of money made. In such cases it has been held that this form of action will lie without any previous demand, but I think there is a wide distinction. The sheriff receives the money in the performance of a duty for which he is paid, and the very exigency of the writ requires the sheriff as said by *Bayley*, J., in Morland v. Pellatt, 8 B. & C. 772, to bring the money into court on the return day, to be paid to the execution creditor; and although *Littledale*, J., in the same case says, "I am disposed to go still further and to say that the sheriff was liable to an action for money had and received at the suit of the creditor, as soon as it was paid and before the return of the writ;" yet I do not understand that learned judge's observation to mean, without a previous demand, for during the argument when Dale v. Birch, 3 Camp. 764, was cited as a general authority that the action lay upon the receipt of the money, he remarked in reference to that case—"that was after a return was made," and *Parke*, J., in the same case, doubted whether an action would lie before the return day of the writ, and Mr. Chitty, in his first vol. of Pleading, 365, in referring to *Littledale's* dictum in the case of Morland v. Pellatt, as to a recovery before a return of the writ, adds, but the action should not be brought until after a demand of the money has been made; so I am inclined to think that those decisions rested upon the return of the writ, involving the immediate payment of the money, and avoiding the necessity of a demand.

The bearing of the courts against the hardship of bringing an action without a prior demand is shown in the case of Jeffries v. Sheppard 3 B. & Al. 696. There the sheriff had been ruled to return the *fi. fa*, and upon its return was sued for the amount, and he applied to stay the action on payment of the amount of the levy without costs, upon an affidavit that he had been always ready to pay the money, and that the action had been commenced without any demand, and the court, *Abbott*, C. J., presiding, made the rule absolute upon the ground that the action had been commenced without any previous demand. Lord *Mansfield*, in a case in Douglass, 138, says "great benefit arises from a liberal extension of the action for money had and received, because the charge and the defence in this kind of action are both governed by the true equity and conscience of the case," and he then says, "if the present action had been brought without notice of the nature of the demand, I should have thought it could not have been supported." And in another case (Cowper, 807) he says, "an action for money had and received is governed by the most liberal equity, neither party is allowed to entrap the other in form." Considering that this case may arise any day between the same kind of corporations, the question naturally presents itself, at what period and under what circumstances does money levied, as in this case, become money had and received in the hands of the township council? Is it upon the occasion of every pound as it gets into the hands of the collector or the treasurer, or is it when the amount required is collected?

There must be a time, and I cannot satisfactorily determine the time or under what circumstances otherwise than after a demand and a wrongful refusal or neglect. Under the 27th clause, sec. 12, of the Common School Act, the plaintiffs could of their own authority and by their own officer and without the intervention of the defendants have levied these moneys. It would be a very hard case indeed where a duty such as this is cast upon a town-council to levy assessments for the benefit and convenience of school trustees, if without any wrongful act on their part or misapplication of the funds, the trustees could bring an action against the council and mulct the municipality in costs without any previous demand or notice whatever. If the plaintiffs had applied for a mandamus to enforce payment of these school moneys the application would not be entertained without showing a demand.

Per cur.—Judgment for the defendants on the demurrer.

CHANCERY.

(*Reported by* THOMAS HODGINS, ESQ., LL.B., *Barrister-at-Law*).

PROUDFOOT V. LOUNT.

Judgment—Registration—Misnomer—Seal of court.

A judgment was recovered against "*Charles Westley Lount*" which was the correct name of the defendant. The registration was of a judgment against "*Charles Wesley Lount.*" *Held*, sufficient.

The certificate of registration of a judgment given by the clerk of the Queen's Bench, expressed it to be under "my hand and seal," and it being objected that it should have been expressed to be under the seal of the court, leave was given to the judgment creditor to produce an affidavit to shew what seal was really affixed to the certificate.

This was a motion for a decree by the assignees of a judgment recovered against the defendant.

The points involved appear in the judgment.

McBride for the plaintiffs.

Blake, for defendant.

SPRAGGE, V. C.—The question raised is whether there has been an effectual registration of the judgment recovered by the plaintiffs in the name of *Edward Dudley McMahon*, against the defendant.

The defendants alleges that the certificates for registration are defective. It is a registration and a re-registration. It is pointed out as a defect in the original certificate that the style of the court is, "In the Queen's Bench," instead of "In the Court of Queen's Bench." The words in the statute are, "In the court of ——." Another alleged defect is, the omission of the words, "in a plea of," stating the form of action. The words in the statute being "In a plea of ——." But these points had been raised before my brother *Esten*, in another cause; and we have since considered them together, and have come to the conclusion that the certificate is, norwithstanding, sufficient within the statute. There is but one thing to which the words "In the Queen's Bench" can apply, that is, the court of Queen's bench, and it is the ordinary style by which the court is designated in its pleadings and proceedings. It is not indeed the full statutory style of the court, but neither is the style given in the form of certificate given by the statute; the full style being, "Her Majesty's Court of Queen's Bench for Upper Canada," but it is a correct designation and describes the Court of Queen's Bench, and that only, as much as if the words "Court of" were introduced. Those words are probably inserted in the statute only to shew, that it was some court that was to be designated.

I think it must have been through inadvertance that the words "In a plea of ——," find a place in the form of certificate given by the statute, since the passing of the Common Law Procedure Act. The certificate is the act of a ministerial officer of the court; and he can only certify what appears by the records of his office. Before the passing of that act, he saw upon the face of the roll what the form of action was; it was stated in so many words, "In a plea of debt," or "in a plea of trespass on the case upon premises," or otherwise as the case might be; but since the passing of the act this has ceased to be the case; and if he fills up the blank after the words, "in a plea of," he must do it by finding

out in some way, what the form of action would be if expressed, or would have been but for the passing of the act. The attorney entering the judgment, on asking for the certificate, may tell him, but he could not certify for information so obtained; and as a ministerial officer he has no right to certify from conclusions formed in his own mind. In short, that is implied which in the certificates of the registrar of this court is expressed "as by my books appear;" or upon the statutory certificate, "as by the roll of the said judgment appears."

A further objection is taken to the original certificate, that it does not give the correct name of the defendant; the error pointed out is the omission of a letter in the second name; the name in the certificate being *Charles Wesley Lount*, the name in the judgment, *Charles Westley Lount*, and that being the correct name.

The object of the statute being, as Lord *St. Leonards* says of the act of William & Mary, to enable purchasers to discover judgments by the names of the persons against whom they are entered; if the name of a defendant were falsely entered, his lordship continues, as *Compton* for *Crompton*, the judgment will be void against purchasers.

It cannot be contended, I think, that the certificate must be accurate to the very letter. In the case referred to the true name was *Crompton*; if it had been spelt with two *n*'s instead of one, that would not I apprehend, render the judgment void, but as it was, it was calculated to mislead. Suppose an index containing a number of names and the name of *Crompton* the one searched for, the person searching would not commence certainly before "*Cr*," or probably "*Cro*," and would not meet with the name *Compton* at all; or suppose the name *Compton* searched for, the person making the search would naturally leave of after getting to the end of names beginning with "*Com*," so that to hold a purchaser bound by judgments against the one name, as affecting the lands of the other would be manifestly dangerous and unjust.

But the question, it appears to me is, how is a purchaser bound, and why; I apprehend it is because he is affected with notice. If so that which would convey notice to a person of ordinary intelligence would, I think, be sufficient; either that must be the principle, or the slightest deviation in the spelling of any one of the several names which the judgment debtor may have will avoid the registration. There is no such strictness in any other civil proceeding. I may instance cases where parties have been held to bail, and where if the names are *idem sonantia*, the defendant is not discharged, and the courts have been by no means rigid in seeing that the names sound exactly alike. In ——— v. *Rennolls*, (*a*) the affidavit to hold to bail called the defendant Rennolls; in the suit he was called Rennoll; his discharge was moved for, but the court refused it, saying that the mistake of a letter in spelling the name, was not a ground for discharging the defendant. So *Beniditto* and *Benedetto* (*b*) were held *idem sonantia*, on an application to discharge a defendant from arrest.

In the case before me the surname is strictly correct, so is the christian name; the intermediate name is spelt *Wesley*, instead of *Westley*. It would require more than ordinarily distinct pronunciation, and a very critical ear to distinguish any difference; the mistake certainly would not entitle a defendant to be discharged from arrest—ought it to avoid a registration of judgment?—the register's index would direct a person searching to the right surname; but there might be judgments against several of the same surname; the christian and the second name, if any, are points of identity. Suppose the person searching to be making his searches on behalf of a person proposing to purchase from *Charles Westley Lount*, finding a judgment registered against *Charles Wesley Lount*, he would surely be wilfully blind, if he had his eyes, to the probable fact, amounting almost to certainty, that they were one and the same person; there would at least be enough to put him upon enquiry, and the judgment roll would at once prove the identity.

If the principle be that of notice, as I think it must be, I am satisfied it is a good certificate. Suppose the case of a mortgage given by this defendant, and an intending purchaser notified by letter from a proper quarter that *Charles Wesley Lount*, had given such mortgage, it could not be doubted, I think, that he would be affected with notice.

(*a*) 1 Ch. Rep. 659, a. (*b*) 2 Taunt. 401.

The judgment in question appears to have been registered in three offices, Simcoe, York, and the city of Toronto. The error has occurred only in the registration for York; there is no question as to the registration in Simcoe and Toronto, but I think it is good also in the county of York. In this case it is the judgment debtor himself who makes the objection, not an incumbrancer or purchaser. It is objected that it does not lie with him to make it. Certainly the reasons for accuracy in his name do not apply to him; but inasmuch as registration is, or rather was, required to make the judgment a charge, I suppose it is necessary to shew against him that there is a valid registration.

There has, however, been a re-registration, and if that is sufficient it is not material as against the defendant to shew the sufficiency of the former. Against this second registration it is objected (in addition to the objections common to both) that the seal affixed to the certificate is not that of the court, but of the Clerk of the Crown and Pleas; the attestation being, "In witness whereof I have hereunto set my hand and seal this," &c.

The form of certificate given by the statute contains no attestation; that is gratuitous on the part of the officer; and if it misdescribes the seal really affixed, it will not, I think, avoid the certificate. I think an opportunity should be afforded to ascertain the fact, which can be done either by an inspection of the certificate, or by an affidavit as to the identity of the seal. Probably there may be no real question as to the fact. If there is, the register, or a clerk in the Crown office can make affidavit as to its identity.

If it should appear that it is the seal of the court that is affixed to the certificate, the plaintiffs will be entitled to their decree in respect of their judgment as well as their mortgage.

Warren v. Taylor.—Ross v. Taylor.

Mortgage—Judgment creditor—Registration and re-registration of judgment—foreclosure.

A party foreclosing subject to a prior mortgage cannot call the common mortgagor if he has the equity of redemption, to give evidence as to the amount due upon the prior mortgage.

A second mortgagee, as such, cannot impeach a prior-registered mortgage as fraudulent and void against creditors, but a judgment creditor, having accepted a mortgage, does not lose his rights as a judgment creditor.

Where the usual affidavit proving a mortgage debt is made, the onus of reducing the amount lies upon the opposite party.

A judgment creditor omitted to re-register within three years, *held*, that he thereby lost his lien as to persons purchasing or becoming incumbrancers after that time, and before a re-registration was effected.

These actions were consolidated upon the hearing. The facts are set out in the judgment of his Honor Vice-Chancellor *Esten*, upon the appeal from the Master's report.

The cause was originally heard before his Honor Vice-Chancellor *Spragge*; upon the enquiry there directed, the accounts between the parties were taken, and the finding of the Master thereon gave rise to the appeal.

Proudfoot, for the plaintiff, Warren.

Cricknore and *M. Vankoughnet*, for defendant, Baldwin.

McDonald, for Ross, Mitchell & Co.

Spragge, V. C.—I think the most proper order to make at the present stage of the cause is simply to direct an enquiry as to the amount due upon the mortgage to Merrick; the master to enquire whether it was given in whole or in part for moneys then due; or in whole or in part to cover future advances.

I think that the evidence of Taylor is not admissible upon the question of the amount due upon the mortgage; the equity of redemption is in him, and if his evidence could be received to cut down the amount due on Merrick's mortgage, it would diminish *pro tanto* the amount to be ultimately paid by himself, whatever the priority might be as between Warren, the present holder of the mortgage, and Ross, Mitchell, & Fisken, and other incumbrancers. It was suggested that his evidence might be received as between Warren and other incumbrancers, leaving what was due upon the mortgage to Merrick, as between himself and Warren, to rest upon other evidence. He is called upon two points, one to shew that there was no consideration for the mortgage, but that, being in embarrassed circumstances, it was given to hinder and delay creditors, and so is void under the 13th Elizabeth; the other, to

shew that if any amount was due it was a much smaller sum than the amount of the mortgage. The latter would properly be matter of account, but still would have its bearing upon the first point; upon the mere matter of account it is not receivable here, or indeed at all. Taylor's interest upon the first point, it appears to me, is to shew the conveyance not fraudulent, but to reduce the amount due upon it; for this latter purpose his evidence is not receivable. The question is, whether it is for the former, as between himself and the holder of the mortgage, what must be the decree if shewn to be fraudulent, and what if not shewn to be fraudulent? In the latter case he will have a right to redeem upon payment of what may really appear to be due. In the former, he would have no right to redeem at all.

But here the question is between an innocent purchaser for value of this mortgage, for such I think, upon the evidence, Warren appears to be, and a subsequent incumbrancer. The assignee of the mortgage takes it of course subject to the state of the account as between mortgagor and mortgagee; but suppose there to have been really a mortgage debt, whether for the whole amount of the mortgage, or for less, will the fraudulent purpose for which the mortgage was made affect an innocent assignee? If it could not, then Taylor's evidence cannot be received, for it is not receivable upon the question of amount, and as between Warren and subsequent incumbrancers the fraudulent purpose of Taylor and Merrick is immaterial. If upon further directions counsel desire to raise that question against Warren, it will be competent to them to do so. Merrick's evidence is not objected to, but I think is not to be relied upon implicitly. According to his account Taylor's indebtedness to him was of a very large amount. The mortgage was for $3500, and that he says was only for a portion of it, he says a portion of the contract price, whatever that may mean; but he adds: "I having received $700 from the railway company," and in his assignment to Warren he covenants that the whole $3500 was then due; that it is clear therefore that he claimed the two sums, so that according to his account, on the 28th of May, 1854, $420 was due to him beside a portion of the item in paper O. Then came the amount appearing in paper O., £220, which supposing it to be in New York currency, would be $550 more, making in all $4750. Now even his own evidence bears out nothing, even approaching that amount: Fynn and Christian assisted at the work; their evidence would bring the amount still lower, especially that of Fynn, but I thought he exhibited a desire to reduce it as low as possible.

I think it desirable, however, to say no more at present upon the question of account.

ESTEN, V. C.—The plaintiff Warren filed his bill for the foreclosure of a mortgage for $3500, made by the defendant Taylor to one Merrick, and transferred by him to Warren, making the defendants Ross, Mitchell, & Fisken parties as subsequent incumbrancers, by judgment and mortgage, who set up as a defence, that the plaintiff's mortgage was made to defraud creditors and claiming priority over it by reason of its alleged defective registration, and in the meantime filed their bill to establish their own priority, alleging the same facts as they had stated in their answers to the other bill. Evidence was entered into on both sides, and by the decree pronounced at the hearing of both causes, which were consolidated, the validity and priority of the plaintiff Warren's mortgage was established; and it was referred to the master to take an account of what was due under it, and to enquire what the consideration for it was. The master received further evidence, and reported only £104 due on Warren's mortgage for principal and interest. Both parties have excepted to this report. Warren, because the whole amount mentioned in the mortgage was not allowed; Ross, Mitchell, & Fisken, because the master ought to have reported nothing due the defendants Warren and Merrick to the bill of Ross, Mitchell, & Fisken, having alleged a different consideration for that mortgage from the one proved, and not having proved the one alleged.

The facts of the case are, that Taylor was the owner and master of a vessel called the "Matilda," which was wrecked in the fall of 1850, in Lake Ontario, off the defendant Merrick's farm, laden with 250 tons of railway iron for the Cleveland and Pittsburg Railway Company. She sank and lay in about 10 feet water, on a sandy and gravelly bottom, about half a mile from the shore, and about two miles and a half from the place where the cargo could be landed. Taylor returned to Canada, having given authority to Merrick to watch the vessel, which remained in the state I have described until the following spring, when Taylor returned to the place, and in the character of agent of the railway company entered into a written contract with Merrick to remove and land the cargo of the vessel. This contract is produced and proved. It provides that if Merrick should succeed in removing the water from the vessel he should receive for the work to be performed the sum of $1200; if not, that he should receive a larger sum. Taylor was advised, he says, and he thought that as master of the vessel he could bind the company by this contract. Merrick performed the contract on his part, and landed the whole cargo, but did not succeed in removing the water that was in the vessel, and was obliged to employ grapnels, and he became therefore entitled to the larger sum mentioned in the contract. The company repudiated the contract, and refused to pay more than $700, which they did pay to Merrick, who however held the iron as long as he could, in the endeavour to compel the company to pay a larger sum, but finally was obliged to relinquish it, and be content with the $700. Taylor then made the mortgage in question to secure to Merrick the balance of the sum he had contracted to pay him for raising and landing the cargo. The mortgage was taken by Taylor to Canada for the purpose of registration, and was there executed or acknowledged in the presence of one Kelly, on whose oath it was registered. It remained in the registry office apparently until May, 1852, when Merrick and Taylor being at the registry office, were attended at their request by Mr. Woods, to whom the mortgage was delivered by Merrick in the presence of Taylor; and Merrick also gave him instructions with respect to it, and Mr. Woods took a power of attorney from Merrick to place himself, as he says, in a proper position in the matter. The mortgage remained in Mr. Woods' possession until the year 1858, without any communication between him and Merrick with respect to it. The principal sum secured by it fell due in May, 1857; the interest, however, was payable in the meantime. In the year 1857 Merrick sold this mortgage to Warren, and visited Canada for the purpose of making a search for it, which he made in the registry office without success, appearing to have forgotten that he had left it in the possession of Mr. Woods. However, he procured a certificate of its registration, which satisfied Warren, and the transfer was completed. The mortgage itself was supposed to be lost, but in 1858 a Mr. Keating advised Merrick to enquire for it of Mr. Woods, and immediately that application was made to him produced it, and returned it to Merrick. The present suit of Warren was then instituted for the foreclosure of this mortgage.

I may remark that Messrs. Ross, Mitchell, & Fisken, the objection of defective registration having been overruled, could not, as mortgagees, impeach the plaintiff Warren's mortgage as fraudulent and void against creditors. As judgment creditors, however, they could take that ground; and of course their acceptance of a mortgage did not prejudice or affect their rights as judgment creditors. The decree, however, established, that, whatever the mortgage held by Warren, may have been as between Taylor and Merrick, in the hands of Warren, who was a *bonâ fide* purchaser without notice, it was good for whatever had been actually advanced upon it, and referred it to the master to ascertain what amount had been advanced upon it, and what remained due in respect of it, and what the consideration for it was.

Upon this enquiry, the mortgage having been produced, and the plaintiff having made affidavit in the usual manner, claiming the whole amount secured by it, with interest, I think the onus lay upon the defendants, Ross, Mitchell, & Fisken, to reduce it.

Looking to the evidence which was adduced before the hearing, and in the master's office, I do not think enough is shewn to overcome the legal effect of the mortgage deed. Even supposing the contract upon which it was founded to have named, as it is supposed to have done, the sum of $3000 as the additional sum to be paid in case the water could not be removed from the vessel, I should think, looking both to the express evidence and the nature of the transaction, that enough had not been shewn to qualify or impair the legal effect of the mortgage, and that the account should be taken according to its legal import as it stands. The master thinks that it was a device either to defraud creditors, or extort

from the railway company the price not only of saving the cargo, but of raising and refitting the vessel. The former hypothesis is excluded by the decree; and the latter would not affect the plaintiff's claim, for if the services stipulated for were rendered, Taylor would be equally bound by the mortgage to its full extent, whether an intention existed to defraud the company or not. I do not see, however, the ground of this latter supposition.

I presume the only or the main chance of raising the vessel lay in removing the water from her hold, in which case she could have been raised and refitted. But in this event only the smaller sum of $1200 would become payable, to which probably no objection would be made. The larger sum would become payable only in the event of the water being irremovable, in which case it was certainly much less probable, perhaps very improbable, that the vessel would be raised, or could be refitted. It is a remarkable circumstance, however, and appears to have escaped the notice of the solicitors on both sides, although I doubt not well known to the parties, or to some of them, that the contract names as the larger sum to be paid in case it should be found impossible to remove the water from the vessel, not three *thousand* dollars, as was supposed, but three *hundred* dollars. The word is too plain to admit of doubt.

I shall refer the case back to the master to review his report with reference to the foregoing directions, without costs, and with liberty to both parties to adduce further evidence.

As to the appeal of Baldwin, whose claim has been disallowed by the master on account of his neglect to re-register his judgment, I am inclined to agree with the master, and to think his construction of the act correct; but I do not see that it is necessary to decide the point, inasmuch as the plaintiff Warren can have no objection, but must rather desire to retain Baldwin as a party; and the question between Ross, Mitchell, & Co. and Baldwin can be only one of priority, and so long as priority is accorded to them, they cannot complain. No doubt can be entertained that the defendants, Ross, Mitchell, & Fisken, must be entitled to priority, inasmuch as their title accrued more than three years after the registration of Baldwin's judgment; and even according to the construction which has been adopted in England, their priority would be incontestable. The only person entitled to require the entire exclusion of Baldwin is the mortgagor Taylor, who makes no complaint; and if he did, I think I should grant to Baldwin an opportunity of re-registering his mortgage, if he desired it. If only a question of priority has arisen, I think Messrs. Ross, Mitchell, & Fisken, must have their costs of this appeal; but if their priority is conceded, and they are pressing for the entire exclusion of Baldwin, I think it should be without costs.

McDonald v. Rodger.

Registration—Judgment creditor—Misnomer—Practice—Appeal from master.

A confession of judgment was executed in the name of "*Matthew Rodger.*" The certificate for registration was of a judgment against "*Matthew Rodgers.*" *Held*, the mistake vitiated the registration.

Semble, that in a certificate of judgment it is sufficient to state the amount of the true debt.

Where an encumbrancer who objected to the order of priority in which he was placed, appealed from the finding of the master, the court considered this the more convenient course to adopt, although it was open to him to have moved to discharge the master's order.

This was an appeal from the master's report made in a foreclosure suit, on the grounds stated in the judgment of his Honor Vice-Chancellor *Esten*, before whom the appeal was argued.

Roaf, for the judgment creditor, who appealed, cited amongst other cases *Beavan* v. *Oxford*, (1 Jur. N. S. 154); *Brandling* v. *Plummer*, (3 Jur. N. S. 40; S. C. 26 L. J. N.S.; Ch. 326.

Blake, contra, cited *Underwood* v. *Lord Courtown*, (2 Sch. & L. 64-5.) *The Queen* v. *Registrar of Middlesex*, (15 Q. B 976); *Sale* v. *Compton*, (1 Wils. 61); *McQuestion* v. *Campbell*.

Esten, V. C.—The facts of the case are, that a judgment was entered on a confession against the defendant by the appellant *Smith*, on the 22nd of June, in the year 1854, for the sum of £200 damages, and £3 12s. 8d. costs. This judgment was registered on or about the same day, in the registry of the county of Huron, where the lands comprised in the mortgage in question in this suit are situated. The judgment was re-registered on or about the 18th of May, 1858, in the same registry. The heading of both certificates is, "In the Queen's Bench," neither of them mentions the form of action; in both the defendant is called "*Matthew Rodgers.*" In the year 1856 the mortgage in question was executed by the defendant *Rodger* to the plaintiff *McDonald*, and registered in the same year in the proper registry. The master has placed *Smith* after the plaintiff in point of priority; and *Smith* has preferred this appeal against that decision. *Smith* might have applied to discharge the master's order, but the course he has taken was, I think, open to him, and it was more convenient than the other. The master considered the registration of the judgment, in 1854, invalid. The grounds of his judgment do not appear. The re-registration is impugned on the ground that the words, "Court of," are omitted from the heading of the certificate; that the form of action is not mentioned; that the name is mispelled; and that the true debt is mentioned, and not the amount for which judgment is nominally entered. The two first defects have been decided in this court to be insufficient to vitiate the registration.

With regard to the true debt being mentioned, supposing the question to be untouched by decision, I should doubt whether the registration would be void on that account. It would be extremely mischievous to allow an incorrect and deceptive registration. Truth should be the character of a registry, as the object of its institution is to inform the public of the exact state of the title, so that they may purchase and deal with safety and confidence. At the same time it can hardly be said that a registration according to the tenor of the judgment would be wrong. In truth I think it would be highly proper for the clerks to deviate slightly from the form prescribed by the act in such cases, and mention both the nominal amount of the judgment and the true debt.

If the master has deemed the registration in this instance void on account of the nominal amount of the judgment not being mentioned, I should not differ from him. I think, however, this registration was void on account of the mistake in the name. It is true that the close resemblance between the two names would excite the strongest suspicion in the mind of a purchaser; but it is impossible to draw the line between different sorts of mistakes, and it is much better to require a strict adherence to fact. According to the case of *Sale* v. *Compton*, the mistake of "*Compton*" for "*Crompton*" seems to have vitiated the judgment. I must intend the cognovit to have been signed with the true name, and then I think the mistake which has occurred in the present case would vitiate the registration. It might totally mislead intending purchasers. I also think that the registration effected in 1854 became void after the lapse of three years, and that the lien of the judgment thereupon totally ceased as to the debtor and all other persons, and that thereby the plaintiff's mortgage became accelerated.

It is clear also, I think, that with regard to the Francis town lots, the plaintiff would be entitled to priority as to the purchase money, and the sum of £300 agreed to be advanced; but as to future advances I do not see on what ground he could claim priority. Upon all the grounds I think the appeal should be dismissed with costs.

U. S. REPORTS.

SUPREME COURT.

Suter et al. v. The Trustees of the "First Reformed Dutch Church."

Same v. Same.

A majority of a religious congregation have power to dissolve their connection or union with a denomination with which they had connected themselves after their organization.

Appeal from the Common Pleas of Philadelphia. Dissenting opinion of

Thompson, J.—I cannot agree to a judgment of affirmation in either of the above cases, and it is due to the profession as well

as to myself, that the reasons for my dissent from the judgment of the majority of my brethren should be stated. The case presents some delicate and very nice points in civil jurisprudence. Indeed, I am greatly impressed with the idea that the boundary of mere civil jurisdiction has been transcended in arriving at conclusions below and here.

In order to a satisfactory understanding of what may be said, however, it will be necessary to present the facts, and state the main points of controversy as clearly, but briefly as possible. Dissenting opinions must be self-sustaining, as the facts are not entitled to be officially presented by an authorized reporter, and ordinary readers would hardly be likely to hunt them up for themselves, and hence the necessity for a statement of them in this opinion.

The complainants claim to be pew-holders or renters in the "First Reformed Dutch Church of the City and vicinity of Philadelphia," and bring their bills of complaint against the trustees of the church to restore them, as appears by the second bill.

1. From dissolving the union formed in 1813 between this church in its corporative name and capacity, of the "Evangelical Congregation of the City and vicinity of Philadelphia," and the New Brunswick classis, an inferior church, indicatory of the Dutch Reformed Church in the United States, and that it may be decreed to be unlawful for the trustees of the said church to supply the pulpit of the church with a pastor, or to interfere with the exercise of that power by the consistory of the church.

2. In the first bill, which for convenience I notice as the second, the prayer is to enjoin the trustees from applying the income, property and effects of the church in the inculcation or teaching of any other doctrine, faith or practice, than those contained in the Heidelburg Catechism, as expounded in its *Calvinistic interpretation*, being that given by the ecclesiastical assembly known as the Synod of Dort, which assembled at Dordrecht, in Holland, in the year 1618 or 1619, and from establishing in the pulpit of the said church as its pastor or teacher, any clergyman who is not of "sound doctrine" with reference to this standard of faith, and who is not regularly ordained as required by the *charter and fundamental articles* of said corporation, "and especially from installing in the pastorate of the said church the Rev. George W. Smiley, or applying the income or effects of said corporation for his maintenance, support or salary as the minister of said church," &c.

These I think are the material matters embraced in the plaintiffs' two bills. Many things seem to be set forth in them by way of inducement, but being denied in the answers, and not proved by the complainants, consequently go for nothing. Such, for instance, as that the said "First Reformed Dutch Church of the City and vicinity of Philadelphia was originally organized in 1809;" that it was the *design* and *purpose* of the fundamental law of the church that the pastors should be *Calvinistic* and not *Arminian* in doctrine, and should be ordained by Christian denominations so holding. That illegal votes had been given in the passage of the resolution for dissolving the union with the classis, and the like.

These things were mostly unsustained by proof, and where there was any testimony well disproved, the complainants' case gathers no strength from such allegations.

The learned judge of the Common Pleas overruled many points in the plaintiffs' bill as insufficient in law to entitle them to relief, but on certain other grounds to be noticed, decreed in both cases in their favour, and hence these appeals by the trustees.

The members of the association which constituted this congregation and church, originally belonged to a congregation known as the "German Reformed Congregation in the City of Philadelphia," which was and still is in ecclesiastical connection and is a part of the German Reformed Church of the United States. Its declared standard of faith with the Bible is the Heidelburg Catechism. The withdrawal from the church took place in 1809, and all the testimony accords in proving that the separation was not schismatic, but only because the seceding members wished to have church service in English instead of German, as more profitable and suitable to the education and tastes of the youths belonging to them. Not being able to secure this in the old church, they accordingly withdrew and associated themselves as a congregation at first under the name of the "Second Reformed Association," certainly regarding the church they left as the same in faith, and to be considered the *first* German Reformed Church. They soon purchased a burying ground, procured a place to hold public worship, and organized formally as a congregation by the name of the "Evangelical Reformed Congregation of the City and vicinity of Philadelphia." By this name they were incorporated by the court in 1810, and to the trustees duly appointed under the charter, the title to the burying ground and the church lot was conveyed in trust for the congregation. Fundamental articles for the government and declaratory of a standard of the faith of the congregation were adopted, and remain unchanged until this hour, excepting only in the names. The temporalities of the church were committed to the trustees, and upon them also devolved the duty of calling or inviting candidates for the ministry when there was a vacancy, the eventual employment of whom depended on a vote of the congregation. By the Fundamental Articles the pastor was required to be of the "Reformed or Presbyterian denomination, regularly ordained, of sound doctrine, and unblemished character." And "he must preach the word of *God*, and doctrines of *Jesus Christ*, according to the Prophets and the Apostles, and the precepts contained in the Heidelburg Catechism." Rub's and Reg. art. 1.

"The spiritual affairs of the congregation," according to art. IV., "shall be under the government of the minister and seven elders, who shall form a session."

By Art. IX. of the charter it is declared, it shall not be construed to prevent the congregation from "uniting with *any* other Christian denomination *whenever* it shall appear to a majority of the members of said congregation to be for their advantage."

Under this charter and these fundamental articles the congregation remained for several years. It was their desire, and they made efforts, to procure a minister of the German Reformed denomination to preach to them in English, but were unsuccessful. They procured a Clergyman of the Presbyterian, and after him, one or more ministers in succession of the Dutch Reformed denomination, to preach in English. The question was often agitated about an union with some other church judicatory, but never settled until in 1813, during the pastorate of the Rev. Dr. Brodhead, of the Reformed Dutch Church, when an union or connection was formed with the classis of the Reformed Church of New Brunswick, New Jersey. This was brought about doubtless by the influence of this reverend gentleman, for before his time the project of union had always failed. In the provisional resolutions of the congregation, a declaration is made which indicates the presence of a very partial advocate for that peculiar church, for the act is put upon the ground that "from religious education and habits we (the congregation) are more closely connected with the Low Dutch Reformed Church than any other denomination." It is difficult to believe that this declaration was intended by the congregation to mean so much as is attributed to it now. This is to say, an expression of preference for the faith and practice of a church in which the members had not been trained and brought up, over one in which from infancy they had been accustomed to worship, as had their fathers before them. I utterly discard this as evidence of a preference for the doctrines of the Heidelburg Catechism, as now claimed to have been understood by the congregation, although, perhaps, it might have been by the penman so designed. It must not be allowed the weight of a feather against the solemn declaration in the fundamental articles, and the known faith and practice of those who adopted them. They were German Reformed in sentiment, and their standard of faith was the Heidelburg Catechism, which it is proved, from many sources, is not essentially Calvinistic, and tolerates a diversity of belief on a subject which is a dogma of the Dutch Reformed Church, namely, the doctrine of limited atonement.

In 1815 this first step was followed by another. The name of the church was changed from the name by which it was originally incorporated to the "First Reformed Dutch Church of the City and vicinity of Philadelphia." But, as already said, no change was attempted in the Fundamental Articles. They remained as originally declared, and I may as well say here that by them the identity in faith and practice of the church is to be ascertained for the purpose of giving the proper direction to the trusts in its favour. Some incongruity in the forms of government took place

after the connection, arising from an admixture of those belonging to the Dutch Church with those provided for in the articles of incorporation of the church in question. Such as a change in the form of calling a minister, and the establishment of a consistory to take the place of the church session. These were acquiesced in, but they were sheer interpolations, for the articles of union did not provide for a single change in the machinery of government provided by the congregation for its own government. Indeed it is not claimed that the original articles were altered or modified in the least. Hence it is not improper to say that a government and practice not authorized, was usurpation; of course, therefore, these things furnish no proof of the faith of the church, but rather of a disposition to assent in silence to what was deemed immaterial in points of difference.

From 1815 until 1860 we hear of no difficulty in the church. About the last mentioned period a new church edifice was erected by the congregation, which had increased in strength and importance. A pastor was wanted, and was called by the trustees, in conformity with the articles on that subject, and elected by the congregation, and so recorded on the books of the consistory. The classis of the Dutch Church, in some way not disclosed, claimed the right to supervise the action of the trustees and congregation in these matters. They assembled, appointed a committee to call on the pastor to declare his faith, and to submit to an examination by the classis. The minister elect declared his adherence to the standard of the congregation, but denied the dogma of the Dutch Church on the subject of a limited atonement as promulgated in the canons of the Synod of Dort, and refused to submit to discipline on this point by the classis. Whereupon the committee recommended the passage of a resolution by the classis, "that as the election was null and void on account of unsoundness of doctrines, that the consistory proceed to call a pastor in accordance with the rules and constitution of the Reformed Dutch Church, as though no call had been made upon the Rev. George W. Smiley." This resolution was unanimously adopted by the classis. After this action of the classis, the trustees called a congregational meeting of the church, to consider the question of dissolving the existing connection with that body. Immediate action thereon was prevented by an application for an injunction to restrain the action in this matter. The special injunction, however, being refused, the congregation reassembled pursuant to adjournment, and on the 7th of February, 1861, did by a vote of seventy-five to sixty, declare their union with the classis of the Dutch Church dissolved and at an end.

The complainants now contend that this vote was ineffectual to dissolve the connection. That the whole number of the congregation entitled to vote was one hundred and sixty, and that a majority of that number, viz: eighty-one in the affirmative was necessary to effectual action. On the other hand, it is insisted that it was a constitutional vote, there being a majority of the whole body present, and a clear majority of that number voting in the affirmative. The learned judge concurred in the views of the plaintiffs, and on the final hearing granted the injunction prayed, namely, to restrain the trustees of the congregation from interfering with the authority of the consistory "in the discharge of their offices and duties, which by the faith and practice of the Reformed Dutch denomination of Christians, or by the usage and practice of the First Reformed Dutch Church of the City and vicinity of Philadelphia, pertained to the consistory of said church, and especially in the office and duty of providing preachers," &c., and they be required to keep open the church and its pulpit for such clergyman as may be selected by the *consistory of said church*. In short, the decree covered the whole ground—determined against the dissolution of the connection—the right of the trustees to call a minister, and the elligibility of a minister so called and elected by the congregation.

The decree rests solely on the insufficiency of the vote of the congregation thus taken to dissolve the union. The rights by a constitutional vote to dissolve the union was admitted by the learned judge. I am at a loss to comprehend how it could be denied indeed. I do not understand that it is by the plaintiffs' counsel. The union to be formed by the act of competent parties. Each admitted the other to be so, by entering into and consummating the arrangement. The effect of the union did not *ipso facto* extinguish the distinct existence of either. They were separate bodies in union, for an agreed purpose. It was the compact that held them in union, and that dissolved, each remained as before. The article in the charter quoted, expresses this idea, by declaring it to be the right of the congregation to unite with *any* Christian denomination *whenever* it shall appear to be to their advantage. It regards them in union or otherwise, to be what the charter made them, a distinct corporate body. The argument that assimilates the exercise of this right to the execution of a power which becomes *functus* by execution, confounds plain distinctions. It was a declared right inhering in the corporation to be exercised like any other. Such right as exigencies or chance should require. No other limits are put upon it. It is utterly unlike the thing to which it is compared. The very nature of a power ordinarily, is to enable one to do something for another. When the act is performed the power is exhausted, and the agent has no further authority. But the right of a corporation to act according to its discretion *whenever* its interests justifies, action is a general right, and is not in the nature of a power. It is part and parcel of the franchise. But I need not elaborate this for the following cases, all recognize the right of dissolving ecclesiastical connections like this; *Com.* v. *Green*, 4 R. 531; *Johnson* v. *The Presbyterian Cong.* 1 W. & S. 9; *Miller* v. *Galle*, 2 Denio, 533.

The right to dissolve being established, the remaining inquiry is whether it was constitutionally effective in this case. On this point, I think the learned judge erred.

There is a common law rule for the ascertainment of the sense of public bodies where no written rules exist. Where a deliberative body is composed of independent members, text writers and judicial authority unite in stating the rule to be, that the majority of those who attend after notice can effectually act; Angell & Ames on Corp., 501, 502, 505; Wills on Municipal Corp., 66. To this effect is *Rex* v. *Whittaker*, 9 B. & C. 648. In *Gosling* v. *Veley*, 7 Act. & L. 438; a parish vote was to be held by church wardens, and the parishoners in vestry assembled; it was held that the church wardens could legally act on the premises if the parishoners did not attend, and if they did attend the majority would control. A congregation is a public body, composed of indefinite numbers, as much so as a municipal corporation, and should be governed by the same rules.

But even if it be claimed with corporations with definite numbers of shareholders, the rule is also clear; there the *majority of the whole* being assembled, the majority of the assembly is the controlling power. The maxim is "*ubi major pars, ibi totum*," the absent being supposed to take sides and be included in the greater part; Grant on Corp., 68, 69, 70, and 155; Angell & Ames, 499; *Reg.* v. *Bailiffs of Ipswich*, 3 South. 155. In the case of St. Mary's Church, 7 S. & R., Gibson, J., said that "where no special provision is made by the charter, the whole are bound by the decision of the majority of the corporators present. So in substance is *Johnson* v. *Green*, and this was the rule of the Roman law: "*reperture ad universos quod publice fit per majorem parte.*"

The rule is one of necessity, and needs no authority to support it. The vote in this case was by a majority of the whole number assembled. This expressed the will of that assemblage as fully in law as if every member had voted in its favor, if there was no express rule requiring a different number. Was there any such rule?

When we return to the charter, and the rules and regulations for the government of the congregation in search for such rule, no such rule is to be found. And it is a significant fact, that whenever a greater number than a majority is required, in other cases it is provided for, and the occasion stated. Rules in the election of a minister, he must be chosen by "a majority of the votes of the qualified voters." On the dismissal of a minister, "*two-thirds* of the whole number" of the congregation must agree. To alter any fundamental article, "two-thirds of the members present must coincide in the same."

Here we have three different rules applicable to three different occasions which may arise, but to no other, they are all special, none of them touch this vote therefore, the rule of the common law must apply, for none other is provided, and whether the meeting be considered as of indefinite numbers, or that of a close corporation, the rule of the majority of the aspects above stated controls.

Art. IX. of the charter declares that the congregation has the power of uniting with any denomination of Christians *whenever* it shall appear to a majority of the members to be for their advantage. Supposing this to be a rule regulating the number necessary to vote *for* a union, it goes no further. It does not establish a rule on the question of dissolution. It was wise to limit the power to carry the congregation out of its normal conditions; for otherwise its faith might be subverted, and the church and the trust destroyed; and it was equally wise to allow a greater facility of return to its original status as authorized and fixed by its fundamental laws. That condition would be presumed to be lawful, which the condition in a union might be doubtful. These were the reasons, I think, for leaving the rule special, applicable only to action in one direction.

It is clear, therefore, that no rule existed to require a greater vote to effect a constitutional dissolution of the connection between this congregation and the classis of the Dutch Church, than that which was given on the 7th February, 1861. It was a majority of the whole number present, who were a majority of the *whole* members of the congregation, a lawful quorum. The court erred, therefore, in my opinion, in disregarding the common law rule when no other rule existed to govern the case, and in decreeing the act of dissolution of the date mentioned as unconstitutional.

2. The decree in this, the first of these bills, will now be noticed. It enjoins the respondents from employing or applying the resources of the church to the support of any minister who shall teach any other doctrines of faith than is inculcated by the "Heidelburg Catechism, as the same is expounded in its *Calvinistic* interpretation, being the interpretation given to the same by the Synod of Dort," or any clergyman "not of sound doctrine with reference to said standard," and not regularly ordained as required by the charter and fundamental articles of the congregation, and especially from employing as pastor the Rev. George W. Smiley.

The faith of a religious body can only be passed upon by the civil courts, where incidental to a question of property. When a society or church has acquired property, the law maintains the trust of it for the uses and purposes designed by the founders. To ascertain whether the trust is properly administered in accordance with this design, it often becomes necessary to inquire into the faith and practice of those claiming to be beneficiaries. It is only in this aspect that temporal courts have jurisdiction to have doctrinal points in theology discussed at all. It is only for the purpose of ascertaining the identity of the present use with the original dedication, that it is allowed; *Attorney General* v. *Pearson* 3 Mer. 352; *Miller* v. *Gales*, 2 Denio, 492; *Presbyterian Church* v. *Johnston*, 1 W. & S. 9; St. Mary's Church, 7 S. & R. 517.

This line of authority brings systematically before us, it is supposed, a certain point of this logical doctrine in the case in hand. The trust property here is held for the use of a congregation, whom fundamental articles require that its ministers "must preach the word of *God*, and the doctrines of *Jesus Christ*, according to the Prophets and Apostles, and to the principles contained in the Heidelburg Catechism."

Now I think it obvious, that what is meant by this declaration is, that the teaching must be the *general* doctrines of the standard; those which harmonize with the views of Protestant and Reformed denominations of the *general* doctrines of the Christian Church. The dedication is in a general sense, and if peculiar dogmas not *generally* received as elements in all Reformed Churches were intended, they should have expressed or necessarily to be implied, or they cannot be recognized, for there is no rule by which to prove they were included in the laws, and these fundamental articles were for an independent church, and union with any of different faith was not contemplated. This being so, a subsequent union would not change the objects of the trust. I grant a different rule would hold had the trust been created with a view to the support of religion or doctrines in connection with some specified denomination. There the rule seems to be that the trust will be administered to the tenets of the latter. But this was not the case here. Neither was the dogma declared to be essential in the original articles, nor was the connection necessarily to be with a church which held it; and here this rule of administration of the trust does not apply.

There was no such designation, and the congregation might have remained independent indefinitely, and then its tenets would be determinable only by its fundamental principles, as declared in its written testimonies and practices. Did its voluntary union with a judicatory of a distinct church organization change these fundamental principles? I think not, and I think the object of this connection was for the purpose of christian association, advice and intervention, in case of congregational dissensions in spiritual or doctrinal matters only. Government was abdicated by the independent church, and by not one written line nor word was it conceded to the Dutch church. But even if that point were conceded, and government allowed to the classis what was to be the power and principles of the government? I candidly answer, I think they were to be those established by the written articles of the church, and the practice growing out of the faith of its members. It cannot be seriously contended, that it lost its distinctive character by the union. To hold this would be to assert that union was absorption, and that by the act the church which I denominate as the expellants, became a *part* of the Dutch church. As this is not claimed then, I hold that if all its characteristics were not changed by the union, none were. They were all equally vital, and by all overwhelmed and absorbed, I repeat none can be claimed to have been. There was no written consent or protocol even to that effect. The original fundamental articles remained unchanged—the change of name however for whatever object designed had no effect on the principles of the congregation. These must stand, and this controversy turns on them.

According to the rule already stated, we inquire what were the principles of this congregation in its creation and incorporation? By these the question must be determined whether there has been any, or there is about to be any diversion of the trust property in the employment of a minister performing the faith, and called according to the fundamental articles of the church as has been the Rev. Mr. Smiley? Let who will determine this question, the synod or classis of the Dutch church, the court below, or this court, it must be by the tenets of the church when founded, or by showing a clear change of fundamental principles.

On this point we may notice the fact before referred to, that the founders of this church were a portion of a German Reformed congregation, whose standard of faith was the Heidelburg catechism. To whom had been preached its doctrines, independently of and against the dogmas of "limited atonement," as held by the Dutch church. The testimony of Rev. Dr. Helfenstein, now eighty-six years old, and the pastor of the German Reformed church at the time of the succession, proves this; so does Henry Jordan, one of the founders and original contributors to the church out of which this controversy has arisen; so also do Mr. Offerman and Mr. Benser. These ancient witnesses all belonged to the present church, and three of them assisted in founding the new. These witnesses prove the faith and practice of the present church. That in the Heidelburg Catechism was taught the doctrines of free grace and unlimited atonement. Not one word of testimony was given by the complainants to disprove this. I have already said, and the proof shows it, that the separation was not about any difference in doctrine, but only because those who left wanted the doctrines of their church taught in English for the benefit of their children.

That the new congregation had no intention of changing its former doctrines of faith, is also apparent in the fact, that the name they assumed before complete organization as a church, was the "*Second* Reformed Association:" second to what? Certainly to the parent church which they deferred to as first in that series in Philadelphia. Again, when incorporated, they adopted as their corporation name, "The Evangelical Reformed Congregation of the City and vicinity of Philadelphia." This name was consistent with an agreement in doctrine with the parent stock; of itself, however, this only amounts to a negative of any idea of a departure in doctrine. But what is more to the point and decisive, I think, is the question of present consistency of the church with the doctrines of the church as founded, are the fundamental articles of the church originally adopted and never altered.

These adopt the Heidelburg Catechism as a true exposition of Scripture, and as the standard of faith to be taught by their ministers, and to be subscribed to by the elders, who with the minister,

have the spiritual concern of the congregation in charge as a church session. Witnesses, writers, and judicial decisions concur in saying, that in this form, and without the doctrine of a limited atonement being considered an element, is the Heidelburg Catechism accepted as the standard of faith of the German Reformed Church. Testimony of Rev. Albert Helfenstein, sermon of Rev. Dr. Bomberger, of German Reformed Church, in Race Street, 1860. (The Old Paths, by J. F. Berg, 1845.) *Miller* v. *Galle*, 2 Den. 492. Errors and Appeal, New York; Marcusley Rec. Vol. 4, p. 179.

This catechism, it thus appears, admits diversity of belief on minor points of faith. "The main design of framing it," says Dr. J. F. Berg, (The Old Paths, 1845,) "was to present the *great truths* of the Christian faith in such a manner that *all really evangelical minds* might harmonize in the statement. It is believed that it can be rejected by none, excepting those who repudiate the *essentials* of Christianity." This is a truthful presentation I think, and may stand for the substance of what numberless preachers and writers have said in regard to it. Now it is evident that if a purely German Reformed Church had by fundamental articles declared the Heidelburg Catechism as their standard of faith, that the dogma in question would not have thereby been necessarily or essentially any portion of the standard. Reasonable minds, in view of the practice of that church, will concede this. Who were they that founded this church in question, and declared this standard? They were members of a German Reformed Church, brought up in its faith and practice, and although they separated from the parent church, they did not separate from its faith. We are to find the objects of a trust in the faith and principles of the society for which it was created, say *Attorney General* v. *Pearson* and *The Presbyterian Church* v. *Johnston*, (sup.) We have it proved and ascertained here as clearly as a fact was ever proved, that the members of the original association and congregation were German Reformed. We must desert settled law, else interpret the language of the fundamental articles in the light of the faith of those establishing them, and that was in the German Reformed view of the standards. If that, then, was its origin, it is no diversion of the trust funds to continue the propagation of the faith of its founders. The presumption that they founded their church in their own faith and practice, and that their language means that nothing but the clearest evidence of renunciation or alteration should be allowed to overthrow it. It requires clear and unambiguous words, and by a man clearly competent to make a will, before we can believe that he means to disinherit those for whom he ever laboured and well loved. So in matters of faith, conscientous men adhere as firmly to tenets believed to be truths, as they do to their natural affinities. The evidence must be clear to induce a belief of an entire change in either case.

The Vice-Chancellor, Hoffman, whose opinion was affirmed in the court of Errors and Appeals, in *Miller* v. *Galle*, (Sup.) agrees with our case exactly. He says, "here, then, is the only standard, (the Heidelburg Catechism) to which the doctrines of the church is referred—by which the adherence of a pastor and a congregation is to be judged; and I find all the pastors, whose admission is considered an intrusion, teaching this catechism. If they teach it with an Arminian construction, I cannot interfere. It is not established that the property was to be held for *those otherwise interpreting it*." Neither in the faith nor practice of the founder of this church, nor in the words which they use to declare its standard, is there a syllable fairly construed which proves the position of the complainants, that the dogma of the Synod of Dort was to control the interpretation of the catechism. Inherently it does not. The catechism itself, history informs us, was the work of divines holding divers views in regard to the atonement. Frederick III., Elector of the Lower Protectorate, caused it to be written, and its principal contributors were Zacharius Ursinius, a disciple, we believe, of Melanchton and Caspar Oliveanus, of Calvin; while the Elector himself was known as a Philipist. Dr. Mayer, in his History of Religious Denominations in the United States, 344, points to this fact, as the reason why the doctrine of a limited atonement as taught by Calvin, and forty-four years after the promulgation of the catechism was announced as a canon of the Low Dutch Reformed Church of the Synod of Dort, is not considered an essential element of faith, by those whose standard is the Heidelburg Catechism. This being the proof by the witnesses, writers, and historians, we are to regard it as clear, that the Heidelburg Catechism is a standard of faith for those of the German Reformed denomination, or any others who adopt it generally, and without qualification—without obligation to believe in the Calvinistic or Arminian view of this mysterious and utterly unsoluable question by human capacity. I therefore adopt the conclusion of the Vice-Chancellor in *Miller* v. *Galle*: "I find it, (the catechism,) susceptible of our Arminian construction. If it never receives such construction, I am not able to say that the will and intents of the founders are thereby violated," and I can cordially agree in sentiment with Gardiner, President of the Court of Errors and Appeals, in the same case, that if any class of Christians believe that spiritual blessings flow only in a particular channel, they should clearly and explicitly make this appear, before others shall be compelled to accord in that belief; if not, conscience and right of conscience, may be infringed upon, and rights of property be abandoned. The majority of this congregation will be in this category, if this decree be affirmed. They must either sit under the teachings of a doctrine not agreeable, as they think, to their Christian standard of faith, or go hence and seek a more congenial association elsewhere. They ask only that on this point, that the Calvinistic intrepretation of the catechism be omitted. That its more enlarged and benificent doctrines of salvation be taught, leaving individuals the freedom of conscience on peculiar dogmas untrammelled. I say peculiar because the doctrine in question is very far from being unchallenged in the Christian church in its largest sense, or in its Reformed and Protestant sense. I am in no wise competent to express any opinion of its Scriptural character, and as a judge of civil judicatory it does not become me to do so, but I may say that in the present age of the world, it is not, I think, a fundamental article of faith in anything like a majority of the Protestant churches. It is therefore, the more improbable that the church here intended it should be an article of faith with them. It is a settled principle that the doctrine of the founders of a religous trust will control it. When that principle is to be yielded, if it is to be, then it will become more common than ever hitherto, to divert trusts, and carry off bodily congregations and churches from their original faith. A fraternal connection for the purpose of Christian association and advice between distinct but not altogether incongruous bodies, an assimilation in name, but in nothing else, may be sufficient as a general rule for such purpose, but when the wrong is disclosed, it will be no less a wrong because it may have been accomplished by very gentle means. I think the controlling majority of this church will belong to this predicate, if these decrees stand. It will be a vain effort to procure a dissolution of the connection, if it must be accomplished as required by the decision below. New members, absentees, and those otherwise opposed, will pretty certainly defeat the required majority.

I am of opinion, therefore, that the classis have no jurisdiction to declare the election of Rev. George W. Smiley null and void, and direct the consistory to call a pastor in accordance with the rules and constitution of the Reformed Dutch Church, as though no call had been made upon Rev. George W. Smiley.—*Res. of Classis. Because* the Rev. George W. Smiley had been, and was called and elected by the church, in accordance with its fundamental articles, which have never been changed or altered. And *because* the Rev. George W. Smiley did believe in, and proposed to teach, the Heidelburg Catechism, which was the standard of faith declared by the church. And further *because* it was not attempted to be proved that he proposed to teach it in a sectarian, or in any but its general Christian sense; the only proof being that he refused to teach it in accordance with the canons of the Synod of Dort. He was, I think, exactly within the only standard of the church which called him, in all these particulars. This decree of the court below affirms the action of the classis, and thus, in my judgment, is the trust completely diverted from its original purpose. It has not been shown that the fundamental articles of this church have been abrogated, altered, or have ceased in faith and practice to be the exponents of the sentiments of the congregation; if this be not so, then why are not proceedings in accordance therewith constitutional, and if constitutional where is the authority to overrule them? Having no constitutional authority do it, the exercise is essentially despotic. These articles not only provide for

a call by the trustees, and an election by the congregation of a minister, but for his dismissal by an act of the congregation; I cannot comprehend, therefore, the right or necessity for interference by the court, unless it were clearly shown that the minister employed was so employed in direct violation of the church rules so employing him, which has not been done here.

The willingness on the part of the minister elect in this case to teach the Heidelburg Catechism in its general sense, (and there is neither complaint nor proof to the contrary, except his refusal to deliver it in a Calvinistic sense, which does not prove a determination to preach it in an unscriptural sense,) is exactly the sense in which we as judges are to judge of it. Its general Christian sense. In *The King* v. *Woolston*, 2 St. 837, which was an indictment for blasphemy, (in denying the miracles of our Saviour,) there the court would not suffer it to be doubted, whether to write against Christianity *in general* was not an indictable offence and punishable in the temporal courts. But "they desired, however, that it might be taken notice that they laid the stress on the word *general*, and did not include disputes among learned men upon controverted points." Lord C. J. RAYMOND, in Fitzgibbon's Rep. of the same case, p. 64, said, "we do not meddle with any difference of opinion, and we interfere only when the very root of Christianity itself is struck at, as it plainly is by this allegorical scheme. The New Testament and the whole relation of the life and miracles of *Christ* being denied."

I think this should be our rule otherwise we are thrown with the contests of the schoolmen as to what doctrines are or are not explained in a prepared system. It is out of supposed implied doctrines, the controversy here arises. It is not expressed in the catechism, nor in the fundamental articles which expound the trust, and it is not among a large portion of the Christian world a doctrine of the Bible. It is a disputed point, and we should not say that is an essential element in the faith of this church when it is not so expressed, and standing as it has ever stood, and will ever stand, a rock in the ocean of polemics, far above and beyond the reach of man to comprehend—to prove or disprove.

I would for these and many other reasons themselves apparent, reverse the decrees in both these cases.

MONTHLY REPERTORY.

COMMON LAW.

EX. SINGLETON v. WILLIAMSON.

Trespass—Cattle damage feasant—Closes unfenced.

It is a general principle that legal remedy by act of the party cannot apply to an injury, the natural consequence of the act, or default, of the party injured. And this principle applies to the right of distraining *damage feasant*, the cattle of the owner of adjoining land. Therefore if cattle of one owner get into the land of the other, through the neglect of that other to keep up a fence dividing the lands of the parties, and then stray into another close of his, he cannot distrain them *damage feasant* and is liable to action for so doing.

EX. BRAMWALD v. FELLS.

Practice—Motion for new trial—Affidavits—Exhibits.

On motion for a new trial on the ground of surprise, material documents on which the surprise suggested turns, should be annexed to the affidavits, and if not they cannot afterwards be supplied.

EX. BLAKE AND OTHERS v. DONE.

Ejectment—Practice—Trial—Amendment—Adding names of parties as plaintiffs.

In ejectment the judge has power, at the trial, to amend the writ by adding the names of parties as plaintiffs, in whom the legal estate appears to be vested (if they consent to be added) even although it appears that the party who originally sued had no right of action, (so that there is in effect a substitution of plaintiff), provided the real question in controversy between the parties, that is, the title to be tried, remaining in substance the same, as in the case of *cestui que trust* suing by mistake in his own name instead of the trustees.

C. P. WALLIS v. LITTELL.

Evidence, parol, to vary written agreement.

Where by a written agreement, the defendant agreed to assign to the plaintiff a farm with immediate possession, upon the same terms as he held of his landlord; but at the time of the making of such agreement, an *oral* agreement was entered into between the plaintiff and defendant, that the written agreement should be void if the landlord refused to assign.

Held, in an action for non-assignment that the *oral* agreement was admissible, as it is in analogy with the delivery of a deed as an escrow, and neither varies nor contradicts the writing, but suspends the commencement of the obligation.

EX. CALLOW v. KELSON.

Insurance broker—Authority to receive money.

A broker having effected an insurance in his own name on behalf of his principal had the policy left in his hands for the purpose of his receiving the proceeds; and having upon advice of the loss pledged the policy with another broker, obtained an advance thereon, received as on account of the loss.

Held, that the latter might retain the amount so advanced, and that the principal could not recover it from him, but must resort to his own broker for it.

C. P. GARRARD v. GIUBELEI.

Amendment at nisi prius—Common Law Procedure Act—Husband and wife—Non-joinder of wife.

Where a defendant is sued for goods supplied to the wife before marriage, the record cannot be amended at the trial under the Common law procedure act by the insertion of the wife as a co-defendant.

EX. BUTLER v. HUNTER.

Negligence—Contractor—Pulling down houses—Liability of employer.

Where a person employs a builder to take down his house, the builder and not the employer is liable for the consequences of a neglect of any ordinary precaution, such as shoring scaffolding or the like.

EX. MCCANCE v. THE L. & N. W. RAILWAY CO.

New Trial—Damage—Evidence—Estoppel.

A person sending horses by railway, having signed a document declaring that their value was not above £10 each, and also agreeing that they should be carried at his risk, and he having sued them for injuries to the horses caused by defects in the carriages, not mentioning the document in his declaration, to which they only pleaded payment into court.

Held, that the declaration of value was not part of the contract, so that the jury or the court, in their place might look at it as limiting the damages recoverable.

And *semble*, that the proviso added, even if part of the contract, did not qualify it as a condition, so as to require a denial of the contract to enable the defendants to shew it, and, therefore, that it might be looked at even under the plea of payment into court.

CHANCERY.

M. R. IN RE CAREW'S ESTATE ACT.

Judgment—Consideration services rendered—Distinction between professional and non professional persons.

Where a non-professional person claimed a benefit under a judgment confessed and given to him by another, upon the ground of services rendered by him to the latter, the court held that the

burden of proof as to the consideration, lay on the former, and that as he had failed to prove the consideration for the judgment, his claim must be disallowed.

V. C. S. RHODES V. WROXLAY.

Mortgagor and Mortgagee—Dividend of insolvent estate—Rule where security insufficient.

Where in an administration the personal estate is insufficient to pay the debt in full, an equitable mortgagee, who is also a simple contract creditor in respect of the same debt and whose security is also insufficient, is entitled to prove for and take a dividend upon the entire debt for the time being actually unpaid, notwithstanding that the security has been realised by order of the court, and the proceeds have been carried on to a separate account to meet the mortgage claim. But such creditor must not, ultimately receive more than twenty shillings in the pound from all sources.

V. C. S. RE GREENWOOD TRUSTS.

Will—Period of ascertaining class—Next of kin, "according to statute of distributions"—Joint tenancy.

Bequest after the termination of a life estate to "such persons as shall happen to be my next of kin, according to the statute of distributions of intestate's effects.

Held, that those persons took who were next of kin at testator's death, and did so as joint tenants.

V. C. W. BUCHANAN V. HARRISON.

Will—Devise of legal fee to Trustees—Equitable reversion on failure of gift for remoteness—Descent not broken.

Residuary gift—Word "property" does not pass reversionary interest in reality—Possessio fratres.

A testator devised real estate to three trustees, one of whom was his heir-at-law, and he directs that during the lives of his wife, his daughters, and their husbands, the income should be applied for the benefit of those persons and their children, and when those persons should be dead, the estate should be sold and the proceeds divided amongst his grand-children. The devise of the corpus had been held to fail for remoteness.

It was now held that, assuming the legal fee to have passed to the trustees, the descent was not broken so as to create a new reversion, but that the heir-at-law took the old estate; and further that the character of this equitable reversion was not affected by the devise of the legal fee to the heir as trustee.

The heir-at-law, "as to all the rest, residue, and remainder of his personal estate and property whatsoever and wheresoever," after payment of debts, &c., gave and bequeathed the same, &c.

It was held that the reversion which he inherited from the first testator does not pass by this residuary gift.

It being alleged that the heir-at-law had so dealt with the property as to create a new reversion in himself, so that his sisters of the whole blood would inherit in preference to his brother of the half blood, an enquiry was directed whether there had been such dealing as would amount to a *possessio fratres*.

V. C. W. CRESSWELL V. HAINES.

Vendor and purchaser—Difficulty caused by unsoundness of mind of vendor—Suit for specific performance—Costs.

Several owners of shares in a copy-hold estate agreed to sell it, the purchase money was made payable by instalments, and the surrender of the premises by the vendors was, by arrangement, delayed until the whole should have been paid. Before the last instalment was payable, one of the vendors became of unsound mind, but was not found lunatic by inquisition. Thereupon a bill for specific performance of the contract became necessary.

It was held that, as the delay of the surrender had been for the convenience of both parties, there ought to be no costs given on either side, up to the hearing.

V. C. S. JAUNCEY V. THE ATTORNEY GENERAL.

Will—Construction—"Herein" in will extending to Codicil—Residuary "property" cut down to "pure personalty."

Testator, after giving legacies to charities and individuals, directed that the residue of monies to arise by sale and conversion of his real and personal estate after payment of debts and the legacies "herein" mentioned, should be divided between certain charities, and that such part of his estate as charities could not take, should be first applied in payment of legacies "herein mentioned" not given to charities.

By a Codicil he revoked the residuary bequest and varied the amounts of charitable legacies and after payment of funeral, &c., expenses, and legacies might subsequently make, gave the residue of his property to charities.

Held, that in the construction of will and codicil as one instrument, the direction in the will extended to the codicil, and that "property" must be cut down to "pure personalty."

L. C. THE ORIENTAL IRELAND S. N. CO. V. BRIGGS.

Specific performance—Public company—Application for shares—Qualified acceptance—Demurrer—Practice—Jurisdiction.

The court will not enforce the specific performance of a contract constituted by a proposal on one side and an acceptance on the other, unless that proposal is unqualified and unconditional. Accordingly, when B. had written to the directors of a company, applying for an allotment of certain shares, and undertaking to sign the articles of association, and the secretary of the company, in reply, had informed him by letter that the directors had allotted him the shares, adding that the articles of association must be signed, or, in default thereof, that the shares would be forfeited, and a bill was filed by the company against B., who had declined to sign the articles of association, stating the alleged contract and praying that B. might be compelled to sign the said articles, and such acceptance of the shares as the court might think necessary. A demurrer to the bill was allowed.

In allowing such a demurrer, although according to the present practice the court could not give leave to amend the bill, yet in order that the allowance of the demurrer might not affect the right of the plaintiffs to maintain another bill alleging a sufficient contract, the order was without prejudice to any new bill that the plaintiffs might file.

Semble, the court would have jurisdiction to enforce a contract of this description if it were in other respects a binding contract.

REVIEW.

THE LAW OF MERGER AS IT AFFECTS ESTATES IN LAND, AND ALSO CHARGES UPON LAND, by Charles J. Mayhew, of the Inner Temple, Barrister-at-Law, June 1861.

This is the title of a small but useful volume published by the well-known law booksellers and publishers, V. and R. Stevens Sons and Haynes, 26 Bell Yard, Lincoln's Inn, London, 1861. The name of that eminent firm is almost in itself a guarantee that the work bearing the impress of the firm is all that it professes to be. Much circumspection appears to be used before the firm undertakes the publication of any work either small or great. Such has, at all events, been our experience. The book before us is no exception to the rule.

The author, in his preface, truly remarks that the legal doctrine of merger is one of the most curious and subtle in our system of Jurisprudence. The doctrine applies as well to estates in land which merge by their union in the same person as to pecuniary charges which may be either lost or kept on foot according to the mode adopted in transferring or dealing with them. The author deals with both branches of the subject in a succinct and able manner.

He states that the chief object of the work is to present a re-arrangement, in a concise form, of the materials compiled by Mr. Preston. It must, however, be borne in mind, that

since the publication of Mr. Preston's able work, many important alterations have been made in the law of real property, rendering necessary corresponding alterations in the views expressed by Preston—these Mr. Mayhew has not failed to notice. His work is not only more recent than Preston's work, but because it is more recent is more reliable than that work.

The work is divided into two parts. Part I. is on Merger as it affects estates in land. The following are its contents: On the objects and origin of Merger—Estates in fee—Estates tail—Estates for life—Estates for years. Part II. is on Merger of charges upon land. The following are its contents: As to tenants in fee—As to tenants in tail—As to tenants for life.

The volume is small; its execution is neat; it is carefully written. We can safely recommend it to the patronage of our readers.—EDS. L. J.

Messrs. Rollo & Adams are the agents in Toronto for the sale of the work.

THE NORTH BRITISH REVIEW—THE EDINBURGH, THE WESTMINSTER, AND THE LONDON QUARTERLIES.—The last numbers of these several standard reviews are received from the enterprising publishers, Leonard, Scott & Co., of New York. The first paper in the North British, "History and Philosophy," deals with Mr. Goldwin Smith, Regius Professor of Modern History in the University of Oxford, in no measured terms. His writings are reviewed and his talents weighed in a fearless and we think truthful manner. This gentleman, who is constantly writing on something, and of late has written a good deal about Canada, will not feel flattered by the paper. He is one of the "busy bodies" who recently have done so much towards destroying the good feeling hitherto existing between the mother country and Canada. We cannot therefore do better than give an extract from the paper before us in regard to him. Speaking of his lectures on modern history, the Reviewer says—

Three of those discourses, specially on the "Study of History," are devoted to an exposition of the theoretical views of the writer on the mode of investigating historical questions, and on the manner in which historical inquiries ought to be conducted. These lectures, which should have contained at least a tolerably satisfactory discussion of the various aspects of which the question essentially consists, are deficient alike in close analytical skill, and in that comprehensive handling which one might naturally have expected from so high an authority as an Oxford professor. But to do these discourses justice, they are written in a most engaging style. They are often brilliant, always luminous, frequently energetic. The argument is conducted usually with wonderful force, often rising into eloquence, and with a power and beauty which almost atones—if anything could atone—for the absence of those more recondite qualities in which they are conspicuously deficient. The writer is obviously a man of a vigorous and cultivated mind, a lively imagination, and an enthusiasm and fervour of spirit which oftentimes hurries him into eloquence. But there is false eloquence as well as true. When he gets hold of a sound argument, he sends it home admirably; but when a false one comes in his way, he bestrides his mock-Pegasus like a veritable rhetorician, and carsoles it out in as jaunty a manner as the most veritable village orator. His mode of putting a thing is so exceedingly clear as sometimes to be chargeable with apparent shallowness, where no such accusation can legitimately be made against him. Depth and clearness are not contraries. He often invalidates his reasoning by starting with a false assumption, or by allowing some lurking error quietly to take the place of truth in the progress towards the conclusion. This arises, in many cases, from defective observational power. He can depict a grand scene much better than a simple one, where more heed is required. To tell a simple story simply, needs very peculiar gifts. He is not a profound reasoner, though a very vigorous one. Admirable little bits of writing occasionally turn up in those lectures; but they are too frequently marred by too much rhetoric, by too great an anxiety to say something impressive, when nothing really impressive can be said. They are exceedingly rash besides. Were it not for the elegance of his mind, and the obvious delicacy and moral beauty which he throws into almost every picture which he draws, we should be inclined to describe him as a wild bull let loose among a field of diligent cricket-players. He runs right amuck at Comte, who deserves a goring; he trips up Mr. Mill; he is in the neck of Mr. Mansel; he sneers contemptuously at poor Buckle, and has a thrust at Mr. Darwin,—always annonymously and in nearly as many words as we have occupied in the telling of it. He slashes the men of science, and pities the moral philosophers; he denounces the necessitarians, and triumphs over the "positivists." Now, even though all those acts were quite legitimate and praiseworthy, Mr. Goldwin Smith has gone about the matter in so reckless a way, that we fear that he has brought a nest of hornets about his ears, that are likely to do more than buzz. Yet he has many excellences.

Mr. Smith says much on the philosophy of moral conduct and character; much also on a more sacred subject—theology, which, with all due respect for the Professor, had much better not have been said. The fervid excited way in which he plunges and flounders about in the bottomless spaces of those tracts of knowledge is more amusing than edifying. After belabouring the ethical philosophers soundly, he asks them the question, "Is it not rather in *character* than in *action* that morality lies?" and we hope that he will get a decisive answer to his question, though probably not one quite to his mind. Would it not have been as well if Mr. G. Smith had taken the trouble of acquainting himself with what ethical speculators had written, before he began to malign them for an omission which turns out to be no omission at all? He should recollect that no man can make any progress in moral inquiry who is always looking into "society" for his examples of moral life. Unless he has the power of silently taking to pieces the fibres of his own heart, he never will be able to go into a crowd to gather up illustrations or modifications of his pre-established theories. Morality is like anatomy; there is no progress to be made in it, in the first instance, by mingling night and day with crowds of human beings, seeing them in all manner of postures, and in all sorts of moods: but let either one or the other of those inquirers get into the inside of a man for a time, after he comes out—armed with his knowledge of bone and muscle, of blood-vessel and nerve-centre, of brain and limb and hand, or of justice and unfairness, of joy and sorrow, of excitement and equanimity—take him into a crowd and see then what he can make of it. But patient observation, we remarked a little ago, is not one of Mr. Smith's best qualities. Where "essence of morality" lies, he confesses at last, "history must wait to be taught by ethical science."

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

GEORGE SUDLOW PAPPS, of the City of Hamilton, Esquire, to be a Notary Public in Upper Canada. (Gazetted August 23rd, 1862.)

JAMES ROBB, of the City of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 23rd, 1862.)

ALEXANDER FORBES, of Brighton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 23rd, 1862.)

THE HONORABLE DAVID REESOR, of the Village of Markham, to be a Notary Public for Upper Canada. (Gazetted August 30th, 1862.)

ASSOCIATE CORONERS.

WALTER R. GEIKIE, of the Village of Aurora, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel. (Gazetted August 30th, 1862.)

TO CORRESPONDENTS.

S. P. G.—Under "Division Courts."

DIARY FOR OCTOBER.

1. Wednesday...Clerk of Municipality to deliver Assessment Rolls to Collector.
4. Saturday.....Last day for notice of trial York & Peel Assizes.
5. SUNDAY.....16th *Sunday after Trinity.*
6. Monday.....County Court and Surrogate Court Term begins.
7. Tuesday.....Chancery Ex. Term London & Belleville com. Last day for notice
11. Saturday.....Co. Court & Surrogate Ct. Term ends. [Hamilton and Belleville.
12. SUNDAY.....17th *Sunday after Trinity.*
13. Monday .....York and Peel Fall Assizes.
14. Tuesday.....Chancery Ex. Term Brantford and Kingston com. Last day for
19. SUNDAY .....18th *Sunday after Trinity.* [notice Barrie and Ottawa.
21. Tuesday .....Ch. Ex. Term Hamilton and Brockville com. Last day for notice
26. SUNDAY.....14th *Sunday after Trinity.* [Goderich and Cornwall.
28. Tuesday .....Chancery Ex. Term Barrie and Ottawa commences.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

OCTOBER, 1862.

LIABILITY OF MASTER FOR ACCIDENTS TO SERVANT.

The branch of law which we propose to consider is one of modern growth. It partakes of refinements unknown to our ancestors. Owing to the increase of labor-saving machinery, and consequent use of machinery, accidents to workmen are much more frequent than formerly. Owing to this circumstance, combined with the change of law which allows the representative of a person killed by accident to sue for damages, actions to recover damages for accidents resulting in injuries to the body are become very numerous.

Most accidents are attributable to some cause or combination of causes. In the case of an employee injured by accident, the cause may be—

1. Neglect of fellow servant.
2. Neglect of master.
3. Neglect of person injured.

As to these, severally.

1. *Neglect of fellow servant.*

The mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is bound to provide for the safety of the servant, in the course of his employment, so far as he reasonably can. The servant is not bound to risk his safety in the service of the master. If he accept service, he undertakes to run all the ordinary risks incident to it. The negligence of a fellow-servant in the course of common employment, is held to be a risk of that description. When we use the term "servant," its application is not to be restricted to that of a menial. It extends to tradesmen and contractors. It extends not only to persons directly employed by the master, but to persons indirectly employed, such as persons employed by sub-contractors, provided all are employed for one and the same common work: (*Wiggett* v. *Fox*, 11 Ex. 832). A person who volunteers to assist the servants of defendant is no better position than a hired servant, so far as his remedy against the master for injuries received while in employ of the master is concerned: (*Degg* v. *Midland R. Co.*, 1 H. & N. 781; *Potter* v. *Faulkner*, 10 W. R. 93; *Abraham* v. *Reynolds*, 5 H. & N. 143). It would be absurd to hold the master liable to the servant for the neglect of a fellow-servant in putting the former into a damp bed; for the negligence of the cook in not properly cleaning copper vessels used in the kitchen; of the butcher for supplying meat injurious to health; of the upholsterer for supplying a crazy bedstead; or to hold the builder liable for the falling of a brick by a bricklayer, an axe by a carpenter, or stone by a mason. The servant must use ordinary diligence to protect himself from misadventures of this kind; and if from no fault of the master he suffers, the master is clearly not responsible.

The first case to which we shall advert is *Priestley* v. *Fowler*, 3 M. & W. The declaration stated that plaintiff was a servant of defendant in his trade of a butcher; that defendant had desired plaintiff to convey some meat in a van driven by a fellow-servant; that the van broke down, whereby the plaintiff was injured, &c. The action was held not to be maintainable. The plaintiff's right to recover was rested on the supposed obligation of the master to supply a proper van, or to take care that it was not overloaded; but the court held that the master was not liable for damage to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. In conclusion the court said—"To allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of those who serve him; and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master could possibly afford."

So where a servant of a railway company in the discharge of his duty as such, was proceeding in a train under the guidance of others of their servants, through whose negligence a collision took place, and he was killed, the action

was held not to be maintainable: (*Hutchinson* v. *The York Newcastle and Berwick Railway Company*, 5 Ex. 343.)

So where the deceased, a workman employed in the construction of the Crystal Palace, London, was killed through the neglect of a fellow-workman in letting fall an instrument called a "rymer:" (*Wigget* v. *Fox et al*, 11 Ex. 832.)

So where the servants of defendants, a railway company, were turning a truck on a turn-table, and a person assisting them was killed through the negligence of the servants of the defendants, in propelling a steam engine against him: (*Degg* v. *The Midland Railway Company*, 1 H. & N. 773.)

So where plaintiff, an engineer in the service of defendants, a railway company, engaged in running a passenger train on their line, in consequence of the neglect of a switchman, on the same line of railway, was precipitated off the line and thereby injured: (*Fearwell* v. *The Boston and Worcester Railway Company*, 4 Metcalfe 449.)

So where deceased, a miner in the employ of a mining company, was killed, while ascending a shaft of the mine, through the negligence of a fellow-servant, whose duty it was to attend to certain machinery by which the miners were let down into, and drawn up from, the mine: (*The Barton's Hill Coal Company and Reid in the House of Lords*, 4 Jur. N. S. 767.)

2. *Neglect of master.*

The neglect of the master may be either neglect to hire competent servants—to provide safe machinery—or to keep machinery in repair. The master is not under all circumstances excused from the consequences arising from the act of a fellow-servant or workman. He is only so excused when he hires competent servants. The rule is thus stated by Baron Alderson. The master is not in general responsible for an injury to a servant arising from the neglect of a fellow-servant, "when he (the master) has selected persons of competent care and skill:" (*Hutchinson* v. *The York, Newcastle and Berwick R. Co.*, 5 Ex. 351.) If the servant who caused the injury were incompetent to discharge his duty, and the injury arose from that incompetency, there is strong ground for holding the master responsible: (*The Barton's Hill Coal Company and Reid*, 4 Jur. N. S. 767). The master to discharge himself must shew at least that he used reasonable diligence in the selection of the servant: (*Tarrant* v. *Webb*, 18 C. B. 796; *Wigmore* v. *Tay*, 5 Ex. 354; *Potts* v. *The Port Carlisle Dock Company*, 2 L. T. N. S. 288.)

The question whether or not the fellow-servant or workman was competent or incompetent may become quite immaterial, if it be shewn that the machinery used was to the knowledge of the master defective, either by reason of improper construction or improper use, and that such defect produced the accident. In this case, however, the allegation of knowledge on the part of defendant must be alleged and proved or the action cannot be sustained.

Thus, where plaintiff engaged with defendant to serve on board defendant's ship as a common seamen on a special voyage, and alleged that the vessel was leaky and unseaworthy, by which the plaintiff became unwell and sustained damage—held that the declaration, in the absence of an allegation of knowledge on part of defendant, was bad: (*Couch* v. *Steel*, 3 El. & B. 402.)

So where defendant had erected a scaffold for his own use, and afterwards contracted with plaintiff to pull down a certain wall, in doing which the use of the scaffold became necessary, and one of the putlogs or cross supports of the scaffold was rotten and broke, whereby plaintiff was thrown to the ground—in the absence of proof of knowledge on part of defendant, the action was held not to be maintainable: (*McCarty* v. *Young*, 6 H. & N. 329.)

The knowledge may be brought home to the master by various circumstances, the strongest of which is personal interference: (*Ormond* v. *Hall*, 1 El. B. & E. 102.)

Thus, where defendant had employed a laborer to erect the scaffold upon which plaintiff worked. The materials of the scaffold were in a bad condition. The laborer broke several of the putlogs in trying them. One of the defendants told him to break no more—that the putlogs would do very well. This was held to be evidence to go to the jury: (*Roberts* v. *Smith*, 2 H. & N. 213).

So where plaintiff was employed in the defendant's coal pit, and in the course of his employment received an injury caused by a defect in the machinery, and it was shown that one of the defendants personally interfered in the management of the colliery (*Mellors* v. *Shaw*, 7 Jur. N. S. 845).

3. *Neglect of person injured.*

It is necessary, as a general rule, to establish not only knowledge of master but ignorance of the servant. The master cannot be held liable for an accident to his servant, simply because the master knows that machinery is unsafe, if the servant has the same means of knowledge as the master (*Williams* v. *Clough*, 3 H. & N. 258). If, after such knowledge, the servant continues in the employment, his continuance, if not negligence, is acquiescence, or perhaps more, a willingness to run all risks with his eyes open (*Assop* v. *Yates*, 2 H. & N. 768; *Skipp* v. *Eastern Counties Railway Company*, 9 Ex. 223). This rule, however, has of late been qualified. In a case where machinery by act of Parliament is required to be protected, so as to guard the persons working from danger, where a servant continues in the employment, entering upon it when in a state of safety, and in consequence of danger

accruing from the protection being decayed or withdrawn, if the servant continues, but complains of the want of protection, and it is promised to him from time to time that it shall be restored, during that period the master is considered as taking upon himself the burden of the risk (*Holmes* v. *Clarke*, 6 H. & N. 349). But if the servant, knowing the machinery to be unsafe, contrary to the express command of the master, use it or otherwise interfere with it, he is without remedy if an accident occur resulting in injury to him (*Coswell* v. *Warth*, 5 El. & B. 849). So if it can be said that the servant, by his own neglect, in any manner contributed to the accident which caused the injury (*Dynes* v. *Leach*, 26 L. J. Ex. 221; *Senior* v. *Ward*, 28 L. J. Q. B. 139).

Such is the law bearing upon the question as to the liability of the master for injuries sustained by a servant while in his employment. There is some difference of opinion as to its reasonableness. There are those who contend that the servant is not sufficiently protected by it. Indeed during last session of the Imperial Legislature, a bill was introduced to extend the liability of the master, where the accident is caused by the default of a fellow-servant; where the accident is caused to the servant by default of tackle or machinery, though the master is not proved to have had knowledge of it; and where the accident is caused to the servant by the negligence of the master in not furnishing proper machinery, the servant having undertaken or continued the work with a knowledge thereof.

This bill did not become law, and if ever again introduced must meet with a strong and steady opposition from the great manufacturers of England, every one of whom is interested in maintaining the law without amendment. We do not mean to discuss the necessity for amendment; we are content at present to deal with the law as we find it.

COUNTY COURT JUDGES IN UPPER CANADA.

The *Solicitors' Journal*, after giving a long extract from our article in the *Law Journal* for August on the Impeachment of County Court Judges, proceeds as follows:—

"We are not aware what is the precise rank or what are the special functions of county court judges in Canada; but assuming that they hold the same relative rank there as they hold in England, we cannot altogether agree with the view taken by our Canadian contemporary. So far as his remarks apply to the constitution, to the style or title of this "Court of Impeachment," and to its peculiar jurisdiction and procedure, we entirely concur. Whatever offence is worthy of "impeachment" ought not to be prosecuted except pursuant to a vote of the Legislature; and in that case its prosecution should not depend upon the will or the ability, pecuniary or otherwise, of any individual. But unless Canadian county court judges be more important personages than English functionaries of the same title, there seems to be no reason why they should not be removable in like manner. In England the Lord Chancellor, or the Chancellor of the Duchy of Lancaster, within their several jurisdictions have power to remove any county court judge for either 'inability or misbehaviour.' No farce of an 'impeachment,' is required or allowed. A great and perhaps somewhat arbitrary power is intrusted to a great functionary upon the faith of its judicious exercise under the corrective influence of public opinion, and the system has not been found unsatisfactory. It appears to us that the Legislature of Upper Canada might wisely entrust to the Provincial Chancellor, if not to the Governor-General, a similar power, and that the sooner it abolishes its Court of Impeachment the better it will be for its own reputation and for that of its judiciary.

Our cotemporary is wrong in the assumption that our county court judges rank no higher than county court judges in England. They are, we beg to say, "much more important personages than English functionaries of the same title." Our county courts are courts of record, having the like practice and mode of procedure as the Superior Courts and are inferior to the Superior Courts of Common Law only in amount of jurisdiction. They have jurisdiction in all personal actions (excepting libel, slander, criminal conversation and seduction) where the debt or damages claimed do not exceed $200 (£50) and in all cases relating to debt, covenant, and contract, where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant to $400 (£100). In point of territorial jurisdiction, our county courts have authority throughout the whole of Upper Canada quite as much as the Superior Courts. Besides, the judges hold office during good behaviour in like manner as do the judges of the Superior Courts.

These are our reasons for treating an erring county court judge, if any such, with more consideration than a defaulting bank clerk or wayward errand-boy.

FEES TO PUBLIC OFFICERS.

Shortly after the article on this subject, which appeared in the last number of the *Law Journal*, was written, *Ex parte Poussett and the Corporation of the County of Lambton* was decided in the Queen's Bench. The case is not reported. A note of it appears in the proper place in this number. The court held that it is the duty of county corporations to pay, in the first instance, all accounts for fees properly payable to officers concerned in the administration of justice, and afterwards to look to the Government to be reimbursed. The court also held that such accounts must be audited by the magistrates in sessions before payment can be exacted. The decision is of much interest not only to the public officers concerned but to county councils.

JUDGMENTS.

QUEEN'S BENCH.

Present: McLEAN, C. J.; BURNS, J.; HAGARTY, J.

September 22, 1862.

Regina ex rel. Secker v. *Paxton.*—Rule nisi for mandamus discharged with costs.

Ex parte Poussett and the Corporation of the County of Lambton.—Application for a mandamus. *Held* that county auditors have nothing to do with the accounts of the clerk of the peace in the first instance. His accounts must be audited by magistrates in sessions. Rule discharged, but without costs.

Great Western Railway Company v. *The Desjardins Canal Co.*—Rule absolute to rescind order of McLean, C. J., and leave given to defendants to plead *non est factum* and release, on payment of all costs.

Sloane v. *Creasor.*—Action against sureties of Division Court bailiff. Appeal from decision Judge County Court of Simcoe. Dismissed with costs.

Moore v. *Hynes.*—Action on covenant against incumbrances. Question whether sewerage rate in the city of Toronto a charge on the land or on the owners in respect thereof. *Held* not to be a charge on the land. Judgment for defendant.

The Queen v. *Sheridan.*—Appeal from decision of Quarter Sessions refusing new trial. Dismissed with costs.

Todd v. *Snyder.*—Judgment reversed and repleader awarded.

Ryan v. *Miller.*—Action for seduction. Rule absolute to enter nonsuit.

Reed v. *Draper.*—Rule absolute for new trial on payment of costs and payment of £75 into Court in ten days, else rule discharged.

Present: McLEAN, C. J.; BURNS, J.; HAGARTY, J.

September 27, 1862.

Coulson v. *Parks.*—Rule discharged.

Hamilton v. *McDonald.*—Rule discharged on appeal.

Moffatt v. *White.*—Stands till next term.

In re Provisional Warden County of Bruce.—Stands till next term.

Austin v. *Corporation County of Simcoe.*—Rule disharged with leave to plaintiff to appeal, or within a fortnight to accept a nonsuit.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

September 22, 1862.

Carveth v. *Fortune.*—Rule absolute for new trial without costs, on the ground of rejection of evidence.

Haskill v. *Fraser.*—Rule absolute to enter nonsuit.

Turley v. *Rosebush.*—Appeal from County Court dismissed with costs.

Ockerman v. *Blacklock.*—Appeal allowed without costs. *Semble* county judges should return copies of their opinions, not simply "rule discharged or rule absolute."

Howell v. *Allport.*—Postea to plaintiff.

McCance v. *Bateman.*—Appeal allowed and nonsuit set aside.

Sills v. *O'Halloran.*—Appeal allowed. Rule absolute to enter nonsuit.

Shaw v. *Shaw.*—Appeal dismissed with costs.

Caverill v. *Orris.*—Rule absolute for nonsuit.

Van Every et al. v. *Sims.*—New trial on payment of costs, as learned Chief Justice not satisfied with verdict.

Cameron et al. v. *Stevenson.*—Rule absolute.

Shipman v. *Grant.*—Rule discharged, and judgment for defendant on demurrer.

Trustees St. Andrew's Church v. *Great Western Railway Co.*—Rule absolute to appoint an arbitrator.

Cooper v. *Franklin.*—Rule discharged.

Smart v. *The Detroit and Niagara River Railway Co.*—Rule discharged with costs.

Modeland v. *McGuire.*—Judgment for plaintiff on demurrer, with leave to amend on terms.

Bryce v. *Beattie.*—Appeal allowed.

Thompson v. *Falconer.*—New trial without costs.

Don v. *Ogilvy.*—Postea to plaintiff.

Don v. *Law.*—Postea to plaintiff.

Tait v. *Lindsay et al., executors, &c.*—Rule discharged.

Graham v. *Brown.*—Rule discharged.

Dollery v. *Whaley.*—Stands enlarged.

Robinson v. *Potter.*—Rule discharged with costs.

In re Bright and the City of Toronto.—So much as relates to 19th section of by-law absolute with costs.

Metcalf v. *Widderfield.*—Rule discharged with costs.

Titus v. *Durkee.*—Rule absolute to enter verdict for defendant.

Lake v. *Parry.*—Appeal dismissed with costs.

Morris v. *Cameron.*—Judgment for defendant on demurrer.

Regina v. *Town of Paris.*—Judgment on demurrer for the Crown.

Gillespie v. *The City of Hamilton.*—*Nolle prosequi* to be entered according to agreement of parties.

In re Registrar of North Waterloo.—Rule absolute for mandamus.

Griffin v. *Judson.*—Appeal allowed. New trial.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

September 27, 1862.

Ireson v. *Mason.*—New trial without costs, on ground of misdirection.

English v. *Clark.*—Appeal allowed. Rule for new trial in court below discharged.

Carry v. *Wallace.*—Appeal dismissed with costs. No proof of contract express or implied.

Baldwin v. *Elliott.*—Rule absolute for new trial. Costs to abide the event.

Young v. *Edmondstone et al.*—Appeal dismissed with costs.

Regina v. *Ewing.*—As defendant tried a second time improperly court refuse to deliver judgment.

Hodgins v. *Hodgins.*—No judgment. Stands.

Fisher v. *Jameson.*—Stands.

Carruthers v. *Reynolds.*—Stands.

NEW COMMON LAW RULE.

TORONTO, Trinity Term, 26 Victoria.

It is ordered, that in all appeals from the County Courts, in all cases where the bond required by the sixty-seventh and sixty-eighth sections of the County Courts Act is executed, perfected and produced to the Judge of the County Court whose decision is appealed from, as required by the said statute, on or before the first day of the term of the Court appealed to next after the date of such bond, the case appealed shall be set down to be heard on the first or second paper day of such term; and that if the case be

not so set down, the appeal shall be considered and treated as abandoned, and the party in whose favor the decision of the court below has been pronounced shall be at liberty to proceed in the cause as if no proceeding to appeal the same had been taken.

(Signed) A. McLean, C. J.
Robert E. Burns, J.
John H. Hagarty, J.
W. H. Draper, C.J. C.P.
Wm. B. Richards, J.
Joseph C. Morrison, J.

NEW TARIFF OF FEES FOR THE CLERKS OF THE PEACE.

Trinity Term, 26th Victoria,
5th September, 1862.

Whereas, the Table of Fees confirmed by the Judges of the Court of Queen's Bench, on the 15th November, 1845, applicable to Sheriffs, Clerks of the Peace, Constables, and Criers, for services rendered in the administration of Justice, and for other County purposes, has become inapplicable in many respects to the duties as now performed by the respective Clerks of the Peace for the several Counties of this Province, and new duties have been assigned to the Clerks of the Peace since the making of the said Table;

And whereas, by the consolidated Acts of Upper Canada, ch. 119, sec. 2, the said Table of Fees was to continue until otherwise appointed: and power was thereby given to the Chief Justices and other Judges of the Superior Courts of Common Law, at Toronto, from time to time, as occasion requires, by rule or rules by them to be made in Term-time, to appoint the fees to be taken and received by such Sheriffs, Coroners, Clerks of the Peace, Constables and Criers, for such services as aforesaid;

First. — It is ordered, under and by virtue of such authority, that with respect to the duties performed by the several Clerks of the Peace, in the several Counties of this Province, the Table of Fees in the Schedule hereto annexed, shall be substituted for and taken in lieu of such Table of Fees.

Second.—That the Table of Fees in the Schedule hereto annexed, shall not be construed as interfering with the Orders made by the Judges of the Court of Queen's Bench, on the 15th November, 1845, further than as an alteration of the Fees to be taken by the Clerks of the Peace, for the several services stated in the Schedule hereto annexed.

(*Signed,*) Arch'd McLean, C.J.
Wm. H. Draper, C.J., C. P.
Robert E. Burns, J.
Wm. B. Richards, J.
John H. Hagarty, J.
Jos. C. Morrison, J.

SCHEDULE OF FEES.

To be taken and received by the Clerks of the Peace in this Province, in lieu of the Table established on 15th November, 1845.

	To be paid out of the Co. Fund.	To be paid by party applying.
	$ cts.	$ cts.
1. For drawing Precept to Summon the Grand and Petit Jury, attending Justices to sign same, and transmitting to the Sheriff	4 00	
2. Attending each general Quarter Sessions	6 00	
3. Making up Record of each general Quarter Sessions	10 00	
4. Notice of every appointment of a Constable, under 23 Vict., ch. 8, or other officer appointed by the Justices in Sessions, and notice of any order made by the Quarter Sessions, when required to be notified to any person or party	0 20	
5. Subpœna	0 50	0 50
6. Bench Warrant	1 00	
7. Every Recognizance of the Peace for good behaviour	1 00	
8. For discharging the same	0 50	
9. Making up Estreats of each Session	1 00	
10. Every allowance of Certiorari (to be paid by the party applying)		1 00
11. Furnishing to Sheriff and Coroners revised lists of Constables, whenever ordered to be done by the Justices in general Quarter Sessions	1 00	
12. Reading any Statute or public Proclamation, when required to be done by law	0 25	
13. Copies of Depositions or Examinations furnished to Prisoners, Defendants, or their Counsel, when required, each folio of 100 words (to be paid out of the County funds, or by the party applying, according to the nature of the case)	0 05	0 05
14. Receiving, filing, and reading each Presentment of the Grand Jury	0 50	
15. For copy thereof forwarded to the Government, or to the County Council, when directed by the Quarter Sessions	0 50	
16. Arraigning each Prisoner or Defendant indicted, (to be paid out of the County funds, or by the party applying, as the case may be)	0 50	0 50
17. Empannelling and swearing the Jury in every case, whether criminal or otherwise, where by law a trial by Jury is to be had at the Quarter Sessions, and when no fee is fixed by statute: (to be paid out of the County funds, or by the party, as the case may be)	0 50	0 50
18. Swearing each Witness upon any trial by a Jury, or to go before the Grand Jury: (to be paid out of the County funds, or by the party, as the case may be)	0 20	0 20
19. Filing each Exhibit on a trial: (to be paid out of the County funds, or by the party, as the case may be)	0 08	0 08
20. Every Subpœna Ticket, or copy of Subpœna, when necessary: (to be paid out of the County funds, or by the party applying, as the case may be)	0 20	0 20
21. Charging the Jury with the Prisoner or Defendant, upon each indictment: (to be paid out of the County funds, or by the party, as the case may be)	1 00	1 00

	To be paid out of the Co. Fund.	To be paid by party applying.
	$ cts.	$ cts.
22. Receiving and recording each Verdict of a Petit Jury, in any case of trial by Jury, (to be paid out of the County funds, or by the party, as the case may be)	0 50	0 50
23. Recording each Judgment or Sentence of the Court upon a Verdict or Confession, to be paid out of the County funds, or by the party, as the case may be)	0 50	0 50
24. Making out and delivering to the Sheriff a Calendar of the Sentences at each Court	1 00	
25. Certified copy of Sentences sent with the Prisoners to the Penitentiary, after each Session	0 50	
26. Making up Record of Conviction or Acquittal, in any case where it may be necessary: (to be paid out of the County funds, or by the party applying, as the case may be,) per folio of one hundred words	0 10	0 10
27. Every Copy or Extract of a Record or Paper of any kind, required to be made by Law, or by Order of the Justices in Sessions, or for the Information and use of the Government, when required, and where no charge is fixed by law—if the same shall be less than 10 folios of one hundred words each	1 00	1 00
28. If above 10 folios, then for each folio	0 10	0 10
29. Discharging any Prisoner by Proclamation	0 50	
30. Drawing bill of Costs, including taxation (to be paid by the party), and filing the same where necessary to be made and filed, as in cases of Assault, Nuisances or the like, and in Appeals		0 50
31. Drawing out and taking each Recognizance to appear, either of Prosecutor, Defendant, or Witness	0 50	0 50
32. Calling parties on their Recognizance, and recording their non-appearance, for each person called: (only to be charged where the parties do not answer)	0 25	0 25
33. Drawing order of the Justices to Estreat and put in Process: (on the whole list)	0 50	
34. Entering any Order of Sessions, or of the Chairman with two Justices, to remit any Estreat, and recording an Entry of the same: (to be paid out of the County funds, or by the party relieved, as may be ordered)	0 25	0 25
35. Entering and Extracting upon a Roll in duplicate, the fines, issues, amerciaments, and forfeited Recognizances, recorded in each Session, making Oath to the same, and transmitting to the Sheriff	2 00	
36. Making out and delivering to the Sheriff the writ of *fieri-facias* and *capias* thereon.	0 50	
37. Making out and certifying copy of Roll and return of the Sheriff, and transmitting it to the Receiver-General	1 00	
38. Making up Book of Orders of Sessions, declaring the limits of the Division Courts, and entering the times and places of holding the Courts	1 00	
39. Making out and transmitting a copy thereof to the Government	1 00	
40. Making out and transmitting copies (with letter to the Clerks of each Division Court, of the divisions made by the Q. Sessions,	1 00	

	To be paid out of the Co. Fund.	To be paid by party applying.
	$ cts.	$ cts.
41. Drawing Orders of Sessions for altering the limits of Division Courts	1 00	
42. Making out and transmitting copies of such Orders to the Government	0 50	
43. Making out and transmitting copies of such Orders to each Division Court affected by the alteration	0 50	
44. For each copy of Schedule of the Division Courts, with the order of Sessions, for publication	0 50	
45. For every Search under three years: (to be paid by the party making the search).		0 20
46. For the same extending over three years		0 50
47. For every Certificate required of proof of a Deed, to be paid by the party applying for the same		1 00
48. For every other Certificate required by law or by order of the Sessions, to be given, where the same is under five folios: (to be paid out of the County funds, or by the party applying for the same, according to the nature of the case)	0 50	0 50
49. For the same, if more than five folios, per folio	0 10	0 10
50. Copying orders of Court, and causing same to be published, where it is requisite, for each order, exclusive of the expense of publication	0 50	
51. Receiving and filing affidavit of Bastardy, to be paid by the party producing it		0 25
52. Receiving and filing each Tender for any public work, or supply, or printing, or other service	0 25	
53. Making out a list of the several tenders on each occasion, as they are opened, specifying the names, prices, and other particulars, and filing the same, when required to be done by the Justices	0 50	
54. Drawing Bonds or Agreements for the delivery of articles, or for doing the work for the Gaol or other County purposes, and attending execution, when required by the Justices	1 00	
55. Receiving and filing accounts and demands at the General Quarter Sessions, preferred against the County, in each Session, numbering them, and submitting them for audit, and making out the cheques	4 00	
56. Making out and delivering lists of orders on the Treasurer, made at each Court of Quarter Sessions	2 00	
57. Making out and transmitting to the Inspector General, a return or Schedule of all Convictions which have taken place before any Justice or Justices, or before the Court, each list	1 00	
58. Making out the annual account to be laid before the Grand Jury at the Quarter Sessions (*vide Consol. Stat. U. C. ch.* 122), of the sum necessary to be provided for the maintenance of insane persons	1 00	
59. For every report or return required by Statute, or by the Government, where no remuneration has been provided by this Table, or Statute	1 00	
60. Making and transmitting a return to the Government of Justices and Coroners who have taken the Oaths, when required to be done, for each return	1 00	

	To be paid out of the Co. Fund.	To be paid by party applying.
	$ cts.	$ cts.
61. Drawing every special Order of the Court of Quarter Sessions, necessary to be communicated to any party, and entering it on Record	0 50	
62. Letter, and transmitting or delivery to the party interested or affected thereby	0 25	
63. Swearing each party to an Affidavit, where no charge is elsewhere provided for it: (to be paid out of the County funds, or by the party for whom the Affidavit is sworn, according to nature of case)	0 20	0 20
64. Causing notice to be published of any special or adjourned Sessions, when directed by the Chairman of the Quarter Sessions, or other two Justices, so to do: (exclusive of the amount paid the printer for publication)	1 00	
65. Sending notice of any such Session to the Justices individually, when it may be directed by the Chairman, or other two Justices, for each notice	0 10	
66. Attending each adjourned or Special Sessions, and making up Record thereof	2 50	
67. Receiving and filing Notices of Appeal, and the Appeal from any Judgment or Conviction by one or more Justices, where an Appeal to the Quarter Sessions is given by law: (to be paid out of the County funds, or by the party appealing, as the case may be)	0 25	0 25
68. When the Appeal called on, reading the Conviction, Notice of Appeal, and Recognizance: (to be paid out of the County funds, or by the party appealing, as the case may be)	0 50	0 50
69. For all other Services upon the trial of such Appeal case, when tried by a Jury, including the receiving and recording the Verdict, the same charges as in ordinary Criminal Trials: (to be paid out of the County funds, or by the party, as the case may be)		
70. Issuing Process to enforce the Order of the Court in any Appeal case: (to be paid out of the County funds, or by the party, as the case may be)	1 00	1 00
71. Making out Warrant of Distress or Commitment, in any case where no fee is specially assigned therefor in any Statute, or in this Table	1 00	
72. Drawing certificate of approval by the Justices in Sessions, of sureties tendered by the Sheriff: (to be paid by the Sheriff)		0 50
73. Administering Oaths to any Public Officer, when authorised so to do: (to be paid by the Officer)		0 25
74. Receiving and filing each Oath of Qualification of a Justice of the Peace	0 25	
75. All Letters written to the Government, all Letters written by direction of the Chairman, or of the Justices in Sessions, to Justices, Coroners, or Constables, or others, upon special business connected with the administration of Justice, or County purposes	0 25	
76. For distributing the Statutes to the Justices and County officers, or others, when directed by the Statute or the Government so to do, and taking receipts therefor from each Justice or Officer	0 10	
77. For accounting to the County Member for the copies of Statutes not called for by the Justices and County Officers, and delivering the same to him, whenever such duty shall be required by Statute, or by the Government—and no other fee allowed	1 00	
78. For procuring and supplying to Clergymen and Ministers all Books and Forms required under the Consol. Acts, U. C., ch. 72, for each Book with the necessary set of Forms	0 25	
79. For forwarding the Returns directed by the Census Act, Consol. Stat. Can., ch. 23, annually	0 50	
80. For receiving and Filing Voters Lists under the Election Law, Con. Acts, Can., ch. 6, sec. 6, sub-sec. 2, each list	0 25	
81. For attending and producing before County Judge the Duplicate List, when required by the Judge to do so, under sub-sec. 8 of the same	0 50	
82. For filing each List, Return, or other Paper, where no charge is specially provided for, except Accounts and Claims against the County, and papers connected with matters to be charged against private individuals: (to be paid out of the County funds, or by the party for whom the service is rendered, according to the nature of the case)	0 08	0 08

(*Signed*,) A. McLean, *C.J.*
Wm. H. Draper, *C.J.*, *C.P.*
Robert E. Burns, *J.*
Wm. B. Richards, *J.*
John H. Hagarty, *J.*
Jos. C. Morrison, *J.*

SELECTIONS.

SIR A. McNAB, BART.

The Canadian Bar has recently lost one of its foremost and most patriotic citizens; a man who reflected honour on the legal profession, to which he belonged; a man who, in more than one capacity, so served his Queen that he may fairly be reckoned among the *optimé de patriâ meriti*. Sir Allan Napier MacNab, Barrister-at-law (at one time Prime Minister of Canada), died at Hamilton, on the 8th of August, after a short, but severe illness, at the age of 64.

Allan Napier MacNab was born on the 19th Feb., 1798. His grandfather, Robert Macnab, of Dundurn, Perthshire (who sprung from the ancient Highland family of Machâ Nab), was a captain in the 42nd Higlanders, and by his wife one of the Stuarts of Ardvorlich) had issue, a brave officer, Allan McNab, lieutenant in the 3rd dragoons, who went to the province of Canada as aide-de-camp to General Simcoe, when Canada was "a dense and unpeopled wilderness," and ultimately settled there, having married a lady of the noble house of Napier, the daughter of our then Commissioner of the port of Quebec. Of this marriage the subject of our present

notice was the issue. Born and educated in the colony, he was little more than fourteen years of age when he volunteered to join the grenadiers of the 8th regiment in the attack on the Americans, when most of the company were killed. After the campaign of 1814-15 he was actually gazetted to an ensigncy in the British Army; but when the reduction in the line took effect in 1816, he found himself without employ, and, being of an active disposition, he repaired at once to Toronto to study law, and in due course of time—we believe about the year 1823—was called to the Canadian bar, at which he practised with considerable success. He now took up his residence at Hamilton, which soon began to feel the effects of his energy and ability, and was gradually raised from a second-rate municipality to a flourishing city. An address presented to him late in life by the members of the Canadian bar placed upon record the high opinion entertained of his honour, ability and integrity among his own profession, and we regret that we have not space to repeat it here.

In 1830, Allan MacNab had gained so wide a reputation as a lawyer, a man of business and practical sense, that he was solicited to offer himself as a candidate for the representation of the county of Wentworth, in the Parliament of Upper Canada; and he was successful in his first attempt to enter upon public life. He had not held a seat in the local legislature for many years before he was chosen as speaker of the province, and in that capacity was most actively engaged in 1837-8 in the suppression of the Canadian rebellion, headed by Mr. Papineau, who (it so happened) had been recently elected to the speakership of the Parliament of Lower Canada. Sir F. B. Head, in some of his published works, places on record in full detail the patriotic conduct of Sir Allan MacNab on this occasion; but adds, somewhat sarcastically it must be owned, in reference to the reluctance of the Home Government to bestow on the subject of this memoir any higher reward than the mere barren honour of knighthood, that the two speakers fared much alike, for "while the rebel was forgiven, the patriot was forgotten." Nor can the remark be censured as entirely undeserved, or even as a great exaggeration; for Lord Durham not only pardoned the leaders of the outbreak, but even heaped upon them honours which, whether prudently disposed or not, were very strongly grudged by the loyalist party, while their own services were scarcely recognised. We remember, observes a local writer, that a singular scene in the House of Assembly between Sir Allan Macnab and a prominent speaker of the extreme radical party, caused great amusement at the time. A Mr. Simpson, who had married Mr. Roebuck's mother, was speaking in favour of M. Girouard, who had been commander of the rebel force at St. Eustache, and whom the Government had appointed Commissioner of Crown Lands. Sir Allan rose, and, bowing to the Speaker, begged leave to ask Mr. Simpson if this was the M. Girouard for whose apprehension a reward of 500*l.* had been offered? Mr. Simpson—"Yes." Sir Allan—"Was he apprehended, and was the reward paid?" Mr. Simpson—"Yes." To whom was the money paid?" Mr. Simpson—"To myself." Sir Allan—"Then if there was no mistake, and if the Government appointed M. Girouard a commissioner, you will of course, return the money?" Mr. Simpson—"Oh no! I have spent it." Sir Allan—"I thought, Mr. Speaker, that these facts might as well come from the hon. member (bowing to him) as the best authority." It is almost superfluous to add that the remark was followed with roars of laughter.

The patriotic conduct of Sir Allan McNab was also exhibited in the seizure of the *Caroline*, which had been sent by some leading Americans to keep open communication between the rebels and the United States. As is well known to every reader of Sir Francis Head, and indeed to every one who has perused the parliamentary debates, he set the vessel on fire and sent her over the falls of the Niagara, seizing her at a moment when her crew were ashore. His gallant conduct on this occasion was publicly defended by Lord Palmerston in the lower House, and (if we remember right) by the late Duke of Wellington in the upper House of the Imperial Legislature, and in July 1838 Sir Allan MacNab received, by patent, the honour of knighthood.

When the union between the Legislatures of Upper and Lower Canada was effected, Sir Allan lost his emoluments as Speaker of the Assembly. He, however, took office in more than one subsequent ministry, and in 1856 was appointed to the responsible post of Premier. This office he held under the last year of Lord Elgin's administration as Governor-General, and under the first of that of Sir Edmund Head.

On the 5th Feb. 1858 Sir Allan was created a Baronet of the United Kingdom, thus receiving from Lord Palmerston a tardy, but by no means excessive, reward for public services of more than a quarter of a century in duration. Soon afterwards, on visiting England, he was nominated honorary colonel in the English army and aide-de-camp to the Queen. It was understood that the latter honour was bestowed upon him by her Majesty herself, to mark her sense of his energy and ability in enrolling a militia force in the province of his adoption. He contested Brighton at the last general election, upon moderate Conservative principles but without success.

Sir Allan MacNab was twice married, but as he has left no issue male his baronetcy has become extinct. His first wife, whom he espoused in 1821, was Elizabeth, daughter of Lieutenant D. Brooke, by whom he had a son, who died in infancy, and also a daughter, married in 1849 to Mr. John Salusbury Davenport, a deputy-commissiary-general; his second wife, whom he married in 1831, was Mary, daughter of Mr. J. Stuart, sheriff of Johnstowne district, by whom he has left two daughters both surviving, viz. Sophia, married on the 15th Nov. 1855 to the Right Hon. Viscount Bury, M.P., Comptroller of her Majesty's Household, and formerly superintendent of Indian affairs in Canada; and Mary Stuart, married in Sept. 1861 to John George Daly, Esq., son of Sir Dominic Daly, governor of South Australia. Sir Allan leaves also a surviving sister to lament his loss.—*Law Times.*

MR. JUSTICE TALFOURD'S SKETCH OF SIR WILLIAM FOLLETT.

As we announced to our host our intention to depart on the following day, he brought us his record of visitors for the customary inscription of our names; and, turning over the pages, I was startled by the traces of a well-known hand, tremulously indicating the presence of "Sir W. Follett," when on a journey—too late, alas!—in search of renovated strength, in the autumn of 1844. Since then, the calamity which impended over that celebrated lawyer has occurred: what an extinction, how sadly premature, how awfully complete! The contrast between life and death never seemed to me so terribly palpable as in this reminiscence thus awakened; the action of the life had been so fervid, the desolation of the grave was so rayless. Before me lay an expiring relic—for the writer was stricken mortally when he traced it—of a life of the most earnest endeavors and the most brilliant successes—a life loved, prized, cherished, honored, beyond the common lot even of distinguished men—the life of an advocate who had achieved, with triumphant ease, the foremost place in a profession which in its exercise involves intimate participation with the interests, hopes, fears, passions, affections, and vicissitudes of many lives; the life of a politician admired by the first assembly of free men in the world, idolized by partisans, respected by opponents, esteemed by the best, consulted by the wisest, whose declining health was the subject of solicitude to his sovereign—quenched in its prime by too prodigal a use of its energies—and what remains? A name dear to the affections of a few friends—the waning image of a modest and earnest speaker—and the splendid example of success embodied

in a fortune of £200,000, acquired in ten years by the labors which hastened its extinction—are all this world possesses of Sir William Follett. The poet's anticipation, "Non omnis moriar," so far as it indicates earthly duration, has no place in the surviving vestiges of his career. To mankind, to his country, to his profession, he has left nothing; not a measure conceived, not a danger averted, not a principle vindicated; not a speech intrinsically worthy of preservation; not a striking image, not an affecting sentiment: in his death the power of mortality is supreme. How strange—how sadly strange—that a course so splendid should end in darkness so obscure! It may be well, while the materials for investigation remain, to inquire into the causes of success so brilliant and so fairly attained by powers which have left so little traces of their progress. Erskine was never more decidedly at the head of the Common Law Bar than Follett; compared with Follett, he was insignificant in the House of Commons; his career was chequered by vanities and weaknesses from which that of Follett was free; and yet, even if he had not been associated with the greatest constitutional questions of his time, and their triumphant solution, his fame would live by the mere force and beauty of his forensic eloquence as long as our language. But no collection of the speeches of Follett has been made, none will ever be attempted; no speech he delivered is read, except perchance as part of an interesting trial, and essential to its story; and then the language is felt to be poor, the cadences without music, and the composition vapid and spiritless; although, if studied with a view to the secrets of forensic success, with "a *learned* spirit of human dealing," in connection with the facts developed and the difficulties encountered, it will supply abundant materials for admiration of that unerring skill which induced the repetition of fortunate topics, the dexterous suppression of the most stubborn things when capable of oblivion, and the light evasive touch with which the speaker fulfilled his promise of not forgetting others which could not be passed over, but which, if deeply considered, might be fatal. If, however, there was no principle of duration in his forensic achievements, there can be no doubt of the esteem in which they were held or the eagerness with which they were sought. His supremacy in the minds of clients was more like the rage of a fashion for a youthful Roscius or an extraordinary preacher than the result of deliberate consideration; and yet it prevailed, in questions not of an evening's amusement, but of penury or riches, honor or shame. Suitors were content, not only to make large sacrifices for the assured advantage of his advocacy, but for the bare chance—the distant hope—of having some little part (like that which Phormio desires to retain in Thais) of his faculties, with the certainty of preventing their opposition. There was no just ground, in his case, for the complaint that he received large fees for services he did not render; for the chances were understood by those who adventured in his lottery; in which, after all, there were comparatively few blanks. His *name* was "a tower of strength," which it was delighted to know that the adverse faction wanted, and which inspired confidence even on the back of the brief of his forsaken junior, who bore the burden and heat of the day for a fifth of the fee which secured that name. Will posterity ask what were the powers thus sought, thus prized, thus rewarded, and thus transient? They will be truly told, that he was endowed in a remarkable degree with some moral qualities which smoothed his course and charmed away opposition, and with some physical advantages which happily set off his intellectual gifts; that he was blessed with a temper at once gentle and even, with a gracious manner and a social temperament; that he was without jealousy of the solid or showy talents of others, and willingly gave them the amplest meed of praise; that he spoke with all the grace of modesty, yet with assurance of perfect mastery over his subject, his powers, and his audience; and yet they will scarcely recognise in these excellences sufficient reasons for his extraordinary success. To me, the true secret of his peculiar strength appeared to lie in the possession of two powers which rarely coëxist in the same mind—extraordinary subtility of perception, and as remarkable simplicity of execution.—*Sequel to Vacation Rambles.*

SIR MATTHEW HALE.

The following precepts, in the handwriting of Sir Matthew Hale, were found among his papers after his death. It is a code worthy of the learned Judge who rightly observed it.

"That in the administration of Justice, I am entrusted for God, the king and country; therefore, that it must be done rightly, deliberately, resolutely."

"That I rest not on my own understanding or strength, but implore and rest upon the direction and strength of God."

"That in the execution of judgment, I carefully lay aside my own passions, and not give way to them, however provoked."

"That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unreasonable and interruptions."

"That I suffer not myself to be prepossessed with any judgment at all, 'til the whole business and both parties be heard."

"That I never engage myself in the beginning of any cause, but reserve myself unprejudiced 'til the whole be heard."

"That in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country."

"That I be not too rigid in matters purely conscientious, where all the harm is diversity of judgment."

"That I be not biased with compassion to the poor, or favour the rich, in point of justice."

"That popular, or court applause, or distaste, have influence in any thing I do, in point of distribution of justice."

"Not to be solicitous what men say or think, so long as I keep myself exactly according to the rules of justice."

"If in criminals it be a measuring cast, to incline to mercy and acquittal."

"In criminals that consist merely in words, when no mere harm ensues, moderation is no injustice."

"In criminals of blood, if the fact be evident, severity is justice."

"To abhor all private solicitations, of what kind soever, and by whomsoever, in matters depending."

"To charge my servants not to interpose in any business whatsoever; not to take more than their known fees; not to give any undue precedense to causes; not to recommend counsel."

"To be short and sparing, at meals, that I may be the fitter for business."

LEGAL NOTES AND ANECDOTES.

A bailiff who had been compelled to swallow a writ, rushing into Lord Norbury's court to proclaim the indignity done to justice in his person, was met by the expression of a hope that the writ was "*not returnable* in this court."

Lord Campbell mentions that Lord Erskine, when Lord Chancellor, in one of his judgments, observed, "Lord Coke considers the word *lunaticus* as by no means material, classing it with *amens* and *demens*, and there is no doubt that the moon

has no influence over lunatics;" and he notices that Vesey, jun., the reporter, represents this as a point of law decided by Lord Erskine, and puts in the margin of his report "In cases of lunacy, the notion that the moon has an influence is erroneous."

An old English statute commenced by an enactment relating to the admission of attorneys, and finished by prohibiting the importation of horned cattle.

A few years ago, a learned M. P. brought in a bill with the double object of providing public prosecutors for England, and making it a statute offence for a servant to steal his master's corn for the purpose of feeding the master's horse.

Sir Matthew Hale did not extend his supremacy over the entire See of the Criminal Law; and therefore, when Lord Campbell writes of his History of the Pleas of the Crown, that it is a "*complete* digest of the Criminal Law as it existed in Sir M. Hale's day," he must be understood as expressing, in an equitable sense, that what was intended to be done was done.

It has been said of Blackstone's Commentaries that they have been so often patched, that they will soon resemble Sir John Cutler's *silk* stockings, from which every particle of silk had been displaced by darnings of worsted.

It was pleaded on behalf of a Hundred charged with a loss incurred by robbery on Gad's Hill, that time out of mind, it had been customary to rob upon Gad's Hill.

Kelynge reports:—"At the Lent Assizes for Winchester (18 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners, being about to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all; and yet the bishop's clerk, upon the demand of "*legit* or *non* legit?" answered "legit." And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, "*legit*." Then I bid the clerk of assize not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court; and so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read. Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks,"

A searcher after something or other, running his eye down the index of a law-book through letter B, arrived at the reference "Best—Mr. Justice—his great mind," Desiring to be better acquainted with the particulars of this assertion, he turned to the page referred to, and there found, to his entire satisfaction, "Mr. Justice Best said he had a great mind to commit the witness for prevarication."

A translator of Latin law-maxims translated "messis sequitur sementem," with a fine simplicity, into "the harvest follows the seed-time;" and "actor sequitur forum rei," he made "the agent must be in court when the case is going on."

At a sitting of the Dublin Court Exchequer, Baron Richards found it necessary to administer a rebuke to Mr. Whiteside, Lord Derby's Irish Solicitor-General. Mr. Whiteside demanded, in a declamatory manner and in an unusual style, that the court should give its reasons for the course taken in this case, and expressed regret that there was no appeal from its decision. Baron Richards said, he had too much reliance upon the gentlemen of the bar to fear that such a style of addressing the court would be adopted as a precedent. "Mr. Whiteside has referred to the performance of my duty as a Commissioner in the Incumbered Estates Court," said the judge; "he has no right to inflict upon me the odium of his panegyric. I disclaim his comment, and reject his praise."

In the Statutes at Large some funny things may be found. There is one which is not to be brought to book, and must be given as a tradition of the time when George III. was King. Its tenor is, that a bill which proposed, as a punishment of an offence, to levy a certain pecuniary penalty, one half thereof to go to his Majesty and the other half to the informer, was altered in committee, in so far that, when it appeared in the form of an act, *the punishment* was changed to whipping and imprisonment, the *destination* being left unaltered.

Bentham was at the trouble of counting the words in one sentence of an Act of Parliament, and found that, beginning with "Whereas" and ending with the word "repealed," it was precisely the length of an ordinary three-volume novel.

The Irish statute-book opens characteristically with "An Act that the King's officers may travel *by sea* from one place to another within *the land* of Ireland."

Many very ancient works have no title-pages, but commence thus, *Hoc Incipit, &.* A gentleman of more ambition than capacity, coming into possession of such a volume, had it very handsomely bound, causing it to be lettered thus: "Works of Hoc Incipit. Rome. 1490."

In a carriage case before the Queen's Bench, Mr. Hawkins had frequently to advert to that description of vehicle called a "Brougham," which he pronounced in proper dissyllabic form. Lord Campbell suggested that the word was as frequently contracted to "broom," which was just as well known, and the use of which would save a syllable. Henceforward Mr. Hawkins called it "broom." Presently the argument turned on omnibuses, and Lord Campbell frequently used the word "omnibus," to which he gave its due length. "I beg your Lordship's pardon," retorted Mr. Hawkins, "but if your Lordship will call it 'bus,' you will save two syllables, and make it much more intelligible to the witnesses." The learned lord assented to the proposed abbreviation.

Gibson, C. J., delivering the opinion of the court in *Riddle* v. *Weldon*, on the rights of a lodger to exemption from distress, says that Poin's friend speaks with "legal precision," when he demands—"Shall I not take mine ease in mine inn?" *

In Rolle's Reports, p. 286, in an action for words, the case is, "*On dit*, Sir Th. Holt had taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder, and the other upon the other shoulder, et ne averr que le cook fuit mort; et pur ceo fuit adjudge nemy bon;" the cook's death, after the splitting of his head, being matter of inference only. Mr. Wallace says this case may be commended to Mr. Chitty, who may, perhaps, reconcile the matter of pleading involved in it with the doctrines of Medical Jurisprudence. †

The fisherman in Plautus's *Rudens*, expresses what are common notions of the ignorant in law concerning property *found*:

> Ubi dimisi retem atque hamum, quidquid hæsit extraho,
> Meum quod rete atque hami nacti sunt, meum potissimum 'st.

The mitigation of punishment in cases of Homicide *se defendendo* is glanced at by Shakspere's Gravedigger, who throws out that Ophelia would not have had Christian burial, but that the Crowner had found her suicide *se offendendo*.

In Manning and Bray's "History of Surrey," the following curious account is given of Mr. Sergeant Davy's early career:—"This gentleman was a most eccentric character. He was a chemist at Exeter; and a sheriff's officer coming to serve on him a process from the Court of Common Pleas, he very civilly asked him to drink some liquor. Whilst the man was drink-

* King Henry IV. (Part I.), Act III. Scene 3. † The Reporters, 183, 3d ed.

ing he contrived to heat a poker, and then asking what the parchment process was made of, and being answered of sheepskin, he told the man he believed it must eat as well as mutton, and recommended him to try. The bailiff said it was his business to serve processes, not to eat them; on which Mr. Davy told him if he did not eat that, he should swallow the poker; the man preferred the parchment; but the Court of Common Pleas (not then accustomed to Mr. Davy's jokes) sent for him to Westminster-hall, read him a serious lecture for contempt of their process, and sent him to the Fleet. From this circumstance, and the conversation of some unfortunate legal man whom he met there, he acquired that taste for the law which the eating a process had not given to the bailiff; and when he was discharged from the Fleet, he applied to the study of it in earnest. He was called to the bar, made a sergeant, and by his humor acquired so much the ear of the court and of the juries, that every one desired to have him as an advocate. He was a great while in very considerable practice; but, not confining his wit to the narrow compass of the courts, the guineas procured in it slipped through his pockets into some other place, and he ended his professional career little richer than he began it." *

An innkeeper recently appeared at the Borough Police Court, on a summons which charged him with having his house open before one o'clock on 19th August, that being "the Lord's day." It was objected by the counsel who appeared for the defendant, that the term "Lord's day" was a misnomer according to the Act of Parliament, which specified "Sunday;" and the objection being sustained by the magistrates, the case was dismissed.

The following entry appears on the court register of the Romford Petty Sessions (in Havering Liberty) for the year 1730, relating to the trial of two men charged with an assault on Andrew Palmer. As a curious illustration of the manner in which justice was administered in country parts in "the good old times," I think it may be interesting to the readers of "Notes and Queries:" "The jury could not for several hours agree on their verdict, seven being inclinable to find the defendants guilty, and the others not guilty. It was therefore proposed by the foreman to put 12s. in a hat, and hustle most heads or tails, whether guilty or not guilty. The defendants, therefore, were acquitted, the chance happening in favor of not guilty."†

In the Court of Queen's Bench, the name of Mr. Charles Dickens having been called, Lord Campbell said, "The name of the illustrious Charles Dickens has been called on the jury, but he has not answered. If his great Chancery suit had been still going on, I certainly would have excused him; but, as that is over, he might have done us the honor of attending here, that he might have seen how we went on at common law."

A very curious document has been issued from the Parliamentary printing-office. It is the bill which has passed the Commons, entitled, "An Act to repeal certain statutes, which are sleeping and not in use," and it is made singular by the fact that, in it are recapitulated numerous samples of ancestral wisdom. One of the statutes provides "that no man shall ride in harness within the realm nor with launcegays." Another says, "the rates of laborer's wages shall be assessed and proclaimed by the justices of the peace, and they shall assess the gains of victuallers, who shall make horse-bread, and the weight and price thereof." A third defines "what sort of Irishmen only may come to dwell in England" (this has been sleeping a very long time); and a fourth is framed to prevent a butcher from slaying any manner of beasts within the walls of London.—*Monthly Law Reporter.*

* Manning and Wray, vol. iii. p. 456. † Notes and Queries.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

SPLITTING THE PLAINTIFF'S DEMAND.

(*Continued from page 232.*)

With respect to the bond to the Crown to be given under the Act, the 24th section provides that:

"Every Division Court Clerk and Bailiff shall give security, by entering into a bond to Her Majesty with as many sureties, in such sums and in such form as the Governor directs, for the due accounting for and payment of all fees, fines and moneys received by them respectively by virtue of their respective offices, and also for the due performance of their several duties."

The security bond to be given by officers it will be noticed relates to three things: first, the *accounting* for fees, &c., received by clerks and bailiffs by virtue of their respective offices; secondly, the *payment* of such fees, &c.; and thirdly, for the *due performance* of their several duties. Formerly it was usually referred to the County Judge to settle the amount of the security to be given, without any general rules suggested for his guidance, but of late general direction has been given by the Executive to the effect that the officer is to be bound in a sum double that of ordinary receipts for one year, more or less, at the discretion of the County Judge, and two sureties, each in one half of such amount. The following is the form of bond directed by the Governor:—

"Know all men by these presents, that we, ——— of ———, Clerk (or Bailiff) of the ——— Division Court of the said ——— of ———, and ——— of ———, are held and firmly bound unto our Sovereign Lady Queen Victoria, her heirs and successors, in manner and in the sums following, that is to say:—the said ——— in the sum of ——— of lawful money of the Province of Canada; the said ——— in the sum of ——— of like lawful money; and the said ——— in the sum of ——— of like lawful money, to be paid to our Sovereign Lady the Queen, her heirs and successors. For which payments, to be well and faithfully made, we severally, and not each for the other, bind ourselves, our heirs, executors and administrators, and each of us binds himself, his heirs, executors and administrators, firmly by these presents. Sealed with our Seals, this —— day of ———, in the year of our Lord one thousand eight hundred and ———.

"Whereas the above bounden ———, as Clerk (or Bailiff) of one of the Division Courts of the said ——— Count ——— of ——— has been required, according to law, to give security for the due performance of the duties of his Office:

(*In the case of Clerks, the following is the condition.*)

"Now the condition of this obligation is such, that if the said ——— shall duly and regularly keep and render all accounts and

returns, which, pursuant to any Act of the Legislature now passed, or hereafter to be passed, ought to be kept and rendered by him, and shall account for, and duly and regularly pay over to the parties entitled thereto, and particularly to the County Attorney for the time being of the said ——— Count ——— if authorized to receive the same, or to such other officer as may by law in that behalf be authorized, all and every such sum and sums of money as shall come into his hands as Clerk of the said Division Court, and which should be so paid over, and shall well, truly and faithfully, in all other respects, fulfil, perform and discharge all and every the duties of his said office, whether such duties be regulated or imposed by any Act now passed or hereafter to be passed by the Legislature of Canada, and whether extended, increased or otherwise altered by any such Act or Acts then this obligation to be null and void, otherwise to remain in full force, virtue and effect."

(*In the case of Bailiffs, the following is the condition.*)

"Now the condition of this obligation is such, that if the said ——— shall duly and regularly keep and render all accounts, which, pursuant to any Act of the Legislature now passed, or hereafter to be passed, ought to be kept and rendered by him, and shall account for, and duly and regularly pay over to the Clerk for the time being of the Division Court for which he is Bailiff, or to such other Officer or person as shall by law from time to time be authorized to receive the same, all and every such sum and sums of money as he shall collect or receive, or shall come into his hands by virtue of any writ, process or execution, or otherwise, as such Bailiff, other than the lawful fees of him, the said ———, as such Bailiff, and shall well, truly and faithfully, in all other respects, fulfil, perform and discharge, all and every the duties of his said Office, whether such duties be regulated or imposed by any Act now passed or hereafter to be passed by the Legislature of Canada, and whether extended, increased or otherwise altered by any such Act or Acts, then this obligation to be null and void, otherwise to remain in full force, virtue and effect.

Sealed and delivered }
in the presence of } [*Affix Seals.*]

Securing bonds should be executed in the presence of at least one witness, who must subscribe his name and calling or profession.*

With the bond there is an affidavit of justification, which is subjoined.

AFFIDAVIT OF SUFFICIENCY.

"Province of Canada, Count of ——— to wit:

"We, ——— and ———, the Sureties in the annexed Bond named, do severally make oath and say, as follows:

First, I, Deponent ———, for myself, do make oath and say, that I am a freeholder [*or* householder], residing at ———, and that I am worth property to the amount of ———, over and above what will pay my just debts.

Secondly, I, Deponent ———, for myself, do make oath and say, that I am a freeholder [*or* householder], at ———, and that I am worth property to the amount of ———, over and above what will pay my just debts.

Sworn before me, at the ——— of ———, in the said ——— Count ——— of ———, this ——— day of ———, 186 —.
———, A Commissioner, B. R., &c.

* See notes to form of Bond issued from the Crown Law Department of Upper Canada.

CORRESPONDENCE.

(*To the Editors of the Law Journal.*)

Gents:—Some four years ago I obtained a judgment against a party in the First Division Court for the County of Lambton, for some $80. Execution was issued on this at various times, but the defendant managed to elude the vigilance of the Bailiff. Finally, last April I caused an execution to be issued, and the Bailiff seized certain goods of the defendant. The Judge of this County, on the application of the defendant, gave an extension of time for two months. The goods were then advertised for sale, and the Judge again extended the time for two months. If you will be so kind as to say whether or not the Judge can exercise such unheard of power under the Division Courts Act, you will confer a favor on the undersigned unfortunate suitor, and many others placed in a like position by the interference of our Judge with executions.

Yours respectfully,
——— George Morrison.

[We presume that the Judge must have acted under the 108th section of the Act, which provides that "in case it at any time appears to the satisfaction of the Judge, by affidavit or affirmation, or otherwise, that any defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, the Judge may suspend or stay any judgment, order or execution given, made or issued in such action, for such time and on such terms as he thinks fit, and so from time to time until it appears by the like proof that such temporary cause of disability has ceased."

In acting under this section, it seems to us that the plaintiff should have notice of the application to the Judge, and a copy of the affidavit on which it is grounded served upon him, or that he should have been called on by the Judge to show cause, if he had any, against granting a stay on the execution. The power is extensive and unusual and should be sparingly and cautiously used; and in two counties—York and Peel and Simcoe—where we are acquainted with the practice, and where a great number of cases are before the Courts, we do not think there have been ten cases of the kind in as many years.

The latter part of the clause shows that the plaintiff should have notice of the application, for how otherwise can he be in a position to show that the temporary cause of disability has ceased.]—Eds. L. J.

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

(*Reported by* Alexander Grant, Esq., *Barrister-at-Law.*)

The Bank of Upper Canada v. Brough.

(On Appeal from a Decree of the Court of Chancery.)

Mortgagor—Mortgagee—Sale of equity of Redemption.

[Before the Hon. Sir J. B. Robinson, Bart., C. J.; the Hon. W. H. Draper, C. B., C. P.; the Hon. Mr. Justice McLean; the Hon. Vice-Chancellor Esten; the Hon. Mr. Justice Burns: the Hon. Mr. Justice Richards, and the Hon. Mr. Justice Hagarty.]

Held—Reversing the decree of the Court below, that the provision in the Statute 12 Vict., ch. 73, sec. 1 (Con. Stat. of U. C., ch. 22, sec. 257), which authorises the sale under execution of an equity of redemption, applies only where the execution is against the mortgagor himself, and on an execution issued against his lands. [Esten, V. C., dissenting.]

This was an appeal by the Bank of Upper Canada, the defendants in the Court below, from a decree by which a demurrer put in by them had been over-ruled, and relief given against them.

The bill in the Court below was filed by *Secker Brough* against the Bank of Upper Canada, setting forth, that in the month of May, 1853, plaintiff purchased from Messrs. Strachan and Fitzgerald certain building lots in the City of Toronto, upon which he

had made a cash payment or instalment at the time of the sale, and executed to the vendors a mortgage in fee upon the same lands to secure payment of the balance of purchase money—being the sum of £1,012 10s., on the 26th May, 1861, with interest thereon in the meantime half-yearly. That plaintiff subsequently sold and conveyed these lands subject to the mortgage, to one Robinson; that Robinson afterwards sold and conveyed in like manner to Samuel Zimmerman, who died in the month of March, 1857, seized of the said lots, subject to the said mortgage to Strachan & Fitzgerald, and that the estate and interest of Zimmerman therein became assets in the hands of his personal representatives for the satisfaction of his debts.

The bill further alleged that Zimmerman at the time of his death was largely indebted to the defendants, who subsequently and in the year 1858 instituted proceedings at law against his executors, and recovered judgment for a large amount, and such proceedings were taken upon such judgment that on the 27th of August, 1859, all the estate of Zimmerman at the time of his death was sold by the Sheriff under a writ of *Venditioni exponas*; and that the defendants, acting through their solicitor and agent, Clarke Gamble, became the purchasers thereof, and immediately thereafter the same lands were conveyed by the Sheriff to the defendants, subject only to the said mortgage to Strachan & Fitzgerald.

The bill then submitted that as such purchasers and owners of the premises the defendants were bound to indemnify the plaintiff from the mortgage and all payments and other liabilities in respect thereof, and it was their duty from the time they became such purchasers thereof to pay all interest as it became due under the mortgage, but that they had not done so, and that all interest thereon was in arrear since the 25th November, 1859, including the sum which fell due on that day; and that the mortgagees had called upon plaintiff to pay and insisted upon his paying the said arrears, and had threatened to compel plaintiff to pay the principal money secured upon their mortgage when it became due.

The prayer of the bill was, that the defendants might be ordered to pay the interest accrued due, and the principal money so soon as the same should become payable.

To this bill the defendants put in a demurrer for want of equity.

Upon argument the Court over-ruled the demurrer, and declared the defendants bound to pay off the mortgage and to recoup plaintiff any thing he had paid, and ordered them to pay the same and the costs of the suit.

From this decree the defendants appealed.

J. H. Cameron, Q. C., and *Bennett* for the appellants.

It is admitted that if an owner sell land which is subject to a mortgage, the vendor, being also the mortgagor, will stand in the relation of surety to the assignee or purchaser; this rule will extend no further, however, and the assignee of the assignee or purchaser could not under such circumstances be looked upon as a principal for whom the mortgagor would be liable as surety. Here the plaintiff is not entitled under the provisions of the statute, or independently thereof to the relief sought by his bill, and given him by the decree appealed from. Independently of the Statute, it is not pretended that any such right accrues to the plaintiff. *Turnbull* v. *Simmons*, 6 Grant's Ch. Rep. 615, shews there is no power in the Court to decree that the assignee of an equity of redemption shall discharge the mortgage; and no case has been found shewing that a mortgagor can compel the assignee of his assignee to indemnify him against t.e mortgage.

The covenant to pay mortgage money does not run with the land. There is neither contract nor privity of estate between a second assignee of an equity of redemption and the mortgagor, unless the recent statute has worked some change in this respect. But the late act has not effected this change.

By the provisions of the Act the purchaser of an equity of redemption at sheriff's sale is only subjected to the same liabilities that he would have been subject to in case he had purchased from the mortgagor himself. This is the utmost liability that can be established, and more, probably, than a strict construction of the Act would warrant. The statute does afford one remedy, and the mortgagor if he adopt the relief afforded by that Act can have no other, this relief is an action for the mortgage debt and interest against the purchaser, in case the mortgagor has been compelled to pay the same to the mortgagee.

The facts of this case shew the propriety of the Court holding that the remedy of the mortgagor is confined to what the statute expressly gives. Here the bill does not negative the existence of a covenant from *Robinson* to *Zimmerman* to pay off the mortgage and indemnify *Zimmerman*. It may be said that this mode of proceeding is adopted to save circuity of action, but if so, then it should be shewn that each succeeding party was liable to his immediate assignee. Or let us suppose that a set off might exist by subsequent parties as to their immediate assignee, it may be that the Bank would have a complete answer to any claim which Zimmerman's estate could make, although no such answer might be available to the claim of any intermediate party, *Burrett* v. *Lynch*, 5 B. & C. 589; *Underhill* v. *Ellicombe*, 1 McL. and Y., 450; *Antrobus* v. *Davidson*, 3 Mer. 569; *Yonge* v. *Reynell*, 9 Hare 809; *Jones* v. *Kearney*, 1 Dr. and War. 135; *Cox* v. *Bishop*, 3 Jur. N. S. 499, were also referred to by Counsel.

Brough, the respondent, in person,—The plaintiff always had this remedy independently of the statute. Then under the statute, section 3, of the original Act, merely expresses what the law was before, at least so far as the rules of a Court of Equity were concerned. It simply makes the purchaser of the equity of redemption at a sheriff's sale a debtor at law, and gives a right of action against him. All the mortgagor's equitable rights remain untouched, but in addition a legal remedy is afforded to him.

Tweedell v. *Tweedell*, 2 B. C. C. 101; *Cope*v. *Cope*, 2 Salk. 449; *Close* v. *Wilberforce*, 1 Beav. 112; *Lucas* v. *Comerford*, 3 Br. C. C. 166; *Moore* v. *Greg*, 2 Phil. 717; *Mozhay* v. *Inderwick*, 1 Deg. and S. 708; *Walker* v. *Bartlett*, 17 C. B. 446; *Humble* v. *Langlons*, 7 M. and W. 517; *Fagg* v. *Dobie*, 8 Y. and C., 96; *Tulk* v. *Mozhay*, 2 Phill. 774.

Cameron, Q. C., in reply.—If principal money not due and assignee transfers equity of redemption to another person, the liability of the assignee is at an end, and yet this decree would make a prospective charge binding upon the Bank, at a time when they may have got rid of all liability.

Draper, C. J. C. P.—[After stating the facts of the case]—The statute 12 Vic. cap. 73, first enabled creditors to sell the interest and equity of redemption of mortgagors of real estate in Upper Canada on writs of *fieri facias* against lands.

The 1st section authorizes the sheriff upon any *fieri facias* lawfully issued against the lands of any person who may be a mortgagor, to seize or take in execution all and every (in like manner as other real estate might be seized, &c.,) the legal and equitable estate, right, title, interest and property and the equity of redemption of such mortgagor in any lands.

The 2nd section declares the effect of the seizure and sale to be, to transfer to, and vest in, the purchaser, his heirs and assigns, all the legal and equitable estate, &c., of such mortgagor, of the lands and tenements so seized, &c., at the time the writ was placed in the sheriff's hands, and at the time of the sale to vest in the purchaser, his heirs and assigns, the same advantages, rights, privileges and powers as such mortgagor would have had if the sale had not taken place; and provision is made that the purchaser, his heirs or assigns, may pay off any incumbrance, and shall thereupon acquire the same right, &c., such mortgagor would have possessed in case he had made such payment, and on payment of the mortgage money to the mortgagee by the purchaser he shall be entitled to a certificate of payment and discharge which shall be of the like effect and shall be acted on as if it had been given to the mortgagor his heirs, executors, administrators or assigns.

The 3rd section authorizes the mortgagee, his heirs or assigns, to purchase at such sale, &c., to acquire the same right and interest, &c., as any other purchaser might do, provided that if the mortgagee becomes the purchaser he shall give the mortgagor a release of the mortgage debt, and if any other person becomes purchaser, and the mortgagee enforces payment against the mortgagor, then the purchaser shall be compelled to repay the debt and interest to the mortgagor, and in default of payment within one calendar month after demand, the mortgagor may sue for the same in an action for money had and received, and until repayment the debt shall be a charge on the lands so mortgaged and sold. These clauses are consolidated in cap. 22 Con. Stat. U. C., ss. 257-8-9. It is to be observed that the words heirs, executors,

administrators or assigns are not either of them used in connection with the term mortgagor except at the end of the second section. It may be observed that sec. 4 of 12 Vic. cap. 78 is not enacted in the consolidation of this act, but the provisions of the Consolidated Stat. cap. 22 are left to the General Interpretation Act cap. 2 of the Con. Stats. of Upper Canada. The 12th section of this Act, the only one that can have any bearing, is not applicable, for the three sections above referred to (257, 258 and 259 of cap. 22) do not contain the word "person." If, however, I was simply construing the 12 Vic., cap. 78, I should arrive at the same conclusion, for I do not think it would be "consistent or reconcileable with the intent and meaning" of that act to hold that when the "mortgagor is described in its provisions, *it*" (that is the description of the person) should be held to apply to the mortgagor, his heirs, executors, administrators and assigns.

Looking at the title and the preamble, and the precise language of the original act, and using these as aids for construing the Consolidated Act, as we think we are not in any way prevented from doing by the Interpretation Act, (ch. 2nd of the Con. Stats.,) we are of opinion that the enactment in question only authorizes the sale of the legal and equitable estate, &c., and the equity of redemption of the mortgagor, on a judgment recovered against *him* and on an execution against *his* lands and tenements. Throughout the act, when the interest or estate of the mortgagor is spoken of, and when any reference is made to the effect of a sale, and to the consequences which under particular circumstances may follow, the mortgagor alone is referred to, and the possibility that his interest and equity of redemption may have been conveyed by him to a third party, is never apparently contemplated; tending so far at least to show that the object of the act was not to subject equities of redemption to sale under a common law execution, excepting in the hands of the mortgagor upon whose mortgage they arose, and upon a judgment against him. The act does not even provide that the equity of redemption of a deceased mortgagor may be sold for his debts, upon a judgment against either his executors or administrators, or even against his heirs in an action on a specialty debt of his, conceding that such an action is maintainable. It does not seem to contemplate the very possible case that the assignee by purchase from the original mortgagor of the equity of redemption might afterwards mortgage that equity for his own debt, and might have a judgment recovered against him on which an execution against his lands and tenements might be issued; he would have an equitable right to redeem arising out of his own mortgage, and the rights of the first mortgagor would also be vested in him; and yet to hold that the last created equity of redemption could be sold on a *fieri facias*, would be more like a supplementary enactment than a construction of the act in its present shape. We think it safer and more consistent with the intention of the legislature, to limit the operation of the statute to the case which its language plainly defines, namely, the legal and equitable estate, right, title, interest and property and equity of redemption of a mortgagor, on a writ of execution issued against his lands and tenements. The present bill is founded on an equity assumed to arise from the fact that the equity of redemption originally vested in the plaintiff as mortgagor of certain lands (of which he had been previously seized in fee simple) was sold and assigned by him; and that by virtue of a sale by the sheriff, on an execution against a subsequent assignee, the equity of redemption became vested in the defendants. We do not adopt this latter view of the effect of the sheriff's sale and conveyance to the Bank of Upper Canada. Without the aid of some statutory enactment it is clear that this equity could not be the subject of a common law execution, and we are of opinion the statute does not extend to a case like the present, where the judgment and execution on which the sale took place are not against the original mortgagor.

This is the judgment of all the Judges who heard the case argued, except my brother ESTEN, who I believe adheres to the opinion expressed in the Court below. *The Decree, therefore, must be reversed and the Plaintiff's bill be dismissed.*

ESTEN, V. C.—The appellants object to this decree on the grounds:—

1st. That the only remedy available to the mortgagor when the equity of redemption has been purchased at sheriff's sale is that provided by the statute, namely, to pay the debt and demand its re-payment from the purchaser, and if not repaid to bring an action for its recovery and to have a lien for it on the estate in the meantime.

2nd. That the relation of principal and surety has not been constituted between these parties so as to entitle the supposed surety to the relief which the decree affords him against the supposed principal.

With reference to the first ground it is urged, that when a statute creates a right and prescribes a remedy, that remedy and that alone can be pursued, and some cases were cited in support of that proposition the correctness of which as a general rule may be conceded. I think, however, it is a rule that prevails only at law. The proposition, I apprehend, is universally true, that when the relation of principal and surety is created, although it may be by an Act of Parliament creating a right and prescribing a remedy, the Court of Chancery will administer the equity of compelling the principal a *priori* on a bill *quia timet* to discharge the debt and save the surety from a suit. Thus on a bond made by principal and surety, the legal remedy of the creditor is to sue both or one, and if he sue the surety he in turn must sue the principal. Equity finds this state of things, but in order to prevent circuity or multiplicity of actions, and in order to guard the surety against a danger of indefinite duration, gives direct relief against the principal by compelling him to pay the debt to the creditor, and I apprehend if a Court of Equity found the same state of things, although arising under a statute, creating a new right and prescribing a remedy, it would administer the same relief. Thus, if the statute imposing the composition in lieu of statute duty, had provided that the composition should be paid by one of two parties, but if paid by one he should be indemnified by the other; I have no doubt a court of equity would compel the latter at the suit of the former to pay the composition, and save him harmless; and although the Act giving a remedy by distress and therefore prohibiting an action might be thought also to prohibit a similar equity, yet I should think otherwise, and that even in this case the court would entertain the suit of the party entitled to indemnity to compel the other party to pay the composition and save his goods from being distrained; and of course the objection would not apply to a case where it was provided that an action might be maintained as in the present instance. It was then urged that if the mortgagor paid the debt and brought an action for its recovery, defences might exist to such an action by way of set off and otherwise. This objection, I think, is much more untenable than the former. There is no possible defence that could be made at law to such an action that would not be equally available in Equity to a Bill *quid timet*. Nay, a Court of Equity would probably allow many defences which a Court of Law could not recognize. Equity recognizes and gives effect to every legal set off, and to many that are not legal but merely equitable. If the surety should owe a debt to the principal, he could not compel him to pay a debt for which he was surety and exonerate him without first paying his own debt. I am satisfied that there is no possible defence which could be raised to an action by the mortgagor which would not be equally available as a defence to a bill *quid timet* for payment of the mortgage and the exoneration of the mortgagor, and probably many other defences would be open to him upon such a bill in equity that a court of law could not allow. In fact the purchaser would have a right to insist that he could not on such a bill stand in a worse position for any purpose than if the mortgagor had paid the debt and then sued him for its re-payment. I therefore do not feel much pressed by this argument. The suit probably could not be instituted until a demand had been made upon the purchaser, and thirty days had elapsed without its having been complied with. I think much more weight is due to the point, which was not however very distinctly raised in the argument, that the relation of principal and surety was not constituted between these parties. For this position the case of *Antrobus* v. *Duncan*, 8 Mer. 569, was cited. In that case the suit was not by the surety but against him, that is, so far as his immediate contract was concerned, and as regards the general transaction, it was a mere dealing by one party with another through the medium of an agent, for whose acts he was of course responsible, and who in his turn was bound to indemnify the

principal. But of course the equity does not apply to such a case, and if it did not apply to the principals, who were the army agents, it could not of course apply to the defendant who was the personal representative of their surety. The important points which appear to me to arise in this case are, 1st. Whether the Act of 12th Victoria, cap. 78, applies to assignees of the mortgagor; and, 2nd. If it does, whether the relation of principal and surety is constituted between the mortgagor and the purchaser at sheriff's sale. The learned counsel for the appellants did not argue that the Act applied only to equities of redemption in the hands of the mortgagor. Such an argument would have been fatal to his clients' title, for in such a case the sale under which they claim was void. The question does not appear to me to be free from difficulty. Thus, if the mortgagee should himself purchase he is directed to give a release of the debt which could not be done to an assignee of the equity of redemption. Perhaps a more important difficulty is, that by the terms of the assignment the mortgagor may be bound to pay the mortgage debt. Such transactions are not unfrequent. In such a case if he did pay the debt it would not be just that it should be repaid. Under such circumstances, however, it is not an equity of redemption which is transferred but the entire estate, the full value of which the assignee has no doubt paid to the mortgagor, who in his turn has undertaken to discharge the mortgage. I think, however, these difficulties may be overcome and are outweighed by the strong probability which exists that the Legislature could not have intended to confine the Act to cases in which the equity of redemption remained in the hands of the mortgagor, which would give the Act a very limited operation, but must have meant it to extend to cases in which it had been alienated both to immediate and remote assignees. No injustice, as appears to me, could result from this construction. If the mortgagor have alienated the equity of redemption, and it were the intention of the parties that the purchaser should discharge the mortgage then, if the equity of redemption be purchased at sheriff's sale, and the mortgagor afterwards be compelled to pay the debt, it is perfectly just that the purchaser should re-pay it. If, on the other hand, the mortgagor have undertaken to pay it, and have received the full value of the estate, or if any intermediate assignor have pursued this course, in which cases respectively the mortgagor or assignor, will have covenanted to pay the mortgage debt; still it may be considered that the equity of redemption only passed, and may be offered for sale by the sheriff, and that the covenant for payment of the mortgage debt was collateral and to be enforced by the party entitled to the benefit of it against the party liable upon it, the purchaser at sheriff's sale meanwhile paying the mortgage debt, or repaying it to the mortgagor, if he shall have been compelled to pay it.

Upon the other question, whether the relation of principal and surety is constituted between the mortgagor and purchaser at sheriff's sale, I entertain much doubt. In deciding this case I assumed as a proposition universally true, that wherever, if one party paid a debt, he was entitled to be indemnified by another party, the relation of principal and surety was constituted between the two parties. I doubt the correctness of this proposition stated in this broad way. No doubt the party entitled to indemnity may properly be called a surety, and the party obliged to indemnify may be called the principal as between themselves; but I question whether it is not an essential element in a case for such equitable relief as was administered in this instance, that they should both be liable to the creditor. When the supposed principal is not liable to the creditor, it may be very true that as between him and the supposed surety he is a principal, but he cannot be the principal debtor, *quoad*, the creditor, because as to him he is no debtor at all. The practice is in such cases, for the surety to bring the principal and the creditor before the court and to compel the principal to pay the debt, and the creditor to receive it, and to deliver up the securities; but in a case where the supposed principal was not liable to the creditor, it appears to me that the creditor might demur and say he had nothing to do with him, and was not bound to receive the money from him. The question is, whether the present is not a case of that description. The act creates no privity between the purchaser and the mortgagee. The mortgagee cannot sue the purchaser. He can foreclose his equity of redemption, but he cannot sue him for his debt. The purchaser is not liable to the mortgagee, and the liability of the estate in his hands would appear insufficient to constitute the relation which is necessary to found the equitable relief administered in such cases. It would seem that if relief is to be given to the mortgagor in such cases it must be on another principle, namely: that as the act has provided that if the mortgagor shall be compelled to pay the debt the purchaser must repay it and indemnify him, he is not obliged to wait until the mortgagee may choose to sue him, when perhaps the purchaser may have become insolvent; but is entitled on the principle of *quia timet* to require an immediate settlement in order to protect him from the possibility of loss. And I should not think that the purchaser under such circumstances could object that thereby he would be compelled to keep the estate and pay the debt against his will; whereas he might otherwise be enabled to surrender the estate and avoid payment of the debt, he having purchased the estate and come under an obligation to indemnify the mortgagor so as to make him perfectly safe. These observations would go to prove that in order to confer a title to the relief which has been administered in this case, it is not necessary to show a privity between the party bound to indemnify and the creditor, but that it is sufficient to show the obligation to indemnify, and the possibility that through the delay of the creditor that obligation may become of no avail. It is obvious that the mortgagee may delay suit until the interest has accumulated, so as to render the estate a defective security, and then he may sue the mortgagor on his covenant, who, on attempting to obtain indemnity from the purchaser, may find that he is insolvent. This would be contrary to the intention of the Legislature, which meant that the mortgagor should be perfectly safe after the equity of redemption had been purchased at sheriff's sale. Upon the whole I cannot see that the decree is wrong on this ground, and upon the other grounds, I think it is right, and ought to be affirmed, and the appeal dismissed with costs.

Re Freeman, Craigie and Proudfoot.

(On an appeal from an order of the Court of Chancery.)

Practice—Appealable order—Costs.

The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties; where therefore an appeal was made to this court from an order directing the taxation of a Solicitor's bill against his Client in a particular mode, the Court dismissed the appeal with costs.

The respondent, although he may, is not bound in such a case to move at an earlier stage to quash the proceedings.

This was an appeal from an order referring back the bill of Messrs. *Freeman, Craigie* and *Proudfoot* for taxation by the Master, and directing the mode in which the taxation should be had. The circumstances are stated in the report of the case, Chancery Chambers Reports, page 102.

Blake for the respondents (the Solicitors), on the matter being called on objected, that this was not an order from which an appeal would lie, and referred to McQueen, 101-2.

Roaf, contra, submitted that this was not a proper mode of taking advantage of such an objection; the proper course was, by application to quash the appeal without suffering the appellant to incur the expense of preparing for the argument. If the court, therefore, should be of opinion that the appeal would not lie, no costs would be given on the dismissal. But, after the Court took time to look into the practice the following judgment was delivered by

Sir J. B. Robinson, Bart, C. J.—This is an appeal from an order made by His Honor, Vice-Chancellor Esten, on the 22nd of February, 1861, upon a petition of Messrs. Freeman, Craigie & Proudfoot, Solicitors, to the Court, for a direction to the Master to review his report and certificate made upon a reference to him for taxation of certain bills of costs delivered by the Solicitors, to Daniel Totten their client.

The Vice-chancellor, by the order complained of, did refer the taxation back to the Master with certain directions, bearing principally upon the point whether the costs of taxation, should, under the circumstances, be borne by Totten or by the Solicitors. The costs of taxation had been allowed by the Master at £16 4s. 8d.

It is objected on the part of the Solicitors that this is not an appealable order. The grounds on which Totten objects to it apply to the propriety of the directions given to the Master respecting the costs of taxation, and the costs of and incidental to the reference.

We think the proceedings in appeal must be quashed under the 10th section of the Appeal Act, on the ground that this is not an appealable matter, there being no cause pending between the parties, in which the order complained of was made.

It is true that the ninth section of the Act gives an appeal "from all judgments, orders, and decrees of the Court of Chancery," but that has been always taken to mean judgments, orders and decrees—whether interlocutory or final, in a cause. The fifty-fourth section of the Act shews that to be the intention; and the general principles which govern appeals in equity preclude an appeal from such an order as this *

Then besides that, this is an order made upon petition and not in any suit upon a bill filed: the subject matter of the petition and order is such that an appeal does not properly lie against the decision of the Court upon it which merely affects costs proper to be allowed by a taxing officer.

No case has been cited in support of this appeal, and both principle and policy are against it.

Per Cur.—Appeal dismissed with costs.

CARPENTER v. THE COMMERCIAL BANK OF CANADA.

(On Appeal from a Decree of the Court of Chancery.)

Collateral security—Defence at law—Plea of payment.

A defendant at Law, pleading a plea of payment, and either failing or neglecting to establish the plea, cannot afterwards set up the same facts as a defence to a bill in Equity to enforce payment of the judgment at Law.

An action at law having been brought upon a promissory note, and the defendant having pleaded that it had been given as collateral security for another debt, which had been paid, but adduced no evidence to establish this fact, was held precluded, in a suit afterwards instituted in the Court of Chancery to enforce the charge of the judgment against lands, from showing any payments prior to the time of plea pleaded. [ESTEN, V. C., *dissentiente.*]

The bill in the court below was filed by the Commercial Bank of Canada against Joel Carpenter and Brian Carpenter, and set forth, that on the 31st May, 1859, the plaintiffs recovered judgment in the Court of Queen's Bench against the defendants for £1,559 16s. 10d. damages and costs, which was duly registered in the county of Wentworth, in which the defendants were possessed of certain lands (setting them forth); and that £100 14s. 1d. had been paid on account of such judgment; and prayed payment of the balance, or in default a sale.

The defendant Brian Carpenter answered, setting up that the judgment of plaintiffs was recovered upon a promissory note made by the other defendant, and endorsed by one McKinstry and defendant Brian Carpenter, under the circumstances following: That Joel Carpenter, on the 21st March, 1857, was and for some time previously, had been carrying on business as a merchant in Hamilton, and that the Bank held notes endorsed by him, and which they had discounted for him to a large amount, which notes so discounted were notes of his customers; that a large portion thereof had been settled by notes endorsed by other persons; and that the note so endorsed by defendant was delivered to and accepted by the Bank as collateral security for the balance of such customers' paper, being £3,000, it being alleged by the Bank that one-half of such balance was doubtful, but that the whole thereof had since been paid; that the loss, if any, had arisen in consequence of the Bank neglecting to collect and get in the money due upon the other notes delivered to the Bank in settlement of the greater portion of such indebtedness.

The cause had been heard upon a motion for decree. The affidavit of the managing agent of the Bank was read on behalf of the motion, setting forth that the defendant Brian Carpenter was not personally aware of the circumstances under which the note was given to and accepted by him; that no such arrangement as alleged in the answer was made; that the only payment on account thereof was the sum stated in the bill; and that if any such defence had existed to the claim of the Bank, the defendants had the opportunity of urging, and did by plea and at the trial of the action upon the note attempt to prove and urge, but without effect, all the supposed defences set up by the answer.

The defendants both made affidavits in opposition to the motion; and an affidavit of McKinstry was also read, in which he swore tha the endorsed the note for £1,500 in consequence of the dissatisfaction expressed by the Bank at the supposed lapse of a guarantee given for the amount of Carpenter's discounts whilst McKinstry had been manager of the Bank; and that there never was any intention that the said note for £1500 should be held for any other purpose than the protection of the balance of the customers' paper.

Upon the hearing, the court below directed that "it should be referred to the master of this court at Hamilton, to enquire and report whether the note on which the plaintiffs' judgment in the pleadings mentioned was recovered, was held by the plaintiffs as a collateral security merely, or how otherwise; and if as a collateral security merely, then, for what. And if the said master shall find that such note was held by the plaintiffs as collateral security for the payment of any other promissory notes, bills of exchange, or securities for the payment of money, then said master is further to enquire and report whether any, and if so, what payments beyond the sum of one hundred pounds and fourteen shillings, credited in the plaintiffs' bill, have been made upon the notes upon which such judgment was recovered, or upon such judgment, or upon the promissory notes, bills of exchange, or other securities for the payment of money as collateral security for which such first-mentioned notes were deposited, since the pleading by the said defendant Bryan Carpenter of his plea of payment in the action at common law in which such judgment was recovered; and in the event of said master finding that enough has not been so paid, beyond the amount credited in the plaintiffs' bill as aforesaid, to satisfy the said judgment of the plaintiffs, the said master is to further enquire and report whether the defendants, or either of them, have any other, and if so, what other, lands, tenements, or equitable or other valuable rights or interests in lands or tenements in the county of Wentworth, besides those particularly described in the plaintiffs' bill, and if so, whether any person or persons other than the plaintiffs has or have any lien, charge or incumbrance thereupon; and in case the said master shall find any such, then he is to cause them to be served with process under the general orders of this court in that behalf, and is to proceed to take an account of what is due to the plaintiffs and such other incumbrancer or incumbrancers for principal money and interest, and to tax to them their costs of this suit, and to settle their priorities. And this court doth reserve the consideration of further directions, and of the costs of this suit, and of all subsequent costs, until after the said master shall have made his report."

From this decree the defendant Brian Carpenter appealed, assigning as reasons therefor, first, that in and by the said decree, it should have been referred to the master of this honorable court at Hamilton, in case he found that the note on which the plaintiffs' judgment was recovered, as mentioned in the pleadings, was held by the plaintiffs as a collateral security for the payment of any other promissory notes, bills of exchange, or securities for the payment of money, to enquire and report whether any, and if so, what payments beyond the sum of £100 14s., credited in the plaintiffs' bill of complaint, had been made upon the note upon which such judgment was recovered, or upon such judgment, or upon the promissory notes, bills of exchange, or other securities for the payment of money as collateral security, for which such first-mentioned note was deposited by the said defendant Brian Carpenter with the plaintiffs, since the same was so deposited and held by the said plaintiffs as such collateral security as aforesaid; secondly, that the defendant Brian Carpenter being surety for the other defendant Joel Carpenter to the said plaintiffs, is, but ought not to be, restricted by the said decree in this cause from showing all payments made by him or any other person on the note first mentioned, or on account of the securities for which such first-mentioned note was security, to the said plaintiffs since he became such surety as aforesaid, whether the same were made before or after the plea by the defendant Brian Carpenter in the action at common law; thirdly, that such last-mentioned plea, although assumed and declared by the said decree to be a plea of payment,

* McQueen on Appeals, ch. 1.

is not such a plea in the form in which it is pleaded by the said defendant Brian Carpenter, nor does the said plea afford any evidence that the said defendant did or might show or attempt to show thereunder any payment or payments to the extent or effect of preventing him from showing in this cause all the payments made at any time by him or any other person since he became such surety as aforesaid, in reduction of his liability as aforesaid.

Fitzgerald for the appellant.

R. Martin for the respondents.

Sir J. B. Robinson, Bart., C. J.—It is somewhat difficult to deal with this case so as to attain the ends of justice without seeming to violate the principle—which it is important to maintain—of the conclusiveness of the judgment obtained at law in the action between the parties on this same note for £1500.

The truth of the case appears to be, that in the action upon the note there was clear proof of the allegation in the plea, that it was made and delivered by Brian Carpenter as security for his son Joel Carpenter, against any deficiency not exceeding that amount that might accrue in the collecting the notes that remained deposited with the plaintiffs after the withdrawal of seven thousand pounds' worth of the notes, for which those of McKinstry and others had been substituted.

That part of the plea was not only not proved, but it was not even attempted to be proved. In order, however, to make the plea a defence against the whole or any part of the demand, it was necessary to go further, and to prove what the plea further alleged, that payments had been made on the notes left with the plaintiffs, which the note of the defendants for £1500 was to secure, and to such amount as either left nothing due to the plaintiffs upon them, or not so much as entitled the plaintiffs to a verdict for the full amount of the defendants' note for £1500. But the fact is, that no attempt whatever was made upon the trial to prove any payments on account of the £3000, though clearly the plea admitted such evidence, and therefore the verdict at the trial went properly for the plaintiff for the full amount.

In framing the postea, however, this error has been committed—the jury are made to negative the first statement in the plea, namely, that the £1500 note was made and delivered as security for the payment of the notes amounting to £3000, which were still in the plaintiffs' hands, to be collected and applied in payment of the debt remaining due by Joel Carpenter. Now, the plea could be no defence, unless that allegation is true; and if that had been in fact found against the defendant, it would have been wholly immaterial whether the customers' notes to the amount of £3000 had been paid or not; and so the verdict for the plaintiffs upon the plea would be correct, and it would be of no consequence that the jury had not specially found one way or the other as to the fact of payment. The trial of the action on the $1500 note took place before the learned Chief Justice of the Common Pleas; and upon examination of what passed at the trial, it is quite evident that the postea had been incorrectly framed, as I have stated; for it was clearly proved upon the trial, and not contradicted by any testimony, that the £1500 note was made and delivered as security for the payment of the £3000 of notes left with the plaintiffs by Joel Carpenter; but as that fact alone would signify nothing, without proof of payment of the £3000, or of so much of it at least as would go to show that the plaintiffs were not entitled to recover for the whole amount of the note, the verdict, in the absence of any proof whatever of payment having been made on account of the £3000, was properly entered for the plaintiffs, though not on the ground on which the postea places it.

If there were payments, in fact, made on the other notes, which would have shown this note in effect to be no longer recoverable either in whole or in part, the defendant was bound to show it on the trial of the common law action. The plea allowed and called for such evidence, if it could have been given; and we are bound to treat the verdict and judgment for the plaintiff as conclusive. The plaintiffs in their bill set forth the judgment; the defendant in his answer admits it; and the judgment was also proved in the court below.

I do not think, therefore, that it should have been referred to the master to enquire whether the note was given to secure the payment of the £3000 still due by Joel Carpenter on the notes deposited, because that question is disposed of between these parties by the judgment entered of record, which, while it is unreversed, is conclusive between them, no fraud in obtaining that judgment having been proved or alleged. The plaintiffs, however, have acquiesced in the decree, and the defendant Brian Carpenter only has appealed, and on the ground that payments made before the plea pleaded, as well as of what there should be credited in the account to be taken by the master. No doubt if at any time before or after the plea there have been collections made by the plaintiffs on account of the £3000, which would not leave a deficiency as large as the amount of the £1500 note to be made up by Brian Carpenter, the plaintiffs should be willing in the accounts to give to the defendant the full benefit of such payments. I have no idea, from the evidence given in the case, that payments to that extent were made on account of the £3000 before the plea pleaded; and I think it scarcely a matter of doubt, therefore, that there is nothing substantial in the reasons of appeal.

I think, without the assent of the plaintiffs, we ought not to admit of a reference to the master to enquire whether the £1500 note was given to secure the payment of so much of the £3000 due by Joel Carpenter or not; and if the judgment as it stands should be taken to be conclusive upon that point against the defendant, then there would be nothing to be enquired of but payments made since the trial *on account of the verdict;* for the judgment in the common law action, so long as it stands, establishes the fact that there is no connection between the £1500 note and the £3000 due by Joel Carpenter.

I think we cannot properly do otherwise than reverse that part of the decree which refers it to the master to enquire and report whether the defendant's note, *on which judgment has been recovered,* was held by the plaintiffs as collateral security, and direct that it be referred to the master to enquire whether any and what payments have been made since the trial of the common law action, on account of the verdict given in that action, or the sum for which judgment has been obtained; and I will suggest that on account of the manifest error in entering up the judgment, the plaintiffs consent that payments made on account of the £3000 *since the trial* should be treated by the master as payments made on account of the claim under the judgment on the £1500 note, as if they had been made by Brian Carpenter himself.

In the accounts, as I stated before, the plaintiffs should be willing to admit an account to be taken of all payments *at any time* made on account of the £3000, in order that it may be ascertained whether in truth there remains anything, and how much, due of the £3000, for £1500 of which the defendant made himself responsible; but we could not properly insist upon that, because the defendant should have given proof upon the trial of any payments that had then been made.

Esten, V. C.—It appears to me that the judgment is inconsistent with the verdict of the jury. The latter negatives the fact of the note having been given upon any such understanding as that alleged in the plea; while the decree supposes that such fact may have occurred, and directs enquiries in order to ascertain whether it had occurred or not. I presume also that if any payments had been made on the note before the entry of the judgment, credit would have been given for them, and the judgment entered for the true amount; so that it was unnecessary and improper to direct enquiry as to any payments between the plea and the judgment. But the question is, whether, if this note was really given as collateral security for other notes, it was not competent to Carpenter to let judgment pass against him for the full amount, and to institute a suit in the Court of Chancery for an account, as that court has jurisdiction over all matters of security, and the account could more easily and effectually be there taken; or in case the plaintiffs did not proceed to execution at law on the judgment, but instituted a suit in the Court of Chancery for enforcing their equitable charge, whether Carpenter could not have insisted that the note was given as collateral security, and prayed an account accordingly. I think such a course would have been proper on the part of Carpenter. If so, it must be immaterial that he pleaded a plea which he was not obliged to plead, and offered no evidence in support of it. Such appears to have been the fact, from his own affidavit, uncontradicted by that of Mr. Park. If, indeed, he had offered evidence, and the jury had rendered a verdict against him upon the evidence, the result might have been different. The

question, then, having been properly raised at the hearing of the motion, evidence was received on both sides. It seems at present in favor of the defendant. The fact is distinctly stated by McKinstry and Joel Carpenter; and although it is denied by Mr. Park, he does not state upon what consideration the note was given. The court, however, wishing to afford an opportunity to adduce further evidence, directed enquiry on this head; but it seems to me that the enquiry was improperly limited to the time subsequent to the plea. If I am right in my supposition that Carpenter might let judgment pass against him, and seek an account in the Court of Chancery either by a bill of his own or by way of defence to the plaintiffs' bill, then the account should extend to the time of the delivery of the note, and I think the decree should be varied to this extent. If, indeed, Carpenter should be held bound to make his defence at law, and, having pleaded such a plea, to substantiate it by evidence, then I presume the result is conclusive against him, as we must suppose either that McKinstry, Manson, Joel Carpenter and Park were examined as witnesses, and the jury believed Park in preference to the others, and so rendered a verdict in favor of the plaintiffs, or that no witnesses were examined at all, in which case the defendant would be equally bound, having had an opportunity to make his defence, and not having availed himself of it. But in this case the decree would be erroneous in directing an enquiry at variance with the verdict of the jury. However, as on taking the account it would have been absolutely necessary to show and recognise the purpose for which the note was given, the real transaction would inevitably have appeared. I think the decree should be varied to the extent I have mentioned, without costs.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

IN THE MATTER OF THE ARBITRATION BETWEEN THE CORPORATION OF THE TOWN OF BARRIE AND THE NORTHERN RAILWAY COMPANY OF CANADA.

Award—Uncertainty—Motion to be set aside.

A dispute arose between the Northern railway Company and the Corporation of the town of Barrie as to the construction of a branch line into the town, and it was agreed by both parties that a bill relating thereto, which was before the house of parliament then in session, should be withdrawn, and all differences connected with the claim of the town against the company be referred to the arbitration of one H. The arbitrator awarded that there was in 1853 a valid agreement by the company with the town to construct this line, provided that suitable land should be procured by the town: that such land was so procured, but that the line had not been constructed; that the claim of the town to have such agreement performed still subsisted, "and if not performed their right to compensation in lieu thereof ought to be awarded." He then awarded as compensation for the non-performance of the said agreement, and in full satisfaction of the said claim, that the company should pay to the corporation at a day and place named, £5000, and that they should, when requested by the town, execute to them a conveyance in fee of all the lands mentioned in a certain endenture made by one B. to the company; and should further, when so requested execute a general release of all claims in respect of the land and right of way conveyed to them by the several parties over whose lands the said branch line was to pass. On motion to set aside this award for defects apparent on the face,

Held, that it was not defective for uncertainty as to whether the agreement had been carried out, and whether the company had an option to pay the £5000 or construct the branch line, but sufficiently shewed that it had not been performed. and that no such option was intended: that the direction as to the conveyance and general release were authorised, and the latter not objectional for omiting to state to whom it was to be made; and that as to the amount awarded, if, as contended, the corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed that no more was given.

Held, also, that the inability of the company under their charter to expend their funds in paying the award, would be no ground for setting it aside.

(E. T., 25 Vic., 1862.)

Galt, Q.C., obtained a rule on defendants to shew cause why the award in this matter should not be set aside on the following grounds:

1. For uncertainty, in this, that the language of the award leaves it doutful whether the arbitrator intended that the company should have the option of carrying out the agreement entered into between the parties for constructing the branch line, (to lead from the station into Barrie), or in default thereof to pay the £5,000 awarded.

2. That it is uncertain also in this, that the arbitrator does not find by this award whether the agreement has or has not been carried out, and leaves the right of the town to claim the money to depend on the establishment of that fact.

3. On the ground that the arbitrator has exceeded his authority, in ordering a conveyance to be made by the company to the corporation, of certain lands formerly conveyed by one Boon to the company.

4 And has exceeded his authority in directing the company to execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose land the branch line from the main track to Barrie was to pass, and without directing to whom the release is to be made.

5. On the ground that the arbitrator has not stated what sum has been expended by the town in procuring land and water frontage for a turning with right of way thereto, but has awarded generally that £5,000 be paid as compensation for non-performance of an agreement made to construct a branch line to Barrie, which it is submitted cannot be done, for that a municipal corporation cannot claim damages for the non-fulfilment of such an agreement without shewing damage to the corporation, and that such damage must be taken in this award at the sum actually expended by them, which sum is not found by the arbitrator.

6. That the amount awarded is excessive.

The submission was in the first place provided for by a certain written agreement made between the parties in Quebec on the 16th of May, 1861, while a bill was before the legislature, then in session, respecting the constraction of the branch line into the town of Barrie, which bill it was agreed by both parties should be withdrawn on the signing of the agreement. And they further agreed that the matters in dispute arising out of a claim of the corporation of Barrie against the company, in connection with the construction of a branch line into the town of Barrie, should be referred to arbitration, and that in such reference no appeal should be made to the act relating to the Northern Railway of Canada, passed in 1859, or to a certain order of the Governor-General in Council, of the 12th of May, 1859, or to the act in relation to the Northern Railway passed in 1860, so far as to prevent or relieve the said company constituted by those acts from being bound by any obligation contracted by the Northern Railway Company of Canada with the Corporation of Barrie before the passing of the said acts, but that the arbitration should proceed to be heard, and be determined, and an award made, as though the said acts had not been passed.

This preliminary agreement then provided that the Hon. S. B. Harrison, judge of the county court of the united counties or York and Peel, should be the arbitrator, and that his award should be final: that proper bonds should be entered into by the parties; and that the submission should be made a rule of court.

In pursuance of this agreement bonds were entered by the respective parties, under their proper corporate seals, in which it was recited that disputes and differences had arisen between the parties, and were then pending, as stated in the agreement of the 16th of May, 1861, referred to, and that the said S. B. Harrison had been named the arbitrater by both parties for determining such differences; and the condition of each bond was, that the obligors respectively should well and truly submit to, abide by, and perform the award of the said arbitrator touching and concerning the said matters in dispute between the railway company and the said corporation, and so referred as aforesaid.

By his award made on the 31st of January, 1862, the arbitrator awarded:

1st. That there was in 1853 a valid and binding agreement by the Northern Railway Company with the Corporation of the town of Barrie to construct a branch line of railway from the main track in Innisfil into the town of Barrie, provided that suitable land and water frontage for a terminus, with right of way thereto from the said main track, was procured by the corporation of Barrie free of cost to the Railway Company.

2ndly. That such suitable land and water frontage for a terminus, with right of way thereto from the said main track, was procured by the corporation of the said town free of cost to the said Railway Company, and to their satisfaction, at very considerable expense to the said Corporation of Barrie.

3rdly. That the said Railway Company did not, nor did the said Northern Railway Company of Canada, at any time since, construct the said branch line; and that the claim of the said Corporation of the town of Barrie to have the same constructed had never been abandoned or given up at any time, but on the contrary had been always since upon all convenient occasions urged and pressed for performance.

4thly. That reference being had to the agreement in the said memorandum of agreement, by which the award was to be made as though the several acts of parliament therein referred to had not been passed, he awarded "that the said claim of the corporation of the town of Barrie to have the said agreement performed was still subsisting, and if not performed their right to compensation in lieu thereof ought to be awarded:" and

5thly. As compensation for the non-performance of the said agreement, and in full satisfaction of the said claim of the said Corporation of the town of Barrie against the said Northern Railway Company of Canada in respect thereof as by the said reference he was empowered to do, he thereby awarded, ordered, adjudged and determined, that the said Northern Railway Company of Canada, and their successors, shall and do well and truly pay, or cause to be paid, to the said Corporation of the town of Barrie, or their successors, on the 10th day of March next ensuing the date of the award, at the office of, &c., in Toronto, the sum of £5,000 of lawful money of Canada, and that the same be received by the said Corporation of the town of Barrie in full satisfaction and discharge of and for all the said matters in difference to him referred as aforesaid.

6thly. And he further awarded that the Northern Railway Company of Canada do, when requested to do so by the said Corporation of the town of Barrie, make and execute to them a valid deed of conveyance in fee of all lands and tenements mentioned and comprised in a certain indenture of bargain and sale made by one John Boon to the said Company, dated the 18th of August, 1855; and should and do further, when so requested as aforesaid make and execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose lands the said branch line from the main track into the town of Barrie was to pass.

The award then gave directions as to the costs of the reference and award.

Eccles, Q. C., and *Angus Morrison*, during last term shewed cause.

Cameron, Q. C., and *Galt, Q. C.*, supported the rule.

Burns, J., read the judgment prepared by the late Chief Justice of the court, in which he concurred.

As the reference was by way of compromise, and led to the withdrawing of a bill relating to the matter which was before the legislature, neither party should be countenanced by the court in refusing to abide by the award on account of any objection not really applying to the merits of the matter in dispute. There is no complaint of any improper conduct on the part of the arbitrator; no affidavits are filed; and the defendants have confined themselves to exceptions which they contend shew the award to be invalid on the face of it. If these objections are well founded the defendants can have the advantage of them in resisting performance by whatever means it may be attempted to be enforced, and as the court has always a discretion in declining to set aside an award on application, is not this a case in which the party complaining only on such grounds as he contends are apparent on the face of the award should be left to oppose any remedy for enforcing payment?

But in regard to the objections, it seems to me there is nothing in the first, though the award happens to be so expressed as to leave some appearance of ground for it. We must give a reasonable construction to the award. The arbitrator has found that the company have not yet done what they agreed to do eight years before, though they have been in no way absolved from doing it. The words "if not performed" may, when all is taken together, be understood to mean the same thing as "since it has not been performed." The arbitrator says in effect, "if the company has not made the branch line they should make compensation: they have not made the branch line and therefore I award," &c.

If the company would rather make the branch line than pay the compensation they have it in their power to contend that an option is given to them, and to move to stay proceedings on the award till a certain day, to give them an opportunity to make the branch line. The court could then determine whether they had such an option.

But the arbitrator could have never intended to give an option. "If not performed," he says, "their right" (that is the right of the town) "to compensation in lieu thereof ought to be awarded." "If not performed" may be reasonably taken to mean if they have *hitherto* not performed their undertaking, not if they shall not *hereafter* perform it, for he proceeds immediately to award "compensation for the non-performance of the agreement," thereby deciding that it had not been performed; and he awards that the compensation shall be paid at a certain fixed day little more than two months from the date of the award, and this without any reservation to the Company of a right to make the branch line instead of paying the money. What follows respecting the Company conveying back the land is all consistant with the construction that the £5,000 was positively to be paid.

The third objection seems to be immaterial. It should be assumed that the arbitrator determined that the company having refused to make the line, should not keep the land which had been conveyed to them in the confidence that they would make it. It does not appear on the face of the award why the land which Boon had conveyed to the Company should be made over by the Company to the town of Barrie instead of being re-conveyed to Boon, but all that can be said is that the facts which may have made that a just and reasonable direction are not set out in the award, as they need not be. The circumstances may be such as to account satisfactorily for the award in this respect, and we should assume that there were good grounds for it, in the absence of information to the contrary. The town may have paid Boon for the ground, and directed him to convey it to the Company, and if so they should have it back again, since the Company have declined to make use of it for the purpose for which they got it.

It should be assumed that the arbitrator made allowance in his award for the town getting back this land, and thought it just to award the £5,000 after taking that into his consideration. Besides, if the directions respecting Boon's conveying this land to the Corporation of Barrie were on any ground void, the only consequence would be that they would lose the benefit of that direction in their favour, it could interfere with their right to get the compensation awarded.

And so in respect to the fourth objection to that part of the award which directs that the Company shall execute a general release of all claims in respect of the land and right of way conveyed to them or agreed to be conveyed to them by the several parties over whose lands the branch line was to pass. So far as the town is concerned, that release was evidently intended to be something in addition to the pecuniary compensation. If from any defect in that part of the award the direction should fail of its intended effect, that is no reason why they should not be paid the pecuniary compensation awarded. But is there in truth any difficulty as regards that part of the award?

It was a matter on which the arbitrator had a right to give the direction he did, if we suppose that his intention was, that besides paying the £5,000 the Company were to give up the land which they had not applied to the purpose intended. And as to the objection that it is not stated to whom the release is to be given, could not the company release all right of action and claims against the Corporation of Barrie or any other person or persons whomsoever in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose lands the said branch line was to pass? Besides the release was only to be executed "upon request," which request would point out who it was that requested the release.

As to the sixth objection, it must be assumed that the arbitrator had good grounds on the evidence before him for making the estimate of damages which he did. The court has not the grounds before it and cannot go into the merits. If it were correct to assume that the arbitrator could give no damages beyond what the town had disbursed in acquiring land, then it ought to be assumed that he did so confine himself rather than that he did not.

The damages may be excessive, but that does not appear, and the case must be an outrageous one in that respect before any interference could be justified on such a ground.

It was argued that the Company could not consistently with their charter and the law of the land expend their funds in paying the damages awarded. If that be so it may follow that they cannot be compelled to obey the award, but this is no application to the Corporation for that purpose, but an application by the Company to set aside an award for a reason which, if it be a reason, must have existed at the time of the submission as well as now; and after a compromise had been made, and the application to the legislature withdrawn on the faith of the arbitration which was agreed to, it does not lie in the mouth of the Company to object to the award on the ground that no such compensation could be legally awarded. They cannot at least make it the ground of an active interposition at their instance.

The rule should be discharged with costs.

McLEAN, C. J., having been absent during the argument, gave no judgment.

Rule discharged with costs.

RYERSE v. LYONS.

Lease—Rent payable quarterly in advance—Construction.

The plaintiff sued in covenant for three quarters rent, alleged to be payable by the lease quarterly in advance. Defendant pleaded as to the rent for the last quarter, commencing on the 1st of March, 1861: 1. That before the expiration of the first month of that quarter the plaintiff wrongfully evicted him. 2. That by a provision in the lease in case of the mill demised being accidentally burned the rent was thenceforth to cease, and that it was so burned on the 5th of March, 1861. 3. On equitable grounds, as to the rent subsequent to the 6th of March, 1861, the same provision in the lease, alleging the destruction of the mill by fire before the 6th March.

Held, on demurrer, pleas bad. for the rent, being payable in advance, was due on the 1st of March, and nothing which occurred afterwards could divest the plaintiff's right.

DECLARATION, that the plaintiff by deed let to the defendant certain premises specified, for five years from the 1st of September, 1860, at $900 a year payable quarterly in advance, which defendant covenanted to pay, but of which a balance of three quarters was due and unpaid.

Fifth plea, to so much as relates to the plaintiff's claim for rent in respect of one of the three quarters' rent in the declaration mentioned, being the quarter commencing on the 1st of March, 1861, the defendant saith that the said three quarters in the first count mentioned commenced respectively on the first days of September and December 1860, and the 1st of March 1861, and that during the quarter commencing on the day last aforesaid, and before the expiration of the first month of the said quarter, the plaintiff, without the consent and against the will of the defendant, wrongfully entered into and upon the mills and premises in the declaration mentioned, and evicted the defendant from the use and occupation thereof, and kept him so expelled thence hitherto.

Sixth plea, to so much of the declaration as relates to the plaintiff's claim for rent in respect of one of the three quarters in the said first count mentioned, being the quarter commencing on the 1st of March, 1861, the defendant saith that the said three quarters in the said first count mentioned commenced respectively on the first days of September and December, 1860, and the first day of March, 1861, and that it was and is provided and agreed, in and by the said alleged deed, that should the said mills therein and in the said declaration mentioned be destroyed accidentally by fire, and not by neglect or carelessness, then in that case the said rent should thenceforth cease. And the defendant saith that the said mills were on the 5th day of March, 1861, and within six days after the commencement of the said quarter commencing on the first day of March aforesaid, in the year last aforesaid, accidentally destroyed by fire, and not by neglect or carelessness.

Seventh plea, on equitable grounds, as to so much of the declaration as relates to the plaintiff's claim for rent for or in respect of all or any part of the said term in the said first count mentioned subsequent to the 6th of March, 1861, the defendant saith that the said three quarters in the said first count mentioned commenced respectively on the first days of September and December, 1860, and the 1st of March, 1861, and that the plaintiff's claim in said first count includes a claim for rent for and in respect of a period of time subsequent to the said 6th day of March, in the year last aforesaid. And the defendant saith that it was and is provided and agreed in and by said alleged deed, that should the said mills therein and in said declaration mentioned be destroyed accidentally by fire, and not by neglect or carelessness, then and in that case the said rent should thenceforth cease. And the defendant further saith that subsequently to the first day of March, 1861, and before the said 6th day of March, in the year last aforesaid, the said mills were destroyed accidentally by fire, and not by neglect or carelessness.

The plaintiff demurred to each of these pleas.

Robert A. Harrison, for the demurrer, cited *Hopkins* v. *Helmore*, 8 A. & E. 464; *Poole* v. *Tumbridge*, 2 M. & W. 226; *Hume* v. *Peploe*, 8 East 178; *Chanter* v. *Leese*, 4 M. & W. 295, 311; *Clarke* v. *Holford*, 2 C. & K. 540; *Clarke* v. *The Glasgow Assurance Co.*, 1 MacQ. Scotch App. Cas. 668; Vin. Abr. Vol. III., "Apportionment;" *Holtzapffel* v. *Baker*, 18 Ves. 115; Bullen & Leake Prec. 378; Chy. Junr. Prec. 351, 352.

Richards, Q. C., contra, cited *Newsome* v. *Graham*, 10 B. & C. 234; *Bennet* v. *Ireland*, E. B. & E. 326.

McLEAN, C. J., delivered the judgment of the court.

It appears to us that all these pleas are bad. The plaintiff is asking for rent *due* to him according to the lease *before* the burning of the mill. He was entitled to receive it and could have distrained for it on the first day of March, or he could have sued for it on that day. A right of action was vested in him when default was made in the payment, and being vested nothing which subsequently occurred would divest it except payment. All rent becoming due subsequent to the burning ceased to be payable under the lease, but if such provision had not been inserted the plaintiff could have insisted on his rent being paid quarterly, notwithstanding the destruction of the mill by fire, and the defendant could not protect himself against the payment by pleading that it had been burnt down or injured. He was not to be relieved from payment of rent by any other injury to the mill except burning not from carelessness or neglect. If it had been swept away or rendered useless by a flood, the rent would still be payable, or if the plaintiff were able to prove that the burning was wholly owing to neglect or carelessness—if, for instance, he could shew that the burning was owing to the defendant keeping the ashes from a stove in a box or barrel in the mill—the rent agreed upon could be enforced during the full period of the term.

The pleas do not set out any defence to the suit of the plaintiff, and judgment must be for the demurrer.

Judgment for plaintiff on demurrer.

LEE ET AL v. WOODSIDE.

Assignment—Money had and received.

F. had a demand against one T. on notes and acceptances of about $20,000. The plaintiffs agreed to transfer to him certain bank stock worth $2,550, as a loan, to secure which he agreed to assign, and afterwards delivered to them, $14,299 of these notes, all of which were negotiable, but some only were endorsed by F. T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect there for them. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about $200 excepted) came in to the defendant's hands.

Held, that the plaintiffs might recover from the defendant as money had and received to their use, the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt.

ACTION for money had and received to the plaintiffs' use.

Plea.—Never indebted.

The case was tried at the last Spring Assizes held at Toronto, before *Burns*, J., and the facts appeared to be these:—

On the 1st of June, 1860, D. K. Feehan entered into an agreement with the plaintiffs under seal, the material parts of which to this action were in these words:

"Whereas the parties of the second part" (the plaintiffs) "have agreed to transfer to the party of the first part" (Feehan) "sixty shares of the stock of the Bank of Upper Canada, amounting to the sum of three thousand dollars, as a loan to the said party of the first part. Now these presents witness, that in consideration

of the said transfer of the said stock, the party of the first part covenants with the parties of the second part, that he will assign and transfer to them a debt due to him from Messrs. Thompson & Co., for the sum of fourteen thousand two hundred and ninety dollars, together with all notes, bills, or other evidences of the said debt. To have and to hold to the said parties of the second part as a security for the said stock transferred by the said parties of the second part."

There were provisions about re-transferring bank stock, payment of interest, and principal, &c., not necessary to notice, and the agreement ended with this provision: "And the parties of the second part shall have the right to enforce the said debt of the said Thompson & Co., or compound, compromise, or give time therefor, with the consent of the party of the first part, and on the re-transfer of the said stock, or the payment of the said money, the parties of the second part will re-convey to the party of the first part the said debt of the said Thompson & Co., together with the evidences thereof."

The evidences of the debt due by Thompson & Co. consisted of various promissory notes and acceptances of bills of exchange, some due at the date of the agreement and others not falling due until afterwards. These notes and bills were delivered by Feehan to the plaintiffs. Thompson & Company removed to Lower Canada and there failed. It was admitted in this case that the law of Lower Canada was, in such a case, that such property of Thompson & Co. as remained in their hands, which had been sold by Feehan to them, but not paid for, and could be identified, would be liable for that particular debt, and that the demand of Feehan on production of the security would be there treated as a privileged debt.

On the 19th of October, 1860, Mr. Feehan obtained the notes and acceptances from the plaintiffs, giving them a receipt for them, expressing that it was for the purpose of handing them to a solicitor at Quebec for collection. The courts in Lower Canada dealt with them on the footing that Feehan was collecting them as his own.

The whole demand which Feehan had against the firm of Thompson & Co. consisted of notes and acceptances to the amount of $20,446.52, of which the sum of $14,290 was assigned to the plaintiffs, the remainder having been assigned to other parties, with the exception of $2,123.44, which Mr. Feehan retained in his own hands.

On the 17th of December, 1860, Feehan executed a deed of assignment to the defendants, for the benefit of his, Feehan's creditors, and in the schedule to the deed the notes and acceptances which had been previously delivered to the plaintiffs, and afterwards got from them by Feehan to take them to Lower Canada, were all enumerated, and it was stated that they were held by the plaintiffs as security for an advance of $2550. That sum was the cash value the parties put on the 60 shares of bank stock transferred to Feehan, as the first agreement shewed.

Mr. Feehan was examined as a witness upon the trial of this cause, and stated that when he made the assignment to the defendant, he informed the defendant how the notes and acceptances stood pledged to the plaintiffs. He further stated, that in obtaining the notes and acceptances on the 19th of October, 1860, to present them in Lower Canada, it was only done by him for the purpose of realizing the amount as a privileged debt, in order that the plaintiffs might receive the money when collected. The amount realized in Lower Canada upon the whole debt of $20,446.52, due by Thompson & Co., was $3615.86. Of this sum, $3337.87 found its way into the hands of the defendant, and the residue of the $3615.86 was paid over to other parties. The amount of $3337.87 was received by Mr. Feehan from his solicitor in Lower Canada in July, 1861; and he said he informed his solicitor there how the matter stood with respect to the plaintiffs, and when the money was received here he wished to pay over to the plaintiffs the proportions due them according to the amount of the notes and acceptances assigned to them, but the defendant would not consent, and contended that he being Feehan's assignee was entitled to the whole money, and that any demand the plaintiffs might have should be presented to him. Mr. Feehan stated that he thought the plaintiffs should receive their proportion, and that only the proportion of the $20,446.52, which still belonged to himself, should be paid over to the assignee. The defendant stated that he was acting under the advice of the solicitors of the trust, and insisted he should have the whole money, and it was then paid over to him.

It was admitted the defendant had the money still in his hands unappropriated, and that the plaintiffs had given notice to the defendant of their claim to the money before action brought.

A number of objections were made by the defendant's counsel to the plaintiffs' recovery, which were reserved as grounds of non-suit.

A discrepancy existed as to the amount of notes and acceptances which had been originally given to the plaintiffs, and as to what had been returned from Lower Canada; and there not being time to analyze the matter at the trial, a verdict was taken for the plaintiffs for $3,092.69, subject to be reduced if the calculation was not right.

R. A. Harrison obtained a rule to shew cause why a non-suit should not be entered on the following grounds:—1. That there was no proof of any assignment to the plaintiffs by Feehan of the debt due to Thompson & Co., or any part thereof, but only an agreement to assign. 2. That the plaintiffs were not in law entitled to maintain this action against the defendant, because of the want of privity between the defendant and the plaintiffs. 3. That the plaintiffs were not in law entitled to maintain this action, because of the want of proof of any ascertained sum of money in the hands of the defendant, which could be said to belong exclusively to the plaintiffs. 4. That the plaintiffs' remedy, if any, was in a court of equity, where the rights of all parties concerned could be finally and satisfactorily adjusted. 5. That the plaintiffs in respect to the advance to Feehan, were in the same position as other creditors of Feehan, and must with them share rateably under the deed of assignment to the defendant. The rule also asked to reduce the verdict to such sum as the court might find the plaintiffs entitled to, if any.

Cameron, Q. C., shewed cause during last term, and cited *Adderley* v. *Dixon*, 1 Sim. & St. 607; *Heath* v. *Hall*, 4 Taunt. 326; *Williams* v. *Everett*, 14 East 582; *Poole* v. *Cowan*, 8 L. T. Rep. 385; *Wright* v. *Bell*, 5 Price 325.

R. A. Harrison, contra, cited *Wharton Walker*, 4 B. & C. 163; *Wedlake* v. *Hurley*, 1 Cr. & J. 83; *Stephens* v. *Badcock*, 3 B. & Ad. 355; Trower on Debtor and Creditor, 182; *Jones* v. *Carter*, 8 Q. B. 134; *Great Northern R. W. Co.* v. *Shepherd*, 8 Ex. 30; *Bleaden* v. *Charles*, 7 Bing. 546; *Harvey* v. *Archbold*, 3 B. & C. 626; *Baron* v. *Husband*, 4 B. & Ad. 627.

Burns, J.—In this case I have to read the judgment prepared by the late Chief Justice of this court, in which I concur.

If the verdict for the plaintiffs should stand, I see there is some doubt suggested as to the correctness of the amount for which it was entered at the trial. This the parties can settle, and in case of any disagreement refer to the court.

I perceive that of the securities handed over by Feehan to the plaintiffs some have been endorsed by him, others (and for the greater part I think) not endorsed.

As to those endorsed by Feehan in blank, and delivered over by him in security to the plaintiffs, how can there be any question that the money collected on them should go to the plaintiffs, at least to the amount of their debt and interest?

As to those not endorsed (all were negotiable), the delivery of them over to the plaintiffs by Feehan, for the purpose of collecting them by the plaintiffs in Feehan's name, as they might be with his assent, would make the money collected upon them the money of the plaintiffs, as between them and Feehan, if Feehan had not made the assignment to defendant which he did make; and if so, then his assigning his debts afterwards to defendant can place the plaintiffs in no worse situation, when the defendant took them, or rather the assignment of them, with written notice that they had been placed in the plaintiffs' hands to secure the sum agreed upon.

It would have made the matter more clear if the securities had all been endorsed, as some were, though probably not for the purpose at the time of transferring them to the plaintiffs.

There may be a difficulty in adjusting the amount for which the verdict should be entered, for of course it is only on the moneys that can be held to have been paid by Thompson & Co. on account

of the notes given into the plaintiffs' hands as security for their debt these plaintiffs can have any claim.

And as to those notes, the plaintiffs' right to recover seems to me to be clear, for they cannot be held to have passed under the assignment to defendant, except as to the surplus after the plaintiffs' claim. It was evidently the intent, taking the assignment and the schedule together, to provide that the plaintiffs' advances should first be paid out of them, and to give the assignee to understand that there was that prior claim on the proceeds in the plaintiffs' favor, to secure which the plaintiffs held the notes.

I think Feehan's evidence fully supports the plaintiffs' right to the $2,550, so far as it can be shewn to have been collected out of or upon these securities.

If what was collected from Thompson & Co. was collected merely as so much by way of a dividend on their whole debt due, and without any reference to any particular securities (as I suppose it was), then of course a calculation must be made founded on the proportion of the securities held by the plaintiffs to the whole of Feehan's claim against Thompson & Co.

McLEAN, J., having been absent during the argument, gave no judgment.

IRWIN v. SAGER ET AL.

Ejectment—Right to try question of boundary—Conflict of opinion.

It was held by this court that at a former trial the question of boundary should have been tried in this action of ejectment. The Court of Common Pleas held differently upon the same point in other cases, and the Chief Justice of that court having at a second trial ruled in accordance with their judgment, a new trial was granted without costs.

Ejectment of the west half of lot number 29 in the 3rd concession of Ancaster.

This case came on for trial at the last spring assizes at Hamilton, before Draper, C. J., and the title of the plaintiff to the west half of lot 29, in the third concession of Ancaster being admitted, the defendant offered evidence to prove that the land actually in dispute between him and the plaintiff, though claimed as part of that lot, was not in fact part of it, but part of lot No. 28, to which the defendant claimed title. The learned Chief Justice rejected that evidence, holding that under the statute he must treat the appearance as general, for the statute, though providing for a notice limiting the defence, the defence does not provide for a limited appearance; and consequently, as the general defence could not under the admission be sustained, the plaintiff was entitled to a verdict for the whole of the lot sued for; and that he must take possession at his peril of any land not belonging to that lot.

Sadlier obtained a rule *nisi* to set aside the verdict, relying upon the judgment given in this caseafter a former trial, 21 U.C.Q.B. 373, at variance with the decision of Common Pleas in *Lund* v. *Savage*, 12 U. C. C. P. 143, in accordance with which the learned Chief Justice ruled at the last trial.

Barton shewed cause.

McLEAN, C. J.—The able judgment of the learned Chief Justice of this court delivered during the last term in this particular case seems to me conclusive as to the question whether or not a disputed boundary can be decided in an action of ejectment, or whether an action of trespass is the only form of action in which such a question can be raised. Before the passing of the Ejectment Act, Consol. Stats. U. C., cap. 27, the constant practice was to bring ejectment in any case of disputed boundary, and the premises were so defined that there could be with due care no difficulty in seeing on the face of the proceedings the premises sought to be recovered. It is true the verdict in any such action might be disputed at the instance of either party, and another action might be brought, but the facts disclosed in evidence were generally sufficient to satisfy the parties on which side the right lay; and though in some instances other actions might be brought on the same or different testimony, the disputed boundary might be called in question and disposed of, for the time at all events, in an action of ejectment as satisfactorily as in an action of trespass. I cannot, I confess, see that in changing the mode of proceeding in an action of ejectment, and causing the parties actually contesting to appear as plaintiff and defendant instead of John Doe and Richard Roe, the legislature intended to drive a party, in order to assert a right to a piece of land in dispute, to an action of trespass in the first instance, in which damages only can be recovered, and then to an action of ejectment to recover the land after a recovery in trespass.

The 26th section of the Ejectment Act provides that upon a finding for the claimant judgment may be signed and execution issued for the recovery of possession of the property, or *of such part thereof* as the jury have found the claimant entitled to; and the 12th section provides that any person appearing to a writ may limit his defence to a part only of the property mentioned therein, describing *that part* with reasonable certainty in a notice entitled in the court and cause and signed by him or his attorney; and an appearance without such notice confining the defence to a part shall be deemed an appearance to defend for the whole. I think that these clauses, and the 49th section, as to the effect of a judgment in ejectment, and indeed all the provisions of the act, shew that, though the form of proceeding was changed, the action of ejectment was intended to be the same as it had always been. In the case of *Peters* v. *Nixon*, 6 U. C. C. P. 451, the learned Chief Justice says that the practice of trying boundaries in actions of ejectment had prevailed too long perhaps to enable the courts by their own authority to put an end to it; but in that case the decision was to discourage (except when bound by well-established rule) the practice of trying questions of boundary by actions of ejectment, the legitimate object of which it declares is to try titles.

The decisions of this court as to the right to try questions of boundary in actions of ejectment, and those of the Common Pleas on the subject, are so much at variance as to leave suitors in doubt as to the law, and in some cases create so much inconvenience and expense to parties that it is extremely desirable that a decision of our highest court should be obtained; but till then I do not feel at liberty to decide that a course of proceeding which I believe has always prevailed in this province shall be no longer continued.

BURNS, J., concurred.

HAGARTY, J., dissented, retaining the opinion expressed by the Court of Common Pleas, of which he was then a member, in *Lund* v. *Savage*, and *Lund* v *Nesbitt*, 12 U. C. C. P., 148.

New trial without costs.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*)

MASSINGBERD v. MONTAGUE.

Sale for taxes—Sheriff's officer—Duty imposed on sheriff and his officers at sales for taxes—Costs.

At a sale of lands for wild land taxes, one of the sheriff's officers conducted the sale, at which he knocked down without any competition to another officer of the sheriff, a lot of land worth about £350, for rather less than £7 10s., which lot was subsequently, with the assent of the sheriff, entered in the sales book in the name of the party who had conducted the sale, for the purpose of enabling the person to whom it had been knocked down to cheat his creditors. Upon a bill filed to set aside the deed executed by the sheriff, it was shewn that by arrangement amongst the persons attending the sale, it was understood a lot should be knocked down to each person in turn, in pursuance of which the sale in question was effected. Under these circumstances the court set aside the sale with costs as against the person to whom the conveyance was made.

The duty imposed upon sheriffs at sales of lands for taxes is to sell such portions of the lands offered as the sheriff may consider it most for the advantage of the owners thereof; where therefore a sheriff so neglected his duty in this respect that at a sale for taxes very valuable lots of land were knocked down for trifling amounts of taxes, in pursuance of an agreement to that effect entered into amongst the bidders, some of which lands were purchased by bailiffs in his employ, and with his knowledge, the court in dismissing the bill filed to set aside one of the sales to his bailiff as against the sheriff, refused him his costs. It is not sufficient that the sheriff does not participate in such arrangements for his own benefit.

The bill in this cause was filed by the Reverend Hompesh Massingberd, against Charles Montague, William Glass, sheriff of the county of Middlesex, and John Godbold, praying, under the circumstances appearing in the head-note and judgment, to have a sale effected by the defendant Glass, as sheriff, set aside, and plaintiff let in to redeem the lands so sold to the defendant Godbold, on the payment to him of what he had advanced.

The cause came on to be heard before his Lordship the Chancellor.

Roaf, for the plaintiff, referred to *Henry* v. *Barness*. (Grant, vol. 8, p. 345.)

Fitzgerald for defendants.

VANKOUGHNET, C.—This case presents, though perhaps in a less degree than some others, one of those instances of sales of lands for arrears of taxes in which the rights of owners are sacrificed to the cupidity of bidders, who by arrangements among themselves contrive to get, for trifling sums chargeable on the property, whole lots of land, when one-twentieth, and often one-fiftieth part should suffice for payment. It would seem from the facts disclosed in this and other similar cases that persons attending such sales with an intention to purchase, consider it lawful and proper to conspire together to divide between them large quantities of land so exposed to sale; and the officer conducting the sale appears to have considered that he has discharged his duty so long as he does not participate in such an arrangement with a view to his own profit. The law has ever required that those, whose persons or property have been by misfortune or otherwise, subjected to its process, shall be dealt with fairly and without oppression, and with as little suffering and loss as possible, and it throws this duty upon the officer charged with the execution of that process. The statute regulating sales of land for taxes, recognizes and enforces this duty, for it provides that, "the sheriff shall sell by public auction so much of the land as may be sufficient to discharge the taxes, and all lawful charges incurred in and about the sale and the collection of the taxes, selling in preference such part *as he may consider it most for the advantage of the owner to sell first*." The legislature have not, therefore, been less careful to guard against the sacrifice of property subjected to burdens for the public, than the law has been to protect, against wanton waste and loss, property subjected under judicial process to the claims of individuals. Nor should they have been.

Taxes are at all times onerous, and are imposed merely from public necessity, and it is the policy as well as the interest of the state that they should bear as lightly as possible on individuals, and it is the duty of those charged with the collection of such charges, to maintain this policy so far as is in their power. We know that at common law, if a sheriff sells under execution, unless at the peremptory mandate of the court, the property of a debtor at a price greatly below its value, he is liable to damages in an action for the loss. And in one case, *Phillipps* v. *Bacon*, (9 East. p. 303,) Lord Ellenborough is reported to have said, in reference to an attempt to sustain on the common count for trover a verdict recovered against the sheriff for want of proper care and judgment in the sale of property under a *fi. fa.*, "If the question had arisen as at present advised, I should have inclined very strongly, from the argument I have heard, to have held that if the sheriff, or his officers acting for him, depart so entirely and scandalously from their duty, in making a mock sale of the goods in the manner which has been represented to us, it could not be considered as a sale in obedience to the writ of *fieri facias*, but rather a conspiracy to despoil the plaintiff of his property, and would bring the sale within the principle of the six carpenters' case, and make the sheriff a trespasser *ab initio*."

Now is not such a sale for taxes as I have referred to a mockery, and a conspiracy to deprive the owner of his property? and is the sheriff, in conducting and countenancing such a sale, doing his duty, and acting in the spirit of the statute and of the law? Such a sale, to use a paradox, is no sale. The duty of a sheriff is not to expose lands to it, but to adjourn the time, and then execute the writ, giving all proper notice to ensure the attendance of bidders. A course similar to this he adopts on *fi. fas.*, where he returns "goods on hand for want of bidders." It is not his fault if he cannot secure a fair sale, and thus make the money which he is charged to collect; but it is his fault if he permits an unfair sale, which he has the means of checking or preventing.

The writ for these lands is placed in the sheriff's hands, at least three months before the time of the sale, and it is not too much to expect that during that time he shall take some pains to make himself acquainted with the condition and value of the land about to be sold; and the machinery of his office would seem adequate for the purpose at very little trouble or cost. He can hardly excuse himself by total ignorance, when there is imposed upon him the exercise of judgment in selling first that portion of the land which he considers it most for the advantage of the owner to sell.

Now in this case there is much evidence to shew that at periods of the sale, which extended over two or three days, arrangements were made by those present not to compete for particular lots; but there is not the evidence of general combination and of determination to maintain it, which was furnished in the case of *Henry* v. *Burness*. There is abundant proof, on examining the book containing the entries of sale, that whole lots of land were, without any competition, sacrificed for trifling sums, and these too lying in well settled parts of the country, with the average value of which it is hard to believe that persons necessarily well acquainted with the county as the sheriff and his officers must have been, could have been entirely ignorant. Then what do we find in reference to this particular lot? not certainly distinct evidence of any arrangement that there was to be no competition, but we find the sheriff's officer who was conducting the sale, Godbold the defendant, selling it without any competition to another sheriff's officer, Jeffrey, the bailiff; and subsequently, to enable Jeffrey to cheat his creditors, entering in the sales-book, with the assent of the sheriff, the lot as sold to himself; the sale being for less than £7 10s., and the lot worth at least £350. Now can such a transaction stand? These two gentlemen have been too clever. I am not quite certain what the truth in the matter is; but by their own statement, Jeffrey, though he swears he bought for himself, but feared to hold the land in his own name, persuades the sheriff that he bought for Godbold, and gets the sheriff to treat Godbold as the purchaser, to whom, as such, first, the certificate of sale, and afterwards the deed issued from the sheriff. We cannot, after this, allow Mr. Jeffrey or Mr. Godbold to deny that the latter was the purchaser; and as I think he could not sell to himself, the sale and all transactions founded on it must be set aside, and a decree to that effect made, with costs, to be paid by Godbold. Even if the sale were to Jeffrey, and had remained in his name, I should think it an improper one. Considering the duties cast upon the sheriff, and how much he must necessarily rely for information upon his officers and bailiffs, I think none of them should be allowed to purchase at any sale which he in the exercise of his office is called upon to make, and that he should not permit any such purchase. He has the power in his own hands, for if any one of his employees desire to become a purchaser, he can be told by the sheriff that he must first leave his service.

I dismiss the bill as against the sheriff, but without costs, for I cannot hold him free from blame in the matter. He ought not to have allowed the sale to be entered in Godbold's name; neither ought he to have allowed Godbold to become, as he did, the purchaser of several other lots, and the more especially so as he had heard the proposition to allow the auctioneer and his clerk to have a lot or two without opposition.

The amount of taxes paid by Godbold, with ten per cent., up to the filing of the bill, to be re-paid him, or be deducted from the costs.

CHAMBERS.

(*Reported by* ALEX. GRANT, Esq., *Reporter to the Court.*)

CHAPMAN ET AL, JUDGMENT CREDITORS, SHEPHERD AND TILLIE, JUDGMENT DEBTORS, MCDONALD, MOORE AND BELL, GARNISHEES.

C. L. P. Act—Garnishee proceedings—Power to call third party (claimant) before the court.

When it is suggested that the debt sought to be attached belongs to some third person not a party to the suit, there is no provision under our C. L. P. Act for summoning such third party before the court. The law is different under 23 & 24 Vic. cap. 125, secs. 29 & 30, in England.

[Chambers, March 18, 1862.]

On the 6th March last, upon the usual affidavit, an attaching order was issued in this cause.

The affidavit stated that the garnishees, McDonald and Moore, were indebted to defendant Tillie in $800, on a promissory note for that amount made by McDonald in favor of Moore, and by him endorsed to defendant Tillie. It also stated that garnishee Bell was indebted to defendant Tillie in $1,200, upon a mortgage for that amount made by Bell to Tillie.

A summons was issued, calling on the garnishees to show cause why they should not severally pay to the judgment creditors the amounts alleged to be due by them to the judgment debtor Tillie.

On the return of the summons, affidavits were filed, showing that the judgment debtor Tillie had, in September 1861, sold and transferred the note he held against McDonald and Moore to one Walter Scott, who sued the note when it became due, and Moore, who was only surety for McDonald, settled the suit with Scott before the attachment; and that Tillie had, in 1861, long before the plaintiffs had any judgment against Shepherd and Tillie, assigned Bell's mortgage to Scott.

The plaintiffs, therefore, asked for permission to file an affidavit stating that the transfer of the note and mortgage to Scott was colorable, and that in truth Scott was only an agent or trustee of the judgment debtor Tillie.

Burns, J.—The object of asking leave to file this affidavit is, that the garnishees may be compelled to deny their liability to pay Scott. If it be granted, it is argued that the garnishees may protect themselves by applying for an interpleader issue under the Interpleader Act to compel Scott to interplead with the plaintiffs, to determine the question which of the two, Scott or the plaintiffs, are entitled to the proceeds of the securities.

This is an ingenious way of putting the case, but I think it clear that the Legislature never intended to harrass the debtor of the judgment debtor to that extent or in that way.

The claimant of the securities ought to be before the court or judge, and it is clear that no authority exists to bring him before the court unless the Interpleader Act can be used in the way suggested. It would seem very odd first of all to order a *scire facias* to issue upon the garnishees to show cause why they should not pay the debt owing by them, merely with a view that they again in their turn should call upon the plaintiffs and the assignee of the securities to interplead with each other as to who is the proper party to call for payment from the garnishees.

The law is defective with respect to this matter, and in England it has been remedied by the 29th and 30th sections of 23 & 24 Vic. cap. 125, passed 28th August, 1860. Under these sections, whenever it is suggested that the debt sought to be attached belongs to some third person, the judge has power to bring such third person before him, and then may either bar the claim of such person or make any order he shall think fit with respect to the lien or charge, if any, of such person.

Such a provision would be proper to be enacted in this country; but the fact of its having been enacted in England, where the previous law was as ours is now, shows that in such cases as the present the inquiry which the plaintiffs wish in this case could not there previously have been obtained.

I must refuse the application.

Vanluvan v. Tolan.

Costs of the day for not proceeding to trial according to notice—Rescinding Rule.

Where, upon a cause being called on for trial, counsel for plaintiff states he is not ready, and counsel for defendant, though present in court, does not insist upon having the cause struck out or a nonsuit entered, in consequence whereof the cause is passed over, defendant is not entitled to costs of the day.

(Chambers, 13th September, 1862.)

This was an action for slander and malicious prosecution. Notice of trial was served on 29th April last for the then next Spring Assizes, to be holden at Kingston on 9th May last. The record was entered for trial. There were 43 civil cases on the docket. This was number 36. On the afternoon of Saturday, being the second day of the Assizes, there being no business before the court, the presiding judge (Burns) stated his willingness to take any case that was ready, and asked counsel in the different cases if they were ready. The counsel for the plaintiff in this case stated that plaintiff had a number of witnesses in attendance, but that two of his most important witnesses were absent, under the belief that a case so low down on the docket could not be reached on the second day of the assize. The counsel for defendant, though apparently ready, did not insist upon the cause being struck out of the docket or upon having a non-suit entered. The cause was accordingly, like other causes, passed over. On the following Monday cause No. 12 on the docket was proceeded with and not finished till the afternoon of the following Wednesday. The remaining causes on the docket preceding this, together with criminal business, occupied the court till the following Saturday, when the court ended, having disposed of all causes on the docket excepting the two causes preceding this (36) and a few causes following it. The presiding judge refused to make any remarks.

Defendant afterwards, on 28th May last, having filed the usual affidavit obtained the usual rule for costs of the day against plaintiff, he not having proceeded to trial pursuant to notice.

Kingsmill, for plaintiff, in Trinity Term last obtained a rule in the Practice Court calling upon defendant to shew cause why the rule for costs of the day should not be rescinded.

By consent this rule was enlarged before a judge in chambers.

John Patterson shewed cause.

The following cases were cited in argument: *Morgan* v. *Fermyhough*, 11 Ex. 205; *Warne* v. *Hill*, 1 L. T., N. S., 574; *Scott* v. *Crossthwaite*, 6 U. C. L. J., 159.

Morrison, J., having consulted Burns, J., made the rule absolute.

In the matter of the Conviction of James Sullivan.

Certiorari for removal of Conviction—Practice.

Where it is shewn to a judge in chambers that there is a reasonable doubt as to the legality of a conviction under the Master and Servants Act, the judge will order the issue of a writ of *certiorari* for the removal of the conviction, notwithstanding the confirmation of the conviction by the court of sessions to whom an appeal was made against the legality of the conviction.

(Chambers, September 25th, 1862.)

This was an application for an order authorising the issue of a writ of *certiorari* for the removal into the Court of Queen's Bench of a conviction alleged to be illegal.

The conviction, which was under the Master and Servants Act, Con. Stat. U. C., cap. 75, was in the following form:—

PROVINCE OF CANADA,
County of Oxford,
TO WIT:

[L. S.]

Be it remembered, that on the sixth day of August, in the year of our Lord one thousand eight hundred and sixty-two, complaint was made before me, the undersigned, one of Her Majesty's Justices of the Peace in and for the County of Oxford, for that James Sullivan, of the Town of Woodstock, in the said County of Oxford, hired and employed one Edward Moles as a journeyman or skilled laborer to work for him, the said James Sullivan, at the wheelwright trade or business as such journeyman or skilled laborer, at the said Town of Woodstock, at the wages of eight dollars per week, and that he, the said Edward Moles, did duly work and labor for the said James Sullivan, as such journeyman or skilled laborer, at Woodstock, aforesaid, for the time of ten weeks, at the said wheelwright trade or business, from about the twelfth day of May last past, at the said wages of eight dollars per week; and that the said James Sullivan had not paid and refused to pay the said Edward Moles the sum of fourteen dollars and sixty-eight cents, being the balance of said wages for the said time of ten weeks, due and owing by the said James Sullivan to the said Edward Moles; and now at this date, to wit, on this seventh day of August aforesaid, at Woodstock aforesaid, the parties appeared before me, the said justice, and I, having heard the matter of complaint, did adjourn the said complaint until the eighth day of the said month of August for a further hearing and examination; and on the said eighth day of the month of August, having heard the said complaint and examined the witnesses produced before me, I do order and adjudge the said James Sullivan to pay to the said Edward Moles the sum of fourteen dollars and sixty-eight cents, for a balance found to be due by the said James Sullivan to the said Edward Moles for wages for the service or work so done and performed by the said Edward Moles for the said James Sullivan, the said sum of fourteen dollars and sixty-eight cents to be paid in twenty-one days from and after the said eighth day of the said month of August: and I do further order and adjudge that the said James Sullivan do pay to the said Edward Moles the sum of three dollars and seventy-five cents for his costs in this behalf; and that if the said several sums be not paid on or before the thirtieth day of the said month of August,

I hereby order that the same be levied by distress and sale of the goods and chattels of the said James Sullivan.

Given under my hand and seal this eighth day of August in the year of our Lord one thousand eight hundred and sixty-two.

(Signed,) GEO. W. WHITEHEAD, J. P.

An appeal was entered to the Sessions for the county of Oxford next after the date of the conviction, and heard on 9th September last. That court confirmed the conviction.

This application was made pursuant to a written notice previously served upon the Chairman of the Court of Quarter Sessions.

It was contended by *Bird*, who appeared in support of the application that the conviction was bad on its face.

1. Because non-payment of wages to a skilled laborer is not such a complaint as can be entertained by a magistrate.

2. Even if so, that a discharge should be ordered as well as the payment of wages.

He also contended that the conviction not having been signed by the magistrate till after its return to Sessions was illegal.

He contended that under any circumstances, the conviction being illegal on its face, he was entitled to the writ.

Jackson shewed cause for the Chairman of the Sessions.

RICHARDS, J.—It may admit of some doubt, if so long a time after the relation of master and servant had ceased the complainant could avail himself of the statute. I think the point a reasonable one to raise, and in that view I direct the issue of the writ. Order accordingly.

BLACK v. WESLEY.

Stat. 43 Eliz. cap. 5—Division Court—Certiorari after jury sworn.

Held, That Imperial statute 43 Eliz. cap. 5, applies to cases in Division Courts, where a jury is empannelled by the judge, and verdict rendered before delivery of writ of *certiorari* to the judge.

Semble, The act in spirit applies to cases where plaintiff's witnesses are sworn, although no jury is called.

[Chambers, Sept. 27, 1862.]

The plaintiff brought an action against defendant in the First Division Court of the county of Ontario, to recover the sum of $98, for money paid by plaintiff for the use of defendant. The summons for the commencement of the action issued on the 18th May last. On the 2nd June last the cause came up for hearing; and several questions of law having been raised, the further hearing of the cause was adjourned till the 2nd July last. On the 2nd July the hearing was further postponed till 1st September last. On the 1st September, defendant having made application for an order for the issue of a writ of *certiorari* to remove the cause into the Queen's Bench, obtained the order. On the same day a jury was empannelled by the judge of the Division Court at Whitby, to try certain questions of fact submitted to them by the judge, on which the jury found in favor of plaintiff. On the following day (2nd September), the writ of *certiorari* for the removal of the cause, having been issued, was delivered to the judge of the Division Court. He made a return to the writ, setting forth, among other things, the fact, that before the receipt of the writ by him, a jury had been empannelled in the cause, and rendered a verdict in favor of the plaintiff.

Jackson thereupon obtained a summons, calling on the defendant to show cause why the rule for the *certiorari* should not be set aside, and the *certiorari* quashed, and a writ of *procedendo* issue, upon the ground, among others, that the *certiorari* was not delivered to the judge until after the cause had been tried and a verdict rendered. He cited Stat. 43 Eliz. cap. 5; Arch. Prac. 9 Edn. 1244; Tidd's Prac. 9 Edn. 405.

Burns showed cause.

RICHARDS, J.—The statute 43 Elizabeth, chapter 5, provides that no writ sued forth out of any of her Majesty's courts of record at Westminster, to remove any action or plaint, &c., depending in any courts in any city or town, or elsewhere, which have or shall have jurisdiction or authority to hold plea in any action, plaint or suit, shall be received or allowed by the judge or judges, or officer or officers, of the court or courts wherein or to whom any such writ shall be delivered, except that the said writ be delivered to the judge or judges, officer or officers of the said court, before that the jury which is to try the cause in question between the party or parties plaintiffs and the party or parties that sued forth the said writ, &c., have appeared, and one of the said jury sworn to try the said cause.

Here the jury was sworn and gave their verdict on the 1st September, and the *certiorari* was not delivered to the judge till the day following.

It is urged that the jury in this cause was not called by either of the parties, and that their being sworn under such circumstances would not bring the case within the meaning of the statute of Elizabeth.

The mischief intended to be cured by the statute arises when the cause is gone into before the judge alone as well as before a jury; for it enables the defendant, in the language of the statute, "to know what proofs the plaintiffs can make for proving their issue, whereby the defendants that sued forth the writ may have longer time to furnish themselves with some false witnesses to impugn these proofs which the plaintiffs have openly made by their witnesses, which is a great cause of perjury and subornation of perjury."

I think the act in spirit applies to cases where plaintiff's witnesses are sworn, although no jury is called. In this case, however, the jury were sworn and gave their verdict the day before the writ was delivered to the sheriff.

I therefore award a *procedendo*, with costs.

RUSSELL v. WILLIAMS.

Con. Stat. U. C. cap. 19, sec. 61—Division Court—Interpleader issue—Certiorari.

An interpleader issue in a Division Court held not to be within sec. 61 of the Division Court Act, and so not removable by *certiorari*.

[Chambers, Sept. 28, 1862.]

On the 26th May last a warrant of execution was issued out of the Division Court of the United Counties of Leeds and Grenville, on a judgment recovered therein by Almeron C. Williams and Hugh Mulvena, against William Egan, directed to and delivered to Martin Weltse, a bailiff of said Division Court. The bailiff, under the warrant, seized certain goods and chattels as being the property of William Egan, but which were claimed by Solomon W. Russell as his property under a chattel mortgage. On the 31st May an interpleader summons issued out of the Division Court, requiring the claimant and the execution creditors to appear before the court on the 1st July last. On the 1st July last the issue was tried, and judgment, upon certain legal questions raised as to the validity of the chattel mortgage, reserved till 1st September last. Between the 1st July and 1st September, the execution creditors, defendants in the issue, applied for and obtained a writ of *certiorari* for the removal of the issue into the Queen's Bench, on the ground that several difficult questions of law had arisen on the trial of the issue.

Jackson afterwards obtained a summons calling on the execution creditors to show cause why the order for the *certiorari* should not be set aside, the *certiorari* quashed, and a *procedendo* issue, on the ground, among others, that the issue was not removable by *certiorari*, not being for the recovery of "debt or damages" within the meaning of sec. 61 of Con. Stat. U. C. cap. 19 (Division Court Act). He cited *Regina* v. *Doty*, 13 U. C. Q. B. 398.

Stevenson showed cause.

RICHARDS, J., made the summons absolute, and ordered a *procedendo* to issue.

UNITED STATES LAW REPORTS.

WYNKOOP v. WYNKOOP.

A wife has no right or control over the body of her deceased husband; it is the right of the next of kin to the deceased.

Appeal from the decree of the Court of Common Pleas of Schuylkill Co., sitting in Equity.

READ, J.—So universal is the right of sepulture, that the common law, as it seems, casts the duty of providing it, and of carrying to the grave, the dead body decently covered, upon the person under whose roof the death takes place; for such persons cannot keep the body unburied, nor do anything which prevents Christian burial; he cannot therefore cast it out, so as to expose the body to violation, or to offend the feelings or endanger the

health of the living; and for the same reason he cannot carry the dead body uncovered to the grave; *Reg.* v. *Stewart*, 12 Adolp & Ellis, 773, 40 E. C. L.. The executor or administrator must bury the deceased in a manner suitable to the estate he leaves behind him, and such funeral expenses are placed, by an Act of Assembly in the first class of preferred debts. Where the body is decently and properly buried in an appropriate place, such as a family vault, or burial lot in a churchyard, in or near the neighbourhood of the residence of the decedent, it would seem that all was performed which the law required of the living. The duty of the executor or administrator is over, and also his rights, except in case of an improper interference with the grave, the body, or the grave clothes of the deceased. The claims of society have been entirely satisfied. It is of rare occurrence that any dispute arises after the burial, or that any case has been submitted to a court for its decision. The law of burial, in its relations to the place of interment and the protection of the dead body, was discussed at great length by the Hon. Samuel B. Ruggles, in a very learned report to the Supreme Court of the City of New York, in the matter of the widening of Beekman street, which took away certain vaults for the burial of the dead, and required the disinterment and reinterment in some other place of the dead bodies contained in them. Besides the vaults, the bodies contained in eighty graves, amounting to about one hundred, were all disturbed and removed by the church. In one of the graves lay the body of Moses Sherwood, indicated by a marble head-stone bearing the name of "Sherwood." His daughter, Maria Smith, acting for herself and her sister, and for the descendants of her brothers and sisters, five in all who have died, claimed that the remains of her father be reinterred in separate graves in such suitable locality as she might select, that the existing monument be erected over such grave, and that the necessary expense be defrayed out of the funds in court. The referee was of opinion that the claim should be allowed, and submitted to the court certain conclusions of which the second and third were as follows: "2. That the right to bury a corpse and to preserve its remains, is a legal right which the courts of law will recognize and protect. 3. That such right in the absence of any testamentary disposition, belongs exclusively to the next of kin."

After hearing counsel upon the report, the court confirmed it in all respects, awarding $100 to Maria Smith, as next of kin of Moses Sherwood, directing her with that sum to reinter his remains, and erect at his grave the monument taken in widening the street, and declaring her entitled to the possession of the remains and of the monument for that purpose; 5 Bradford's Reports, Appendix, 503, 502.

Colonel Francis M. Wynkoop died suddenly from an accidental gunshot wound, at his residence Valencia, Schuylkill county, Pennsylvania, on Sunday, the 13th day of September, 1857, and was buried in the course of the week in the burial lot of his mother, Angelina C. Wynkoop, in the Mount Laural Cemetery, belonging to the Rector, Church Wardens and Vestrymen of Trinity Church, Pottsville, in the said borough of Pottsville, with military honors, the deceased having served in Mexico, in command of a volunteer regiment principally raised in Schuylkill county. Some days after his widow took out letters of administration, in Schuylkill county, upon her husband's estate. On the 10th of November, 1858, in pursuance of the orders of his widow, the complainant, an undertaker, called on one of the church wardens for the key of the cemetery, in order to take up and remove the remains of her husband to Laurel Hill Cemetery, near Philadelphia, which was refused in consequence of a notice from the mother and next of kin of the decedent, and in whose lot he was buried.

On the 30th of the same month the widow, in her own right and as administratrix, filed a bill in equity in the Court of Common Pleas of Schuylkill County, against Angelina C. Wynkoop, (the mother,) John E. Wynkoop, (a brother,) Anna M. Wynkoop, (a sister,) Thomas J. Atwood, and the Rector, Church Wardens and Vestrymen of Trinity Church, Pottsville, praying an injunction commanding the mother and the said corporation to permit the plaintiff and her agents to remove the body of the deceased. Upon the hearing on bill, answers and proofs, the court below decreed that an injunction be issued according to the prayer of the plaintiff against the defendants, from which an appeal was taken by the mother, Angelina C. Wynkoop.

The bill asserts a fixed legal right in the plaintiff in two capacities, 1st, as administratrix, 2nd, as widow. As to the first, the absolute duty to bury terminated with the burial, and no subsequent expenses would be a legal charge upon the estate of the decedent, whether solvent or insolvent. 2. As widow, in this case she would appear to have no rights after the interment. Suppose a woman has had three husbands, who have all died leaving her a widow, (3 Rawle, 304,) is she to be burdened with the duty and vested with the charge of their three bodies against the expressed wishes of the blood relations and next of kin of each?

But it is said there was an agreement or promise made by all, or some of the relatives of Colonel Wynkoop to the plaintiff, when she was evidently labouring under great mental excitement, almost amounting to insanity, in order, as it would appear, to restore her to a state of comparative calmness. The appellant, in her answer says, "said complainant asserted that the body of said F. M. Wynkoop should never be buried at all, but that it ever should remain with her. Her nerves were wrought up to the highest state of excitement, and consequently her reason, for the time, was almost shattered." The appellant most positively denies that she ever made any such promise or agreement, and the evidence in the cause does not prove her positive and unqualified assertion to be untrue. This ground therefore fails, and the right of the appellant is founded upon her position as mother and next of kin. Besides the fact that the body of her son is deposited in her burial place in consecrated ground, and that he was buried with the ceremonies of the church and with the honours of war, is sufficient to justify us in refusing permission to a removal under the circumstances.

We do not think the present case calls for the interference of a court of equity, and therefore,

It is ordered, adjudged and decreed, that the decree of the Common Pleas of Schuylkill County be reversed, and the bill be dismissed.

GENERAL CORRESPONDENCE.

Master and servant—Con. Stat. U.C. cap. 75, sec. 12—Admissibility of testimony of servant—Return of conviction.

Newcastle, September 22, 1862.

To the Editors of the Law Journal.

Dear Sirs,—Your opinion on the following points will oblige.

A servant sues his master, before a Justice of the Peace, for non-payment of wages, under s. 12, Con. Stats. U. C. c. 75.

On the trial, is the servant, or in other words the plaintiff, a competent witness?

And in case of an appeal, is the Justice obliged to return his conviction to the Sessions?

I ask your opinion with no view of benefitting myself in any matter now in my hands, for I have none; but simply as a matter of general interest, on which different opinions are entertained. Yours truly,

Inquirer.

[Our correspondent puts two questions, both of which are of much general interest. We therefore answer them.

I. The first depends upon the effect to be given to Con. Stat. U. C. cap. 75, sec. 12, read in connection with Con. Stat. U. C. cap. 32, sec. 35. We can find no authority in point. In the absence of such, we can do no more than express our

opinion on the question submitted. We look upon the proceeding under sec. 12, cap. 75, Con. Stat. U. C., more in the nature of a civil than a criminal proceeding. Still, we are not prepared to say that for this reason the testimony of the servant should be excluded. It is clearly admissible under sec. 3 of Con. Stat. U. C. cap. 32, which enacts that "No person offered as a witness shall, by reason of *interest*, be excluded from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising on any suit, action or *proceeding*, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, *magistrate*, or person, having, by law or by consent of parties, authority to hear, receive and examine evidence." The only question is, whether it comes within the exceptions stated in sec. 5 of the same act. It is declared by sec. 5, that the act shall not render competent, or authorise or permit, 1st, any party to any suit or proceeding *individually named on the record;* 2nd, any claimant or tenant of premises, sought to be recovered in ejectment; 3rd, the landlord or other person, in whose right any defendant in replevin may take cognizance; 4th, any person on whose immediate or individual behalf any action may be brought or defended, either wholly or in part; 5th, or the husband or wife of any such party; to be called as a witness on behalf of such party.

If the proceeding under sec. 12 of Con. Stat. U. C. cap. 75, comes within any of these exceptions, it must be the first. That, however, does not exclude the testimony of every party to every proceeding, but only the testimony of a party "individually named on the record." We construe these words to mean that the restriction applies only where there is a record, in which the party can be or is named. There is no record on a proceeding before a magistrate under sec. 12 of Con. Stat. U. C. cap. 75. So that after the best consideration we have been able to give the matter, we think the testimony is admissible.

This conclusion is strengthened, 1st, by a reference to the language of sec. 12 of Con. Stat. U. C. cap. 75, which enacts that "any one or more of such Justices, upon oath of any such servant or labourer, against his master or employer, concerning any misusage, &c., may summon, &c.," clearly intending that the oath of the servant for the purpose expressed, if not for all the purposes of the section, is admissible evidence; 2nd, by universal practice. We know of no case in which such testimony has been excluded. We know that it has been received in every proceeding of the kind, of which we have any knowledge. We know that in one reported case, where the testimony appears to have been received without objection, the servant was afterwards prosecuted for perjury. (See *Regina* v. *Walker*, 21 U. C. Q. B. 34.)

II. The second question may be answered much more briefly than the first. Our answer is in the negative. The question is so decided in *Ranney qui tam* v. *Jones*, 21 U. C. Q. B. 370. An order under sec. 12 of Con. Stat. U. C. cap. 75, is there held not to be a conviction within the meaning of Con. Stat. U. C. cap. 124, sec. 1.—Eds. L. J.]

REPERTORY.

COMMON LAW.

Q.B. BARTLETT v. WELLS. *Jan.* 17.

Pleading—Departure—Replication on equitable grounds—Fraudulent misrepresentation by Infant.

A Fraudulent representation by an Infant that he was of full age, whereby the plaintiff was induced to contract with him, cannot be pleaded as a replication on equitable grounds to plea of infancy to an action for goods supplied.

C.P. DAWSON v. HARRIS. *Jan.* 21.

Costs—New Trial—Costs to abide the event.

In an action upon a declaration containing counts for wrongful dismissal, and also a common count for work and labour, a verdict was found for the plaintiff on the special counts, and for the defendant on the common count. A new trial having been granted, the costs of the first trial to abide the event of the cause, a verdict was found for the defendant on the special counts, and for the plaintiff on the common count.

Held, that the plaintiff was not entitled to the costs of the first trial, on the ground that the cause, the event of which the costs were ordered to abide, sequified the cause of action, in respect of which the rule was obtained by the defendant, and upon which he was successful in the second trial.

C. P. HAMMACK v. WHITE. Jan. 14.

9 & 10 *Vic. cap.* 93—*Negligence, prima facie evidence of.*

A. bought a horse at a public auction, and on the following day when riding it in the public streets, it ran away, and, rushing on to the pavement, knocked a man down, who died from the effects of the injuries he received. In an action by the widow,

Held, that neither the fact of defendant being on the pavement, nor that of his riding in the public streets a strange horse, which he had only bought the previous day, were *prima facie* evidence of negligence.

C. C. R. REGINA v. BAIN. *Jan.* 18.

Misdemeanor—Attempt to commit a felony.

The prisoner was indicted for breaking and entering a shop, with intent to commit felony, which, by 24 & 25 Vic. cap. 96, sec. 57, is made felony. He was seen upon the roof, where a hole was found broken in; but there was no evidence of his having entered the building.

The jury were directed that if they thought he broke the roof with intent to enter the shop and steal, they might find him guilty of misdemeanor in attempting to commit that felony, and they found him guilty of the misdemeanor.

Held, that the conviction was right.

C. C. R. REGINA v. STANBURY. *Jan.* 18.

False pretences—Venue.

The venue, in an indictment for obtaining sheep by false pretences, was laid in county E., where the prisoner was convicted. It appeared that the sheep had been obtained by the prisoner in county M., and that he conveyed them into county E., where he was apprehended.

Held, that he had been indicted in a wrong county.

EX. ANCONA v. MARKS. *Jan.* 18.

Bill of exchange—Holder—Agency—Ratification of acts of agent.

A., the real owner of a bill of exchange, endorsed it in blank, and delivered it to an attorney for the purpose of his bringing an action upon it in the name of B. B. was not aware of the trans-

action at the time, but on a previous occasion had authorized the attorney to bring a similar action. After action brought, B. ratified the proceedings.

Held, that the former authority of B. to the attorney; that the delivery of the bill endorsed in blank, and therefore payable to bearer, to the agent of B., and B.'s subsequent assent to the action, constituted B. the holder of the bill, and enabled him to sue; and that the ratification was equally good before or after action brought.

EX. MILNE AND ANOTHER v. LEISTER. *Jan.* 17.

Evidence—Admissibility of letter to third party as part of the res gestæ—Objection that can be taken only at the trial.

The buyer bought goods of the seller, and gave B. as a reference to his (the buyer's) trustworthiness. On the issue, whether the buyer bought the goods on his own account or on account of G. & Co.,

Held, that a letter from the sellers to their agent, directing him to make inquiries of B. concerning the buyer, and stating that they (the sellers) had sold the goods on account of G. & Co., was, as part of the *res gestæ*, between the buyer and the sellers, admissible to prove that the sellers sold on account of G. & Co., and not of the buyer.

An objection to the admissibility of a document on the ground of a defect which might have been remedied at the trial, can only be taken at the trial.

EX. C. WHITMORE v. SMITH. *Nov.* 30. *Dec.* 1-2.

Award—Plea—Nul tiel agard—Misconduct of Arbitrators.

The reference was to two arbitrators; and it was agreed by the parties that, in case of any difficulty arising, the arbitrators might take the opinion of B. Difficulties did arise, and the arbitrators, without disclosing the difficulties to B., agreed to take his advice and adopt his opinion, which they did, and awarded accordingly.

The award was valid in form, and purported to be made by the arbitrators upon all the matters in difference referred to them.

Held, reversing the judgment of the Court of Exchequer, that whether or no the award was liable to be set aside, on the ground of misconduct by the arbitrators, yet that such defence was not admissible under a plea of *nul tiel agard*.

EX. BARTHOLOMEW v. HILL. *Jan.* 16.

Bill of Exchange—Notice of dishonor, waiver on admission of.

A promise to pay the amount of a bill of exchange made to a person applying on behalf of the holder, is evidence of an admission of notice of dishonor.

Q. B. BEYE v. BURNESS.

Charter party—Condition-precedent—Independent stipulation.

A Charter party commenced in the following terms "It is this day agreed between A. B., Esq., owner of the vessel *Mertaban*, of 420 tons or thereabouts, now in the port of Amsterdam, and J. B." (the charterer), &c.

Held, that the words "now in the port of Amsterdam," did not constitute a statement, the truth of which was a condition-precedent to the liability of the charterer for the non-performance of the contract to load, &c.

EX. CROFT v. STEVENS. *Jan.* 16.

Libel—Privileged communication.

The defendant, hearing that a tradesman had been hoaxed by a letter written in his name, and ordering a certain article, wrote to the tradesman (in answer to an application from him) a letter, to the effect that, in his opinion, the letter was written by the plaintiff. It turned out that it was not; but the jury found that the defendant sincerely believed that it was.

Held, that even if the letter was a libel (which was doubtful) it was a privileged communication.

EX. BROMLEY v. JOHNSON. *Jan.* 22.

Contract—Parol—Reduction into writing—Evidence.

When, after a parol contract, before the parties separate, one asks that he may have a note of it, which purports to contain the contract, and does contain all the essential elements of it, the latter must be taken to contain the terms of the contract, and the previous parol contract cannot be referred to.

EX. SUTHERLAND v. THOMPSON AND ANOTHER. *Nov.* 14.

Partnership—Liability of apparent partner—Acts as manager and as partner.

A person having advanced money to a trader under an agreement for a share of the profits, not *per se* creating a partnership, and having appeared in the business, doing acts which might well be done either as partner or as manager, but in no other way holding himself out as a partner, although so held out without his knowledge by the trader.

Held, not liable as partner for goods supplied for the purposes of the business, even on his own orders, signed in the name, style and form used by the trader.

EX. DICKENSON (by next friend) v. JACKES. *Jan.* 18.

Attorney and client—Negligence—Attorney paying costs of setting aside proceedings.

The court will not, on a summary application, order an attorney to pay the costs of setting aside proceedings for irregularity, even where he has admitted that it was owing to his error, and has promised to pay unless there is clear evidence of the nature of the negligence, and that it was gross.

Q. B. JACKSON v. EVERETT. *Jan.* 20.

Costs—Judgment—Action on certificate—43 Geo. III. cap. 46, s. 4.

By the above statute it is provided that in all actions upon any judgment recovered, the plaintiff shall not, in such action on such judgment recovered be entitled to any costs, unless the court in which the action is brought, or a judge thereof, shall otherwise order.

In an action on a judgment, with a count for other causes of action, the plaintiff may recover costs without an order of the court or a judge.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

IGNATIUS KARMAN, of Formosa, Gentleman, to be a Notary Public for Upper Canada. (Gazetted September 6, 1862.)

RICHARD LOW BENSON, of Port Hope, Esquire, Barrister-at-Law, to be a Notary Public for U. Canada. (Gazetted Sept. 18, 1862.)

HENRY ROBINSON, of Collingwood, Esquire, to be a Notary Public for Upper Canada. (Gazetted September 13, 1862.)

CORONERS.

WILLIAM HENRY DIXON, of the Township of Albion, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel. (Gazetted September 6, 1862.)

PHIPS LLOYD, of Bobcaygeon, Esquire, M.D., to be a Coroner for the United Counties of Peterborough and Victoria. (Gazetted September 13, 1862.)

TO CORRESPONDENTS.

GEORGE MORRISON—Under "Division Courts."

INQUIRER—Under "General Correspondence."

DIARY FOR NOVEMBER.

1. Saturday..... Articles, &c., to be left with Secretary of Law Society.
2. SUNDAY..... *20th Sunday after Trinity.*
4. Tuesday..... Chancery Exam. Term, Goderich and Cornwall, commences.
7. Friday ..... Last day for setting down for hearing, Chancery.
9. SUNDAY..... *21st Sunday after Trinity.*
10. Monday ..... Last day for notice of hearing, Chancery.
12. Wednesday... Last day for service of writ County Court.
16. SUNDAY ..... *22nd Sunday after Trinity.*
17. Monday..... MICH. TERM beg. Chan. Hear. T. com. Recorder's Court sits.
21. Friday ..... Paper Day, Q. B.
22. Saturday..... Paper Day, C. P. Declare for County Court.
23. SUNDAY..... *23rd Sunday after Trinity.*
24. Monday ..... Paper Day, Q. B.
25. Tuesday ..... Paper Day, C. P.
26. Wednesday... Paper Day, Q. B.
27. Thursday..... Paper Day, C. P.
28. Friday ..... MICH. TERM. ends. Clerks of Municipal Councils to return No [of res. ratepayers to Rec. Genl. Chan. Hearing Term ends.
30. SUNDAY..... *1st Sunday in Advent.* St. Andrew.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

NOVEMBER, 1862.

SLANDER OF FEMALES.

The law of England is said to be the perfection of reason. In some respects, however, it is defective. In one respect, to which we at present intend to advert, it is barbarous.

It is now held that an imputation, however gross, on an occasion however public, upon the chastity of a modest matron or pure virgin, is not actionable without proof that it has actually produced special temporal damage to her of a material nature.

The law is unmindful of the mental suffering which the foul slander may cause. It is deaf to any appeal on the ground of loss of society or friends. But the moment it is shown that place or power has been lost by reason of the slander, the law is alive to the injury, and ready to award compensation. Nay, if it be shown that the value of a halfpenny is lost in consequence of the slander, the law is on the alert, but dead to everything in the shape of suffering that cannot be weighed in a tradesman's scales, or computed by a clerk in a counting-house.

The law in this respect is behind the age; it has failed to expend with the growth of intelligence.

Words which import a crime known to the laws are actionable *per se*—that is, without evidence of special damage resulting from them; but, no matter how great the turpitude imputed, no matter how aggravating the circumstances, no matter how venomous the motive, if the words spoken fall short of a known crime, the law is powerless unless substantial special damage be alleged and proved.

To say of a woman, no matter how low her moral character, that she is a thief, is the subject of an action; but to say of a woman, no matter how high her position in society, that she is a prostitute, is not actionable, unless it be shown that in consequence of the words so spoken, she lost some pecuniary advantage.

The law does not appear to look upon the wrong done to the woman, except so far as it affects her pocket, or, if married, that of her husband. Even discord between husband and wife, as a consequence of the words spoken, would not seem to be of itself sufficient.

Let us examine some of the decisions which on this subject are to be found in our reports of decided cases.

If the declaration merely allege that the plaintiff was virtuous, modest and chaste, and before and at the time of the slander enjoyed the society of friends, living with them on terms of mutual respect, confidence and intimacy, all of which she lost by reason of a slander on her character, it would not be sufficient; but if, in addition, it allege that her friends, before the speaking of the slander, gratuitously provided her with meat and drink, and after the speaking of the slander refused to do so, it would be sufficient. The law looks only to the substantials. Loss of society of friends, loss of respect of friends, becoming an outcast of society, pointed at with the finge rof scorn at every corner—all is nothing, in the eye of the law, compared with the serious loss of a cup of tea, or a piece of bread, which one has been accustomed gratuitously to receive. (See *Moore* v. *Meagher*, 1 Taunt, 39.)

Indeed the rights of the woman are wholly disregarded. In one case, though she was the real sufferer, and suffered substantial injury, her very existence was ignored. The wife lived apart from her husband. She kept a boarding-house. She had many boarders, and had good credit among tradesmen. The slanderer appeared. He charged her with adultery and prostitution. Her credit forsook her; her boarders left her. She, in consequence, with her husband (who joined for the sake of conformity) brought an action against the slanderer. The action was held not to be maintainable. (*Saville et al* v. *Sweeny*, 4 B. & Ad. 514.)

It would seem that the great effort of the law is to defeat such actions, and allow the wrong-doer to go unwhipt of justice. In a case where the slanderer alleged that he had had connection with the wife of plaintiff, a virtuous woman, in consequence of which she lost the society of her friends, was brought into public scandal, was nearly crazed, became very unwell, was long under medical treatment, to the disgrace and impoverishment of her husband, the action was

held not to be maintainable. Baron Bramwell thus disposed of it:—"The question seems to me to be one of some difficulty, because a wrong is done to the female plaintiff, who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck with what has been said of the novelty of this declaration—that no such special damage was ever heard of as a ground of action. If it were so, I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action," &c. (*Allsop* v. *Allsop*, 5 H. & N. 534.)

Here we find an eminent judge admitting a wrong, acknowledging that serious damage flowed from it, and yet powerless to apply a remedy because "no precedent for such an action" could be found.

The whole subject has recently been under discussion in the House of Lords. Great difference of opinion existed among the law lords on some points, but all seemed to agree on the conclusion that the law is unsatisfactory.

The facts were as follows:—Lynch, a step-brother of Mrs. Knight, imputing to Mrs. Knight, among other things, gross levity, and asserted that she had been all but seduced by another man before marriage. Mr. Knight, acting on this imputation, sent Mrs. Knight home to her father. Mrs. Knight (joining her husband as co-plaintiff for conformity) brought an action against Lynch, alleging the loss of the society of her husband as special damage. The action was brought in Ireland. After much argument, seven out of the nine judges decided in favor of the action, and the remaining two against it.

On appeal to the House of Lords, the judgment of the Irish judges was reversed, and the action held not to be maintainable.

Lord Campbell (Lord Cranworth inclining to the same opinion) held, that where a person imputes to a married woman adultery, which he pretends to know and asserts as a fact, and the husband, reasonably believing the charge to be true, dismisses her, the wife is entitled to maintain an action (joining her husband for conformity) against the slanderer for the special damage caused to her by the loss of the comfort and support of her husband.

Lord Wensleydale (Lord Brougham inclining to the same opinion) held, that a married woman cannot maintain an action for being deprived of the society of her husband through the slander of another upon her character, though the husband deserts her in consequence.

Lord Wensleydale held, though no action lay, that the desertion of the husband was properly laid as special damage; for to make words actionable by reason of special damage, the consequence must be such as—taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned—might fairly and reasonably have been anticipated to follow from the speaking of the words, and need not be such as would reasonably follow. (*Lynch* v. *Knight*, 5 L. T. N. S. 291.)

So long as this state of the law continues, it is a mockery to boast that under our law there is no wrong without a remedy. Wrongs of the most malignant type may be inflicted with impunity. Reform is seriously needed. We trust that Lord Brougham will soon be induced to add one more to the many law reforms for which we are indebted to him. It is distressing to know that our law, which is said to be the perfection of reason, is really an outrage upon reason. It holds out indemnity to every foul-mouthed slanderer disposed to malign all that is near and dear to us.

APPEALS FROM COUNTY COURTS.

It is the practice of some county court judges to decide all cases before them without stating the reasons upon which their decisions proceed. We have more than once drawn attention to the fact, and expressed a doubt whether or not such a course would be upheld on appeals to the superior courts of common law.

Recently we find that the matter has been under the consideration of the Court of Common Pleas, and that the Chief Justice of that court, in delivering judgment in *Ockerman* v. *Blacklock*, used the following language:—

"I cannot help observing that in this and every other appeal entered during this term from this county court (Hastings), and there have been several, the learned judge has certified the formal proceedings, pleadings and evidence in the cause, with a copy of the notes taken by him of the arguments of counsel before him in term; but he has not given us the benefit of knowing what he said or delivered as his judgment, or whether in fact he said any thing more than that the rule was discharged, or that he gave judgment in favor of plaintiff or defendant, as the case might be. He does not communicate the reasons which influenced his conclusion, nor the authorities or principles on which he acted.

"The statute regulating these appeals requires the judge to certify the pleadings in the cause, and all motions, rules or orders made, granted or refused therein, together with his own charge, judgment or decision thereon, and when there has been a trial, the evidence and all objections and exceptions thereto.

"It may be that, construing the statute according to its very letter, it is enough in relation to a rule *nisi* that has been

granted to return a copy of the rule disposing of it, but if this be so, which I do not assume, I think the true spirit of the act would be more certainly complied with by certifying a copy (if it were written) or a statement (if it were verbal) of the charge to the jury, or the judgment or decision of the learned judge. The words used, "his own charge, judgment or decision," seem to import more than a mere setting forth, as in this case, that the "judge afterwards duly gave his decision and judgment on the same rule, which was that the same should be discharged."

"It is so well established and time-honoured a practice for judges to give the reasons for their decisions, that in common understanding when we speak of the judgment or decision of any judge sitting in term, we refer to the report of what he said, when the court disposed of the matter before it, though technically speaking the *judgment* is the disposal of the matter by the court, and not the opinion of each particular judge. It may be well argued, that this is what the legislature intended.

"The superior courts have not as yet been called upon to decide this question, for the almost universal practice of the learned judges of the county courts has prevented its arising. They have in general shewn a praiseworthy anxiety to explain fully the grounds of their judgments, and I have very often derived much help from the learning and ability their judgments have displayed."

It is to be hoped that after this expression of opinion, the county court judges, one and all, will show a determination to render unecessary the decision of the question raised. Many judges have, as mentioned by the Chief Justice, "shewn a praiseworthy anxiety to explain fully the grounds of their judgments." The few who have hitherto failed to do so, no doubt will hereafter be too glad to do what is expected of them, without waiting for a formal adjudication on the question whether or not the law is compulsory.

The judges of the superior courts evince a strong desire to support the decisions of county court judges whenever impeached. The least county court judges can do is to assist the judges of the superior courts in the discharge of a duty important in its nature and important in its results.

SELECTIONS.

ON THE LIABILITY OF MASTER TO SERVANT IN CASES OF ACCIDENT*

The Bill on this subject which was introduced this session by Mr. Ayrton and rejected by the House of Commons, purported to extend the liability of the master certainly to two cases where at present he is not liable, namely, (1) where the accident is caused to the servant by default of tackle or machinery, though the master is not proved to have been guilty of any personal negligence; (2) where the accident is caused by the default of a fellow-servant; and perhaps to a third case, (3) where the accident is caused to the servant by the negligence of the master in not furnishing proper machinery, the servant having undertaken or continued the work with knowledge thereof. These three cases were dealt with by the first section of the Bill in these terms: "Whenever any workman or servant shall be injured in consequence of his master, or any other person employed by his master, not doing any act or providing any thing which may be requisite or proper, or doing any act or providing any thing which may be improper, in or for carrying on the undertaking, work, or business in or about which such workman or servant shall be employed by or on account of his master, then such workman or servant shall be entitled to recover from his master damages for such injury by an action at law; provided always, such injury shall not have been suffered in consequence of any wilful act or omission of a fellow-workman or fellow-servant, for which such fellow-workman or fellow-servant is punishable as a criminal offence; and provided also, such action shall be commenced within twelve calendar months after such injury shall have occurred."

The second section extends Lord Campbell's Act to the cases described in the preceding section.

The existing law is fairly open to inquiry, because it is comparatively new. The case which is always cited as the first and leading case, *Priestley* v. *Fowler*, (3 M. & W., p. 1,) dates only in 1837. The general principles of the law relating to accidents are old enough and well established; but for several reasons the application of them to cases involving the relation of master and servant, has not, until recent times, fallen under the consideration of our Courts of law. 1st, Changes in circumstances. The general introduction of machinery has necessarily multiplied accidents, and serious accidents; thus in 1861, in factories alone, and from machinery alone, notwithstanding our special statutory precautions and our inspectors to enforce them, there were about 4,000 accidents. (Report, October, 1861.) Again, the construction of great works by "division of labour" has brought prominently forward new relations between employer, contractor, sub-contractor, and the servants of all these. 2ndly, Changes in the law. The old quasi-religious law of Deodand, whereby the chattel or part of a chattel causing the death of a man was forfeited to the Crown or the lord of the franchise, was abolished in 1846 (9 & 10 Vic. c. 62); and in the same year was passed Lord Campbell's Act, (9 & 10 Vic. c. 93,) which gave for the first time a remedy to the families of persons killed by negligence. The Factory Regulation Act 1844, (7 & 8 Vic. c. 15,) and other statutes of the like kind, gave fresh rights or defined and confirmed old ones; and 3dly, the institution of County Courts, and the general cheapening of legal procedure, have rendered the means of redress far more available than formerly to the working classes.

The subject is accordingly novel, and hitherto has been brought piecemeal only before the Courts, as this or that case with its own peculiar circumstances might chance to demand consideration. The whole matter, therefore, deserves and requires discussion.

I will begin by stating shortly the general objects of a law purporting to regulate the liability of masters towards servants in cases of accident occurring in the course of the employment. The first object should be—To prevent accidents. The law should make it the interest of every person to be careful in his work, careful of himself, careful of others;—the master careful in selecting his servants, in superintending them, in choosing right methods of work, in providing sound machinery; the servant careful not only of his master's property, but also of his own life and of his fellow-servant's. For in truth it is very difficult to make men careful: the risk of injury appears so distant, so doubtful, and the very thought of it is so unpleasant; whereas the thought, trouble, and it may be expense to avoid the risk, are certain and immediate. Sheffield workmen, it is notorious, even resent improvements that render their work less dangerous, lest wages should fall; and many

* This paper was contributed by Mr. Vernon Lushington, to the Jurisprudence Department of the Social Science Association.

out of mere indolence, some out of mere bravado, will not avail themselves of precautionary means actually provided. Employers again do not like accidents; accidents do them no good, and they have humanity enough to be sorry for those who suffer; yet how few, from want of consideration or from mean economy, will voluntarily take the pains or incur the expense to maintain due arrangements for the safety of their workmen! The necessity of our Factory Acts, Colliery Acts, and other statutes of the kind, too surely shows this. Against all such selfishness of employers, and unmanly recklessness of workmen, a law making persons responsible for injury occasioned by their negligence to others, and excluding them from compensation for injury caused to themselves by their own negligence, is a valuable protection.

The second object should be,—To furnish rules whereby, when injury actually occurs, justice may be done between the parties. This appears rather a vague matter, but is a very real one, and in the present day of special importance. Our population being industrial, and every day more and more so, the social relation, including the legal relation, of master and servant, needs in all respects to be clearly on a right basis,—to appear just in the sight of men. In particular, accidents, involving, as they do, grievous personal loss and pain, rouse a sense of wrong, which co-operates with other causes to work dissension between class and class, and sometimes even leads to acts of lawless revenge. The recent murder in Manchester may illustrate this. The retributive law in cases of accident should be just; by being just, I mean founded on a fair consideration of the capital facts which mark the relation of master and servant, and the consequence of accidents arising in the course of the employment,—fair equitable consideration. This position is not denied, it is freely admitted, and the law purports to be based upon a construction of the contract of service, which it is to be remembered is, so far as express terms go, silent as to liability. But if the law has in any respect gone wrong, it will be from misapprehending or insufficiently appreciating some of these characteristic facts.

The principal of these facts seem to be as follows:—

1. The master and servant are engaged in a common work for the benefit of both. There is a virtual partnership between them. No one, least of all a lawyer, when he remembers the duty of the master to take reasonable care of his servant, can say the contract is for money wages and nothing else.

2. The servant works with his hands for wages, is a poor man, generally of imperfect education, and belongs to a class traditionally improvident. The master is a person of more or less capital, employs many servants, keeps accounts, and in the course of his business is accustomed to make pecuniary calculations based on complex contingencies.

3. The choice of servants, the selection of machinery and materials, the determination of the method of work, is with the master and the master only. Practically, and with few exceptions, this is absolutely so.

4. The master and servant are equally aware of the dangers incident to the employment: I say equally, for though the servant may be practically more familiar with some dangers, there are others which the employer may well understand better; and of all he must be presumed in law to know adequately.

5. When an accident to a workman occurs, it may be accompanied or not by damage to the master's property, sometimes very great damage; but in all such cases the workman suffers with his body, literally with his flesh and blood, perhaps with his life. In a great number of instances the prospects of himself and his family are ruined. On the other hand, the master may lose heavily through the negligence of a servant without the servant suffering any injury; and in all such cases the master has practically no redress. Railway accidents and collisions at sea, involving thousands of pounds, are commonly of this kind. This is true, but not in my opinion very material. Such facts, which lie at the root of the subject, ought to be fairly weighed in framing the law, or estimating it when framed; and I ask you to bear them in mind now in approaching the consideration of the rules of the English law which regulate the liability of masters to servants in cases of accident.

These rules are not statutory rules, but are the ancient Common Law rules concerning negligence, modified by the Judges from the sense of what their contract of service requires. By "negligence," the law means the want of common and reasonable care; the want of due care, all the circumstances of the case considered. Every person is bound to use common and reasonable care, but what is to be deemed such care varies with circumstances. One kind of care is expected from an expert, another from a layman; one kind of care from a master, another from a servant; one kind of care from a person under contract, another from a stranger; what is negligence in a grown-up person will not be negligence in a child, and so on. In legal proceedings this question of negligence is generally a question of mixed law and fact, determinable upon the evidence by the jury after instruction by the Judge. As a general rule, in all cases of accident, including those between master and servant, the jury have to say, upon a consideration of all the circumstances, whether there has been, by either party or both, a want of common and reasonable care, contributing to cause the accident.

The rules of law then relating to accidents sustained by servants in the course of their employment, are:—

Rule I.—*For injury by pure accident the servant has no remedy.* This is in accordance with the ordinary rule of law. Nobody has been guilty of negligence, nobody is to blame; and ill-luck has to be borne where it falls. The rule may be just, and it may be necessary, but no exception is made in consequence of the relation between the parties. The rule discards or overbears any consideration of the virtual partnership subsisting between employer and employed; and the practical result is, that in many cases the workman is maimed or killed in the service of his master, and without any compensation to himself or his family. It is true that in some instances, as in the late Hartley Colliery accident, or in the common case of shipwreck, the employer may have at generous expense adopted every measure to prevent accidents, and may himself be a heavy loser by the casualty; but in the majority of cases the suffering is chiefly on the side of the man. This may be remembered when we come to consider the more doubtful cases. It should be noticed that this class of accidents, purely inevitable accidents, though largely incident to a few callings, as for instance seafaring, is not otherwise extensive; most accidents are the result of carelessness somewhere.

Rule II.—*For injury caused by the master's personal negligence the servant may recover compensation, if he has not contributed to the injury by any negligence on his own part.* This again is the ordinary rule as between strangers, no less and no more.

The master is accordingly bound towards his servant to take reasonable care in providing sound machinery, reasonable care in selecting competent fellow-workmen, and reasonable care in arranging methods of work; and for any accident caused by his default in any of these respects, and without fault of the plaintiff, he is liable. But the burden of strict proof of the master's default is upon the plaintiff, which in itself enables many masters to escape liability for accidents undoubtedly caused by their negligence; and this not only by obtaining verdicts in actions brought, but in deterring injured servants from suing.

Again, without personal negligence on the part of the master there is no liability. The law gives the servant no warranty from the master that the tackle shall be reasonably sufficient, though the master provides the tackle and the servant's life depends upon it; no warranty that the fellow-workmen shall be competent, no warranty that the mode of work prescribed shall be safe from unnecessary risk. The tackle may be rotten,

the ship unseaworthy, the system of work unnecessarily dangerous, but the servant has no remedy against the master for injury so caused unless the master has himself been guilty of a want of reasonable care, guilty of negligence. Hence a variety of accidents whereby the servant suffers and without redress. I do not now speak of inevitable accidents, which I have already dealt with, nor of accidents caused by fellow-workmen, which I shall deal with presently, but I now confine myself to those caused by the negligence of persons who have provided improper materials by contract with the master. The law holds that the servant has no remedy against the contractor because he is a stranger to the contract; (*Winterbottom* v. *Wright*, 10 M. & W., 109;) a position I accept, but have no space to examine critically; and no remedy against the master, because the master has not been personally guilty of negligence; in effect no remedy at all. Is not this hard law? And what of the maxim, *Ubi jus, ibi remedium*, no wrong without a remedy?

Now this might be different. The law might imply from the contract of service a warranty from the master that the tackle and machinery should be sufficient for the ordinary work to be done. In so doing the law would do nothing very unprecedented. To the contract of marine insurance the law annexes an implied warranty that the ships shall be seaworthy. So the Common Law has for centuries implied a large obligation on the part of the innkeeper to his guest, and on the part of the common carrier to his bailor, so far as property is concerned. It makes them insurers against all accidents save the "act of God and the Queen's enemies;" and as it appears to me, for the reason that the innkeeper in the one case, and the carrier in the other, have practically the charge of affairs; just as in the case of master and servant, the master provides the tackle, and has superintendence of the work. It is true that the liability of the common carrier is generally avoided by a special contract, (allowed by the law,) and that it has not been extended in its full strictness, though very nearly it has, to the contract of common carriers with passengers. (Hodges on Railways, p. 619.) But why should it not be so extended? and why should not a rule of law, which has done so much for the security of property, be applied to insure the safety of the lives of workmen? Such a rule would enforce personal care on the part of masters, and would not encourage carelessness on the part of workmen; nor would it operate unfairly: for the master, who has as good a head for calculating as any innkeeper or common carrier, could estimate such contingent liabilities in making his wages, bargains, and other contracts, far better than the workman now calculates them. The master, moreover, would have his remedy over against the defaulting contractor, the author of all the mischief. It was said in Parliament the other day, when this matter was discussed: Will you require of the master more than reasonable care? Certainly not, I answer. But will you make the master liable, except for want of reasonable care? Certainly, yes, I answer; he should be liable for the want of reasonable care on the part of the contractor whom he has employed. The only difficulty is a purely practical one, how to express the limits of the warranty in due terms. For the tribunals having refused to declare a warranty to be implied by law, it must be given, if at all, expressly by statute. The first section of Mr. Ayrton's Bill, though capable of improvement, seems to me to define fairly enough the liability of masters in this respect.

Rule III.—*Whatever the negligence of the master the workman cannot recover, if by his own negligence he has contributed to cause the accident.*

A similar rule obtains universally in Common Law in all cases of negligence. Its equity is not altogether obvious, but it is well ratified by experience. Hard cases continually occur in which the fault is on both sides, the suffering on one side only; and the first suggestion of equity is that compensation might be allowed upon a consideration of the proportion of blame attributable to either party. But practical difficulties stand in the way of such an arrangement: for when A and B are both in fault, who can say how much blame is due to A, how much to B? The only Court in which any apportionment of damages prevails, is the Admiralty Court, where, by what is said to be the old maritime law, if both ships are to blame for a collision, the damages are divided; but it is needless to dwell on this. The Common Law rule has long been settled that a plaintiff contributing, by negligence on his part, to his own injury, is without remedy, and rests upon the ground of public policy;—that a severe rule of this kind admonishes every man to be careful of his own safety. The rule is therefore perhaps beyond attack; but as between master and servant, it operates peculiarly unfortunately, for it induces the master to be careless, and often causes the servant to suffer for the joint default of himself and his master, when the master is far the more to blame of the two. This will be apparent when I state that entering or continuing upon work with knowledge of danger caused by the negligence of the master, is generally considered as conclusively showing contributory negligence on the part of the workman, so as to bar his remedy. This was the main point decided in *Priestley* v. *Fowler*. How it operates in practice let the two following cases speak.

Dynen v. *Leach*, (26 L. J., Exch. 221.) "The defendant was a sugar refiner, in Liverpool, and had employed the deceased as a labourer. It was part of the deceased's duty to fill the sugar moulds, and hoist them up to higher floors in the warehouse by means of machinery. The usual mode of attaching the moulds to the machine was by placing them in a sort of net-bag, which effectually prevented any accident. This was the mode adopted by the defendant, until, from motives of economy, he substituted a kind of clip, which laid hold of the rim of the mould. The deceased, on the occasion in question, had himself filled the mould, and fastened it to the clip, but when it was raised, the clip by some jerk slipped off the mould, which fell on his head and killed him. On these facts the wife of the labourer was not entitled to recover."

Senior v. *Ward*. (28 L. J., Q. B. 139.) "After the passing of 18 & 19 Vic. c. 108, special rules were framed and approved of for the regulation of a coal-mine of which the defendant was the proprietor and manager. By one of these rules, for the direction of enginemen and banksmen, every morning, before any one descended the shaft, the cage by which they were let down was to be twice run slowly up and down, loaded, in order to test the sufficiency of the rope and tackling; this rule had been habitually neglected for many weeks, to the defendant's knowledge. One night, the rope by which the cage was suspended, being before in good repair, was (as it was afterwards discovered) injured by an accidental fire in the mine. The next morning A, who was a miner employed by the defendant in the colliery, and other miners, who all knew of the rule for testing the rope, and of its being habitually violated, presented themselves at the pit to be let down to work, and there not having been any previous testing of the rope, &c., according to the rule, were told by the banksman that they had better examine the rope before they went down. They, however, got immediately into the cage, and the rope breaking as they descended, they were all killed. An action having been brought by A's representative against the defendant: held that the action was not maintainable, for that the deceased's own negligence had materially contributed to the accident." In this case a widow lost three sons.

No one can deny that in these and the like cases the chief blame is with the master, while the cruel loss is upon the workman. The fault of the man is acquiescence in his master's wrong: and common experience tells us that, except in extraordinary cases, he is practically obliged to acquiesce, to choose between acquiescing or giving up his employment. The Judges have felt this, and in a recent case have held that continuing to work with a knowledge of the danger does not

necessarily amount in law to want of reasonable care, but is, with the other facts tending to shew negligence, to be left to the jury. (*Holmes* v. *Clark*, 10 W. R. 405.) The facts of that case were as follows:—When the plaintiff entered into the service of the defendant, who was owner of a cotton-mill, certain machinery, which was required by statute to be fenced, was fenced. After he had been some months in the service, the fencing by some accident or by decay was out of repair, and the machinery was unprotected. The plaintiff complained of it more than once, and it was promised that it should be replaced or restored. Before it was replaced, and whilst the plaintiff in the course of his duty was oiling the machinery, he was caught by the machinery and lost his arm. Upon these facts the Court of Exchequer, and afterwards the Court of Exchequer Chamber, held the plaintiff entitled to recover. The decision rendered substantial equity, no one can doubt; and it rests, I think, securely upon the principle, that nothing can bar a plaintiff of his right against a wrongdoer but a want of reasonable care on his own part contributing to the accident, which the jury are to be judges of upon a consideration of all the circumstances. But in result it effects a considerable change in the law. Cases which would have been stopped by the Judge, may now go to the jury, who naturally are disposed to find for the plaintiff. But even as construed by the light of this case, this rule necessarily operates with severity upon workmen, and enables masters to be guilty of the greatest carelessness with impunity.

The section of Mr. Ayrton's Bill, it must be remarked, does not notice this rule of law: and perhaps the intention was to enforce the master's liability, notwithstanding the servant's acquiescing in the danger caused by the negligence of the master or others employed by him. If so, I think it is going too far; as there might be instances in which the servant voluntarily, for his own convenience and perhaps for additional reward, accepts the dangerous machinery. The rule given by *Holmes* v. *Clark* appears to hit the right middle course; and might be imported into the statute by inserting amongst the provisoes there mentioned one to this effect: "Provided the workman or servant has not, by want of reasonable care on his part, contributed to occasion the injury."

Rule IV.—The last rule, and one to which I would ask especial attention, is, that *A workman cannot recover against the master for injury occasioned by the negligence of a fellow-workman.* This rule, which governs perhaps the most numerous class of accidents befalling workmen, dates from 1850, from the case of *Hutchinson* v. *The York, Newcastle, and Berwick Railway Company*, (5 Ex. 343,) and takes away from the servant the right which he would possess if a stranger, of suing the master of the person whose negligence occasions the accident. It is therefore a novelty. It is now, however, firmly established as the law both of Scotland and England by a decision of the House of Lords overruling a contrary opinion of Lord Justice Clerk, and Lord Cockburn; (*Barton Hill Coal Company* v. *Reid*; 3 Mac Queen, 266;) it is also the law in America (*Farwell* v. *The Boston and Worcester Railway Corporation*, 4 Metcalfe, 49.) The Judges say: the servant enters the employment with a knowledge of the risks incident to it, among which are the risks arising from the negligence of fellow-servants; he therefore takes such risks upon himself.

In order to estimate the force of this reason, it is necessary to consider the ordinary rule called *Respondant Superior*, which makes the master responsible for the wrongful act of his servant. Now it must be taken for granted that the master is not personally guilty of any negligence, that he has taken due care in the selection of the servant, and is altogether innocent of blame; and perhaps it is not very clear at first on what ground a person so innocent is made to answer for the fault of another. It does not become clear until you give due weight to the other facts of the case; namely, that the master for his own profit set the servant on to work; that the person who suffers injury is wholly innocent of blame, and that his remedy against the actual wrongdoer is practically no remedy at all. This last consideration is important, for as before said, "*Ubi jus ibi remedium*," no wrong without a remedy. The law finding the remedy against the actual wrong-doer is valueless, casts about if possible to find a solvent person whom it may not inequitably fix with the responsibility, and finds him in the person next to the wrong-doer, the master who is profiting by the work. It is, I think, for the converse of this reason, that the master has been held not liable for the act of one who is not strictly his servant, as an "independent contractor" whom he has employed. There is not the same necessity to make him liable; he chooses the contractor indeed, he pays the contractor, he profits by the contractor's work, but then the contractor is considered able to answer for his own mischief, and for the mischief occasioned by any of his servants. The case is simply not within the policy of the rule, they would say. In this conclusion, however, I do not agree. For it is too much to say that the contractor or sub-contractor is always a sufficient man; often he is not; and often it is difficult to determine, before all the evidence is given, where the negligence lies. I see no reason why the original employer should not in all cases be liable, with a remedy over against the person actually in fault, or the master of such persons. Such a rule would be simple, easy in practice, and just. But at any rate it is agreed on all hands that a master is liable to a stranger for the act of his servant. Then why not liable to one of his own servants? Is it that the stranger does not share in the performance of the work, that the servant does? that the stranger does not share in the resulting profits of the work, and that the servant does? But by hypothesis, the suffering servant's share in the work is innocent; and it is assuming the whole question to say that he takes his wages as a consideration for the risks he has to run. Why should the existence of a contract with the master diminish the obligation otherwise resting upon him? Why should the servant who renders good service to the master be worse off than the stranger who renders none? Contracts generally impose liabilities, not remove them. The leading case of *Coggs* v. *Bernard* (1 Smith, Leading Cases) shews that even a gratuitous bailee is bound to take ordinary care of the thing bailed, by his servants as well as by himself; and further, that the passing of a consideration for the bailment only adds to the obligation. So in the ordinary contract of carriage, the Common law as we have seen not only binds the carrier to take reasonable care, but makes him an insurer. Above all, in the ordinary case of the servant suing the master for personal negligence, the contract does not stand in the way.

Then if it is not the mere existence of a contract, nor the share in the work done; ought the entering into the service with the knowledge that risks may arise from the negligence of the fellow-servants, to bar the remedy against the master? Let us examine this. If entering upon the employment with such knowledge amounted to a want of reasonable care, I could understand why it should bar the remedy: but it clearly does not; there is nothing tortious or negligent in entering the employment with such knowledge; such knowledge is simply inevitable. If, again, it be said that the knowledge of the risk operates as an implied waiver on the part of the servant of all right to recover for injury occasioned by risks so known, as a consenting to his own wrong;—I answer, analogy is all the other way. The bailee knows the dangers his goods run in transit, the railway passenger knows the danger of his journey when he takes his ticket; yet their remedies under the contract suffer not thereby. Even a stranger has some knowledge, at least must be presumed to have, of the dangers that may befall him on the highway, as from negligent driving and the like. But most of all, in the common case of the servant suing the master for personal negligence, there is antecedent knowledge of the risk, with full right of action in the event of the risk

happening. On this point we have the following strange observations from the Court of Queen's Bench, when invited to compare the two cases.

"Though the chance of injury from the negligence of fellow-servants may be supposed to enter into the calculation of a servant on undertaking the service, it would be too much to say, that the risk of danger from the negligence of a master when engaged with him in their common work enters in like manner into his speculation. From a master, he is entitled to expect the care and attention which the superior position, and presumable sense of duty, of the latter ought to command." (*Ashworth* v. *Stanwix*, 30 L. J., Q. B. 185.)

The simple answer seems to be, that a servant *has* a right to expect equally both of master and fellow-servant reasonable care, though care of different degrees; and he enters on the service with a knowledge of this right, but no less with a knowledge that both master and fellow-servant are mortal men, and either may fail in their duty.

If I am right in this reasoning, the rule which deprives a servant of remedy against his master for injury by a fellow-servant, is not founded in strict law on the fact of a contract subsisting between the parties, nor on the fact of entering the employment with knowledge of the risks, but must rest, if at all, upon considerations of public policy; on an opinion, that on the whole, in such cases, it is better that the servant should take the risk on himself. I submit that this opinion is erroneous, for the following reasons, which are simply a recapitulation of the positions with which I began this paper, the statement of the general purposes of the law, and the facts characteristic of the relation of master and servant.

1. The workman is a poor man, dependent for his daily bread upon his bodily exertions. If there is any person to whom the law should strive to give a remedy for innocent suffering, he is that person. And we have seen that, in many cases, the law in other respects deals hardly by him.

2. A rule making the master liable would stimulate him to take every care in selecting servants, and in superintending the work. The existing law exonerates a master simply because he is rich and delegates his office to a subordinate. Servants also would be induced by a change in the law to take greater care of their fellows, in order to avoid incurring the displeasure of the master. The statutory rule requiring factory machinery to be fenced, which in effect makes the master often responsible for the negligence of one of his servants towards others, has been found to work well in this respect.

3. The rule suggested is not open to the objection that it would be unfair upon the master, for the master, in fixing his rate of wages and his prices, may take into account contingent losses arising from accidents caused by workman to workman, as he now takes into account all other losses.

4. The rule suggested would help to bind master and men into a closer and more friendly partnership. The compulsion of law to take every measure for the safety of workmen would not only induce habits of carefulness, but would co-operate with other influences to promote habits of kindly consideration from the master, which in turn would bring better service from the workman, and in all ways improve their mutual position.

These are leading reasons for the change proposed. But to these I would add the following objections to the existing law. The existing law has introduced a qualification upon the leading principle that a person is answerable for the tortious acts of his servants; which in itself is an evil, unless necessary. It has further introduced subtle questions, of which the case of *Holmes* v. *Clarke* and other cases, (*Abraham* v. *Reynolds*, 3 H. & N. 143; *Barton Hill Road Company* v. *Reid*, 3 Mac Queen, 266; *Barton Hill Road Company* v. *M'Guire*, ib 300,) promise an ample harvest, as to who are and who are not fellow-servants within the meaning of the rule. And it has already committed this contradiction, that although the contractor and his servants are not the servants of the original employer, (*Reedie* v. *London and North Western Railway*, 4 Ex. 244,) as against a stranger, yet the servants of contractor and sub-contractor are held fellow-servants with one another and the servants of the employer, (*Wigget* v. *Fox*, 11 Ex. 837.) Not only equity therefore and public policy, but simplicity and consistency of legal doctrine are in favour of the change.

With these remarks I commend Mr. Ayrton's Bill to the approval of the Association. I do not wish to exaggerate its importance. Compared with other matters affecting the working classes it is not important; but it belongs to an important class. Statutory interference with trade should not be applied without much consideration, but modern experience, as of our Factory Acts, Colliery Acts, Merchant Shipping Acts, shews clearly that positive enactments may be required to secure justice to working-men from their employers, and may work most beneficially to all parties.—*Law Magazine.*

CASE LAW.

The most rigid Conservative who ever anathematized reform in Church and State would scarcely venture to maintain that our present materiais for legal research are perfect, or that the study of the law is free from many an awkward hitch and serious inconvenience. Apart from the perplexity caused by the confused state of our statute book, an evil which we have alluded to before, and shall no doubt have occasion to discuss again, there exists a difficulty of equal magnitude in the vast number of reported cases from which the lawyer has to seek out such points as arise from time to time in the course of professional practice. We have heard that the study of the Sanscrit language was held by the native pundits of the Indian peninsula to be a task involving the labour of a lifetime; that its recondite grammar was spread out into volumes sufficient to furnish the shelves of a moderate library; and that great was the scandal when English, French, and German authors gathered the disjointed fragments together, and ruthlessly compressed them into the limits of an octavo volume. There was some excuse for the feeling of indignation thus excited, for Sanscrit was an obsolete language existing only in the traditions of the learned, and its study had no bearing on the practical interests of society, or the daily pursuits of life. This cannot be said of law; yet in the brightest days of our civilization we have allowed that science to be oppressed with the same incubus which in the case of a mere *dilettante* study our linguists have laboured successfully to remove. It is to the last few years that we owe that vast "plague of reports," which threatens to reduce legal study from a science to a mere mechanism, and to place the decisions of our courts on a level with the casuistical lucubrations of mediæval philosophers. Apart from the selections of cases contained in legal periodicals, there are no less than 1100 volumes of *authorized* reports, of which only 150 existed a century ago. It were well if we could look upon these figures as an ultimate limit; but it is only too evident that in a few years the number will be doubled; as fresh cases are accumulating at the rate of 2250 per annum, adding yearly to the legal library no less than twenty-seven or thirty volumes.

The disastrous result of such an oppressive increase of reported decisions may be readily anticipated; indeed, it is amply foreshadowed by the facts of our daily experience. The time of a lawyer is far too much taken up with the search for particular points, sometimes of the most minute description. He dares not relax from this semi-mechanical labor, lest, when he thinks he has grasped a principle, it should suddenly be torn from his grasp by a "case in point" which the

court may deem it necessary to follow. We grieve that it should be said of our modern lawyer that he is always ferreting out trifles, that he founds his arguments on petty distinctions and casts off general principles as practically useless, that he throws each train of thought off his mind in sheer weariness as soon as his point is elicited, and seldom acquires a general grasp of the subject, that he is rather like a local pilot who studies the headlands of one particular coast than an experienced navigator who knows the front and profile of every sea-board. But as time goes on matters will become worse and worse; the courts will become more and more case-ridden, and the minute shades of distinction will be infinitesimally subdivided; the reports will be multiplied in increasing ratio by the very action of the system which their present inordinate bulk is introducing and fostering; and the trained practitioner will at last be almost as much at a loss to find the point he requires as an embryo student who is turned loose for the first time to seek his coveted nugget amid the chaotic masses of a legal library. It is time that lawyers should lay their heads together to find the best means of obviating so inconvenient a result; for the public opinion of England though long enduring, is a formidable assailant when thoroughly aroused, and if reform does not originate with the profession itself, hostility will sooner or later act with chilling effect from without.

There are many objections to codification, which we need not here detail at length, since they are, at any rate among lawyers, pretty generally recognized and understood. We may remark, however, that the results of the experiment as tried in France, are by no means encouraging, as the mass of commentaries, decrees, modifications and explanations, grafted on the Code Napoleon, bids fair to render it one of the most cumbrous systems of legislature in existence. We should look, too, with distrust on any attempt to paralyse the discretion of our really excellent judges, or any sweeping measure of reform which would cast away for ever the accumulated wisdom of ages. There are no such obstacles, however, to digesting the reports and weeding out all useless and obsolete matter; and there could be little difficulty in making regulations with a view to curb their luxuriance for the future. It is the opinion of an able writer in the papers of the Juridical Society,* that a mixed committee of twenty men could accomplish the work of digesting the reports in less than eight years, and could give to the world in a hundred volumes such a compendium as every practical lawyer endeavours to form in shadowy outline by his own unassisted study. The digest, when once made, should alone be admitted for purposes of citation, and it should be continued by responsible officers appointed to keep an authentic record of all important decisions.

We entertain some doubt whether the digest could be prepared in so short a time or confined within so limited a compass as the writer in question anticipates. We cannot forget that White and Tudor's Leading Cases, a work which is in fact a digest of cases on certain outlying points of equity, forms two volumes of a much larger bulk than that of ordinary reports; and whether any reporters, official or non-official, would record the cases with the brevity which is attained in the very useful work in question. We cannot, however, feel insensible to the imperative necessity of confining our legal lore within a reasonable compass. The paper above alluded to is perhaps a little too sanguine, but it is useful as advocating the only feasible method of escaping from a difficulty, and as offering many practical and useful suggestions as to the means by which so desirable a measure of reform may be carried out. (See Warren's Law Studies, pp. 844-846, 2d ed.) —*From the Solicitor's Journal and Reporter.*

* Vol. 4th paper xxix. By George Sweet, Esq.

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq, *Barrister-at-Law, Reporter to the Court.*)

CORPORATION OF CHATHAM V. MCCREA ET AL.

Bond—Surety—Notice of default of principal.

W. McC. and R. S. W. (the defendants) enter into a bond conditioned that one McK. shall pay to the plaintiffs certain rent in equal monthly payments, with a proviso "that the said municipality (the plaintiffs) shall on default being made by the said C. McK. in the payment of the said amount monthly, give notice thereof to the said obligors." Upon an action brought for non-payment and breach of the bond, it appeared the payments were to be made on the last day of each month, beginning with the last of January, 1861.

The first payment was made the 1st of February, the next the 8th of March, the third the 19th of April, the fourth the 14th of June, and some irregular amounts between that day and the 15th of November were paid.

The first notice given was on the 15th of August, 1861, the second on the 26th of September, and the last on the 28th of December, 1861.

Held, that the proviso for notice was to be considered as a condition precedent to the plaintiffs' right to call upon the defendants as sureties, and that notice of default not having been given within a reasonable time, the defendants were relieved. The question of reasonable notice is one for a jury, but the undisputed facts leaving no doubt what the decision of a jury should be, the court ordered a nonsuit to be entered.

Declaration on a bond made by defendants to plaintiffs, in a penalty of £600, subject to a condition, after reciting that one Charles McKeugh had purchased the fees arising from the market in the town of Chatham, for the rent or sum of $1860, payable in 12 equal monthly instalments, as set forth in the indenture of lease granted to the said McKeugh, and that defendants had agreed to become sureties for him, that the said McKeugh should pay to the treasurer of the plaintiffs the said rent or sum, at the times and in the manner mentioned in the lease, and should perform, keep, &c., all the duties, rules and regulations, and other things required of him as market clerk to the said corporation for the year 1861, and following the said condition there was a proviso that the said municipality should, on default by McKeugh in the payment of the said amount monthly, give notice thereof to the defendants.

Breach, that McKeugh did not pay, and there remained due by him the sum of $600. Second breach, that McKeugh did not perform, &c., the duties, rules and regulations and other things required of him as market clerk.

Averment, that all conditions were fulfilled, and all things happened to entitle plaintiffs to recover.

Pleas.—1st. That although the said McKeugh made default in the payment of the first and of several subsequent instalments, contrary to his covenants, yet the plaintiffs did not give any notice whatever of such default to the defendants.

2nd. That McKeugh did perform, &c., all the duties, rules and regulations, and other things required of him as such market clerk of defendants.

The plaintiffs took issue on these pleas.

The case was tried in April, 1862, at Chatham, before *Hagarty*, J. The bond was put in. and it appeared that after the condition that if McKeugh should pay, &c., the obligation should be "null and void, otherwise to be and remain in full force and effect," the following words were added by interlineation: "provided always, that the said municipality shall on default being made by the said Charles McKeugh in the payment of the said amount monthly, give notice thereof to the said obligors." The plaintiffs only proceeded on the first breach, viz., non-payment by McKeugh.

The lease was also put in, by which the plaintiffs in consideration of $1860, to be paid as rent by McKeugh to the treasurer of plaintiffs, demised to him for a year, ending the last Saturday in December, 1861, the fees arising from the public market in the town of Chatham. And McKeugh covenanted to pay the rent in twelve equal monthly instalments, the first to be paid on the last day of January, 1861, and each of the other instalments to be paid on the last day of every succeeding month. There were other covenants not material to be noticed, and at the end a proviso that in default of due payment and fulfilment of the other covenants the plaintiffs might enter upon, possess, and enjoy the said market fees notwithstanding the lease.

By a statement rendered by the treasurer of the plaintiffs, it

appeared that the monthly payment for January was not made until the 1st of February, 1861; that for February was made on the 8th of March; that for March on the 19th of April. The next payment for April was not made until the 14th of June. No payment was then made until the 2nd of August, between which day and the 15th of November, 1861, there was paid, including both days, the gross sum of $340, making a total of seven months' rent, amounting to $793 32.

A notice was given to each of the defendants, dated the 10th of August, 1861, by the town clerk of the plaintiffs, that McKeugh was a considerable sum in arrears in his "payments of the rent of the market fees." This was the first notice given. Subsequent notices were given respectively dated the 28th of September and the 28th of December, 1861, by the last of which an arrearage of $566.88 was claimed. Another letter claiming $552.48, and threatening legal proceedings against defendants as McKeugh's sureties, was written to them on the 24th of January, 1862. At the end of July, 1861, the sum of $340 was due, over and above all payments made. On the 2nd of August a payment of $50 was made, so that on the 10th of August McKeugh was $290 in arrear.

It was agreed defendants should have leave to move to enter a nonsuit on the objection that no sufficient notice of default was given. There was no contest as to the foregoing facts, and it was left to the Court to apply the law thereto, and the plaintiffs had a verdict for the full amount claimed.

In Easter term *A. McNabb* obtained a rule *nisi* to set aside the verdict and enter a nonsuit; or to reduce the verdict to such sum as the court should determine, according to the leave reserved.

In the following term *Eccles, Q. C.*, and *Atkinson* shewed cause. *McNabb* supported his rule.

Draper, C. J.—I do not perceive that any leave was reserved to move to reduce the verdict.

Taking the proviso as attached to and connected with the words immediately preceding it, namely, that the obligation should be "null and void, otherwise to remain in full force and effect," the fair meaning is, that if McKeugh makes default, the bond is to be in full force and effect, provided the plaintiffs shall, on default being made in payment of the stipulated amount monthly, give notice thereof to the obligors.

The defendants have contended that though this is not a formal agreement on the part of the plaintiffs to give notice, it is a condition introduced for their, the obligors, protection, and that non-payment by McKeugh of any monthly instalment does not alone forfeit the bond, unless the plaintiffs give notice of such non-payment, and that the want of such notice, on the day when the first or any subsequent monthly payment fell due, discharged them (the obligors) altogether, because the defendants as sureties would have had a right to insist that the plaintiffs should immediately enter upon and receive the market tolls as soon as McKeugh made default, and that they were deprived of the opportunity of claiming this remedy for their own protection by reason of their not receiving due notice of the default.

I think this proviso does operate to make notice of the default a condition precedent to the plaintiffs' right to call upon the sureties, and the only questions are, what is the proper construction of the proviso, does it require the notice of any default in any monthly payment to be given immediately such default takes place; and does this omission to give proper notice of default in paying any one instalment discharge the defendants as to all the residue thereafter to accrue due?

This proviso does not fix the time within which notice is to be given, nor is there any rule of law absolutely determining it. If given within a reasonable time, it would, I apprehend, be enough, for I do not think the defendants would be discharged by the fact that, default being made in payment on the last day of January, notice was not given to the defendants on the following day. It would, I apprehend, be a question for a jury, if the circumstances were such as fairly to raise the question. But here it appears to me the undisputed facts leave no room to doubt what ought to be the conclusion of a jury upon them. McKeugh was in default in making no payment on the 30th of April, and did not pay the sum then due until the 14th of June following. Of this default no notice was given. He was again in default on the 31st of May, the 30th June, and the 31st of July, making no payment until the 2nd of August, and then he only paid $50, not half the sum which was due on the 31st of May, and the first notice which was given was dated the 10th of August, and was served soon after, the precise day not being proved. I think no jury would decide this to be a notice within reasonable time; and that they ought to be told that the delay was, from the very character of the transaction, against the spirit of the proviso, and that upon these admitted facts the proper conclusion is, that no sufficient notice was given.

Then, as to the effect of want of such notice. It (the notice) is a condition precedent to the plaintiffs' right to recover, and the general averment in the declaration that all conditions were fulfilled, and all things happened to entitle plaintiffs to recover, include this condition. The plea puts the giving notice expressly in issue, and the burden of proof is on the plaintiffs.

In my opinion they failed to sustain their averment, and therefore failed to make out the case stated in the declaration, and as a consequence the rule for entering a nonsuit should be made absolute.

Per cur.—Rule absolute.

In re Grant and the City of Toronto.

By-law—Esplanade—Debentures.

The statute 16 Vic., ch. 219, authorises the issuing by the city of Toronto of $120,000 of debentures for esplanade purposes. A by-law having been passed on the 7th of May 1860, entitled "To provide for the issue of additional debentures for $54,000 for esplanade purposes" upon an application to quash the by-law on the ground that on its face it did not shew any authority in law for raising the sum,

Held, that inasmuch as the by-law in its recital referred to the statute, which was a public act, it could not be said that it shewed no authority for raising the sum, and a *primâ facie* case of an excess of authority in the amount authorised by statute in not being proved, the court in its discretion refused a rule.

Hallinan applied for a rule *nisi* to quash by-law No. 318, of the City of Toronto, passed 7th of May, 1860, and entitled, "To provide for the issue of additional debentures for $54,000 for esplanade purposes." objecting that the by-law did not shew on the face of it any authority in law for raising the sum, nor that the sum is less than, or equal to, the amount which the corporation is entitled to raise for esplanade purposes. It appeared among other things, that debentures for the whole sum of $54,080 had been issued under the by-law.

The recital in the by-law sets out part of the statute 16 Vic., ch. 219, the second section of which authorises the corporation to pass a by-law to raise a loan for such an amount, not exceeding $120,000, as may be necessary for the purpose of constructing the esplanade, and to issue debentures for the purpose of redeeming the same and paying the interest, in any by-law to be passed authorising the said loan $150,000, or any part thereof, and the issuing of debentures, to impose a special rate, &c.

Draper, C. J.—This act being expressly referred to, and being a public act, it cannot be said the by-laws shews no authority for raising the sum; and as the act shews the sum which may be raised to be $120,000, and as the by-law only provides for raising "a further sum of $54,000," it certainly does not appear on the face of the by-law that the authority has been exceeded by reason of any previous sums that may have been raised, amounting, together with the $54,000, to more than $120,000. If such be the fact, it should be plainly asserted, and made a ground for this application.

In the exercise of the discretionary power given by the Municipal Act, ch. 54, Consol. Stat. U. C., we should require a clear *primâ facie* case to induce us to grant even a rule *nisi* to quash a by-law passed more than two years ago, and fully acted upon; besides which for all that appears, this by-law may possibly have been specially promulgated, (it does not appear it has not been,) and then an application to quash it must be made within six months after the promulgation.

We think there should be no rule.

Per cur.—Rule refused.

FORD ET AL. V. JONES

Ejectment—Mortgage—Possession—Right of, till default in proviso of mortgage—Heirs at law—Their right to bring ejectment—Executors.

One D. B. O. F. being the owner of certain land mortgaged it in fee to the T. & L. Co., with a proviso or condition that until default he should remain in possession.

Upon his death (the plaintiffs) his heirs at law, during the currency of the mortgage, brought ejectment to recover possession from a tenant, no default having been made in the mortgage.

Held, that the proviso for remaining in possession until default made, would entitle the mortgagor to bring ejectment, but that the right of action descended to the executors and not to the heirs at law, therefore the defendant was entitled to recover.

The plaintiffs claimed title as heirs at law of David B. Ogden Ford, late of the town of Brockville, in the county of Leeds, Esquire, deceased, who claimed by deed from the Trust and Loan Company of Upper Canada.

The defendant, besides denying the title of plaintiffs, claimed title in himself by deed from Jones.

On the trial proof of no default having been made in the mortgage was given.

The defendant's counsel objected that the fee of the land being in the Trust and Loan Company, the plaintiffs could not maintain the action.

A verdict was taken for the plaintiffs subject to the opinion of the court.

The case was argued on points reserved, by *Anderson* for the plantiffs, citing Com. Dig. Estate,

Richards, Q. C., for defendant, cited *The Canada Company* v. *Weir*, 7 U. C. C. P. 341; *Robertson* v. *Bannerman*, 17 U. C. Q. B. 508; *Doe Lyster* v. *Goldwin*, 2 Q. B. 144; *Mallock* v. *McEwan*, 9 U. C. C. P. 467 Williams on Ex. 554.

DRAPER, C. J.—The material facts appear to be that D. B. O. Ford made a mortgage in fee of the premises, to recover possession whereof this ejectment is brought, to the Trust and Loan Company: that the mortgage contained a proviso that the mortgagor might retain possession until default; and there has been no default; that the mortgagor has since died, and this ejectment is brought by his heirs at law, claiming that the proviso for the mortgagor remaining in possession enures for their benefit and gives them a right to recover.

The case of *Wilkinson* v. *Hall*, 8 Bing. N. C. 508, has been frequently acted upon by our courts, and it in effect decides that Ford, the ancestor, had by virtue of the proviso that he should retain possession until default, acquired from the Trust and Loan Co., to whom he had conveyed the fee by way of mortgage, a term for as long as he had time given him to redeem by payment of the mortgage money, unless he made default in any intermediate payment of interest.

It was a chattel interest—not one of freehold— that he thus acquired, limited in point of duration till the day of payment of the principal money arrived, subject to forfeiture by non-payment of any stipulated installments or of interest; but as a chattel interest it could not on his death vest in his heirs at law, who are the claimants in this action. The fee did not descend to them, though the right to redeem it did, and by law the term vested in the executors of their ancestor.

The *postea* must therefore be delivered to the defendant.

Per Cur.—*Postea* to defendant.

ELECTION CASES.

Reported by ROBERT A. HARRISON, Esq., *Barrister-at-Law.*

THE QUEEN ON THE RELATION OF ARMOR V. COSTE.

Con. Stat. U. C. cap. 54, s. 73—Municipal Council—Disqualification to be member.

On 27th June 1861, a By-law was passed by the County Council of Essex appropriating $2,543 for the improvement of certain Roads and Bridges in the County, amongst others "on the Town line, between Colchester, Malden and Anderdon the sum of $600, and that Messrs. Coste (the defendant) and Cunningham be commissioners to expend the same," and that "the several commissioners hereby appointed to superintend the letting of any work to be done as aforesaid, shall receive three per cent. upon all contracts entered into by them, under the provisions of this By-law." On 1st December, 1861, the defendant received all the money he was entitled to in respect of his services under the By-law.

Held 1. That proof of the mere fact of defendant being a Road Commissioner to expend moneys raised in and for 1861, did not necessarily imply that he was an "officer" of the corporation within the meaning of Con. Stat. U. C. cap. 54, sec. 73, so as to make him ineligible to be elected in 1862, unless clearly shown that his duties continued.

2. That any contract which the corporation made with him to compensate him for services rendered as a Road Commissioner in 1861, having been fully performed by the payment of his commission in 1861, he was not at the time of his election in 1862 "a person having by himself or his partner an interest in any contract with or on behalf of the corporation" within the meaning of the same statute.

Quære.—If a person enter into a Joint Stock Road Company, in which company a Township Municipality has taken Stock, is such person thereby disqualified to be a member of the Township Council.

Where defendant while denying any interest in the contract with the Road Company, admitted that he was employed as a salaried agent for the contractor, costs were refused to him.

The relator objected that Coste were not eligible to be elected Township Councillor of the Township of Malden and Reeve of the said Township, on the grounds:

1st. That he was a person having by himself or partner an interest in a contract, with, or on behalf of the Corporation of the said Township of Malden.

2nd. That he was disqualified from being elected by reason of his being a road commmissioner of the corporation of the county of Essex, and a person receiving an allowance from the said corporation other than as a Deputy Reeve or Warden of the said corporation.

Boyd for relator. *Prince* for defendant.

The facts sufficiently appear in the judgment of the learned judge before whom the matter was argued.

RICHARDS, J.—I shall dispose of the second ground first.

On the 27th June, 1861, a By-law was passed by the County Council of the County of Essex, of which defendant was then a member, to appropriate $2,543 for the improvement of certain roads and bridges in the County. The By-law provided where the money should be expended, naming the several roads and commissioners amongst the others as follows:—"On the Town line between Colchester, Malden and Anderdon the sum of $600, and that Messrs. Coste (the defendant) and Cunningham be Commissioners to expend the same." The by-law then proceeded to enact "that the whole of the above work so to be done and performed as aforesaid shall be given out by contract, by public competition, by the said parties duly appointed to superintend the same, on or before the first day of September next, and should any one or more of the above mentioned parties fail to be present at the time appointed for the letting of such work, then any one member of such commissioners present may proceed to the letting of the same;" and "that all contracts entered into for the performance of any work to be done under the provisions of this By-law, shall be signed by the Commissioners letting the same on behalf of the corporation, and all sums due for such work shall be paid by the County Treasurer upon a certificate being produced, signed by the Commissioner or Commissioners letting the same of the work having been performed according to the contract," and "that the several commissioners hereby appointed to superintend the letting of any work to be done as aforesaid, shall receive three per cent. upon all contracts entered into by them under the provisions of this By-law."

By the terms of this By-law, the contracts were to be let by the commissioners on or before the 1st of September 1861, and from the nature of the work it is possible that all would be completed within the year. At all events the defendant seems to have received on the 12th of December 1861, all the money he was entitled to in respect of his services under the By-law, so that he would have no contract with or demand against the corporation in respect to such services at the time he was chosen Reeve.

His being a Road Commissioner to expend moneys raised in and for 1861, does not necessarily imply that he would be an officer of the corporation within the meaning of the statute so as to make him ineligible to be elected in 1862, unless it is clearly shown that his duties continued.

I therefore think as to this ground that the relators case fails, defendant not being shown to be an officer of the corporation when elected and any contract the corporation may have made with him to compensate him for his services rendered as such commissioner in 1861, having been fully performed by the payment of his commission under the By-law on the 12th December 1861.

The first ground taken by relator is supported by his endeavouring to show the following facts, that there was established a joint stock company called the Amhertsburg, Malden and Talbot Plank and Gravel Road Company, in which company, during last year, the Township of Malden took stock to the amount of six

thousand dollars, and that by virtue of his office of Reeve and of the said stock, defendant sits and votes in the company as a director thereof, that the company during the last year entered into a contract with Michael Seberville for the construction of seven miles of the said Road, and that defendant is interested as a partner or otherwise in the contract entered into by Seberville and the Road Company.

I have read all the affidavits filed on both sides in reference to the matter, and am not satisfied that Coste is a partner with or interested in the contract of the road company, so as to disqualify him from being elected Reeve of the Township. I do not at present decide that entering into a contract with a road company disqualifies a person from being elected Reeve or Councillor of a Township when such Township has taken stock with road company.

I can see many reasons why the taking of such a contract should work a disqualification, and am not prepared to say that it would not be carrying out the spirit of the statute, to hold that it did come within the act, and that such a contractor could not be elected Reeve even if he could be a councillor for the Township, so holding perhaps much the largest portion of the stock of the Road Company. But as in this case I do not feel justified in coming to the conclusion that defendant was a contractor or interested in the contract in a sense to disqualify him, it is not necessary to decide the question how far such a contract if it had been entered into would have worked a disqualification.

I must therefore decide in favour of the defendant on this ground.

The only remaining question is the costs. Defendant whilst denying any interest in the contract of Seberville admits that he is employed as his agent, that he receives from him $400 and his expenses as such agent, and is actually engaged in this work. Whilst he is acting thus as the agent of the contractors he is by virtue of his office of Reeve of the Townships a director of the Road Company; as such director it is his duty to see that Sl berville performs his contract, and does justice to the Company, though the strict enforcement of such contract might cause Seberville pecuniary loss. On the other hand as Seberville's servant and agent it is his interest and perhaps he may consider it his duty to do the work in such manner as may be most profitable for his employer, in which case the interest he is bound to protect as Reeve, and director may suffer.

I do not think any man ought to place himself in such an equivocal position, and it is not unreasonable that such a matter for the public interests should be enquired into.

Looking at the defendants own conduct and position as set up by himself, I am not disposed to give him any costs.

I shall therefore decide in favour of the defendant without costs to either party.

Reg. ex rel. McMullen v. DeLisle.

Consol. Stat. U. C., cap. 54, s. 73—Municipal Councils—Disqualifications—Relator.

Where defendant had been appointed a commissioner for the expenditure of Municipal funds upon the roads of the municipality in which he resided, and the by-law appointing him fixed a certain commission to be paid to him for his services as such commissioner, and it was shewn that some portion of his commission remained unpaid at the time of his election as a member of the Municipal Council, he was held to be disqualified as being a person having an interest in a contract with the corporation.

It is not desirable that the clerks of Municipal Councils having the custody of papers of the corporation should be relators in *quo warranto* cases to unseat members of the councils to which they are clerks.

In this case, in order to discountenance such a practice, costs were refused to relator, Clerk of the County Council to which defendant had been elected a member, although the application to unseat defendant was successful.

Relator objected to defendant holding the office of Deputy Reeve of the Town of Amherstburg on the following grounds:

1st.—That the corporation of Amherstburg is not entitled to a Deputy Reeve, the said town not having the names of 500 resident freeholders and householders on its last revised assessment roll.

2nd. — That defendant was disqualified from being elected Deputy Reeve because he was a road commissioner of the corporation of the County of Essex, and a person receiving an allowance from the said corporation other than as Deputy Reeve or Warden of the said corporation, and as such disqualified to be elected a member of the council of the corporation of the county.

The relator it appeared was Clerk of the County Council of the County of Essex, and as such officer, had the custody of a certified copy of the assessment roll of the Town of Amherstburgh.

In his affidavit he gave a synopsis of the names on the roll, and the result he arrived at was, that there were not the names of 500 resident freeholders and householders on the last revised assessment roll of the town. He then stated that defendant was, by a by-law of the corporation of the county, passed on the twenty-seventh of June, 1861, appointed road commissioner to superintend the expenditure of monies to be expended upon certain roads and bridges in the said county, and by the same by-law it was provided, that, as such commissioner, defendant should receive an allowance from the corporation of Essex of 8 per cent. upon all contracts entered into by the said defendant as such commissioner, which said amount so due as aforesaid, was still due and owing, as he was informed and believed, from the county corporation to defendant.

The affidavits were very conflicting.

Boyd for relator; *Prince* for defendant.

Richards, J.—As to the first ground of objection, if the case turned upon it, I should require further information, the affidavits filed on either side being so conflicting; but as I shall dispose of the matter on the other ground, I shall not delay my decision merely to ascertain who is right as to the number of resident freeholders and householders whose names are on the assessment roll of 1861 for the township of Amherstburgh.

I have already made an abstract in the matter of costs of the party of the by-law passed in 1861, appointing persons to expend money on different wards in the county. The extracts there made will all apply to this case except the one naming the commissioner, and that part which relates to defendant's appointment as commissioner is as follows, viz.: "On the town line between Malden and Anderdon leading into the town of Amherstburgh the sum of $410, and that Messrs. Kolfage, DeLisle (the defendant) and Cunningham, be commissioners to expend the same."

It appears from the papers filed that the amount due defendant under the by-law for his services as such commissioner had not been paid to him at the time of his election as deputy reeve. Mr. Kolfage, the reeve of Amherstburgh, stated that he was present on the 27th June of last year when the by-law to levy a tax in the county of Essex for the improvement of certain roads and bridges in the aforesaid county of Essex was passed, and that he remembers on the occasion of the passing of the by-law he asked the question of relator, who was at the time solicitor and clerk of the said municipal council, whether, as they were acting in their capacity of reeves in superintending the appropriation of monies for county or town line roads, and on letting out the contracts for the same, they could, according to law, be granted under a by-law any allowance for the expenses they would necessarily incur in fulfilling their prescribed duties, and that the said McMullen answered that they were acting in their capacity of reeves, but that as such an allowance could be made to them under the by-law.

The answer set up by defendant to the second objection is, that he was, whilst acting as commissioner under the by-law, acting in his capacity as reeve, and that any compensation awarded to him under the by-law, was in such capacity as reeve: that the statute does not work a disqualification when the allowance is to the person receiving it as reeve, deputy reeve, &c.

I am not prepared to give my assent to the proposition advanced in favour of the defendant. In that view large sums of money might be raised for the purpose of making alleged improvements, to be expended by the members of the municipal council, who would get a per centage on it, and who might vote for the raising of the money to make money out of their commission on the expenditure. The reason of the rule which excludes any one having a contract with the municipality from being elected a reeve or councillor, usually extends to prevent the councillors from increasing their own emoluments. The exceptions as to reeves and deputy reeves receiving an allowance from the corporation undoubtedly means the $1.50 per diem, which the council may allow them for their attendance in council. It is not desirable that reeves or councillors should be mixing themselves up with the contracts given out on behalf of the corporations, whose interest they are by law expected to look after. It is not desirable that they should

be induced to vote for the raising of moneys to be expended under their own supervision, in the hope of being able to make some petty per centage out of such expenditure, and thereby indirectly receive a profit out of their office which the law does not contemplate.

In the case before me, however, it is sufficient to say, that the by-law appoints this defendant, with other gentlemen, commissioners to expend money, by letting out a contract for certain work, and gives him a per centage for so doing. He is not in the by-law mentioned as the deputy reeve of Amherstburgh, nor is it stated that the per centage is as an allowance to him in that capacity. The by-law simply declares the commissioners . . . "shall receive three per cent. upon all contracts entered into by them." Now, under the By-law, they received an allowance for their services as commissioners, which disqualified them from being elected whilst the matter was pending and the allowance unpaid. This defendant has never been paid his commission, and was at the time of his election in the position of a person receiving an allowance from the corporation, or of an individual having a demand against the corporation for services he had rendered, and for which he had not been paid, and under the decided cases disqualified from being elected as deputy reeve.

I am of opinion, therefore, defendant's election as deputy reeve must be set aside.

When the writ in this matter was applied for I intimated my opinion that the clerk of the council was not the proper person to move to set aside the election of a member of the body of which he was the servant; that often the original documents required to be referred to would be in his care and custody, and that the opposite party would, to a certain extent, be placed at his mercy, for the procurement of copies, &c., and that it was not desirable in my opinion, that whilst the clerk, and having the custody of the papers of the corporation, he should be a relator.

I further intimated at the time, that I should probably, if called upon to decide the case, refuse costs to the relator, with a view of discountenancing the practice of persons in his position becoming relators in these proceedings. It further appears from the papers filed, that at the time of the passing of the by-law under which defendant acted, that relator was clerk and solicitor to the municipal council, and expressed his opinion at the passing of the by-law, that the reeve or deputy reeve could properly receive the commission allowed them under it.

Under these circumstances I do not think it would be proper to allow the relator his costs. He seems to me to have placed himself in a false position in this matter; 1st, by becoming a relator when he was clerk of the county council, and 2ndly, in instituting proceedings against parties who acted in good faith in accordance with the opinion he had himself given as the legal adviser of the corporation.

The writ will go to remove the defendant from the office of deputy reeve of the town of Amherstburgh, but without costs to either party.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*)

MONTREAL BANK V. BAKER.

Mortgage—Execution of deed in blank—Absconding debtor.

A debtor being about to leave this province for the purpose of raising funds to discharge his liabilities, signed and sealed a printed form of mortgage upon certain lands, without, however, having inserted either the name of himself or the mortgagee therein, which was also in like manner executed by the wife of the mortgagor, and by him locked up in his desk. From Halifax he wrote to his agent here instructing him to fill up the blanks as he should find necessary, which was accordingly done, and handed over to the mortgagee. *Held*, that this was a sufficient execution of the mortgage, and that the same was a valid charge upon the property embraced in the instructment.

When it is necessary for the purpose of settling the priority of incumbrancers to enquire whether a party who had been sued was or not an absconding debtor within the meaning of the act, this court will do so; and that too although the defendant in the action may not have taken any steps to set aside the attachment issued at law.

This was a suit of foreclosure brought by the Bank of Montreal upon two mortgages against William Baker, the mortgagor, and Joseph Shuter, The Commercial Bank of Canada, Thomas Rigney and James Brown, the younger, who were made parties as incumbrancers, Shuter ranking prior to the plaintiffs as to one of their mortgages, and in respect of which they submitted to redeem him.

The bill further stated, that the defendants The Commercial Bank claimed priority over such second mortgage, bearing date the 25th May, 1857, by virtue of a judgment recovered against Baker, and duly registered; such judgment having been recovered in a suit wherein proceedings had been commenced by writ of attachment, and which was sued out prior to the registration of such second mortgage of the plaintiffs; but which the plaintiffs submitted the Commercial Bank could not properly claim, Baker never having been in fact an absconding debtor, or liable to such process.

All the defendants answered the bill. The Commercial Bank alleging that Baker was at the time of suing out their attachment an absconding debtor, and that such attachment never had been superseded or abandoned; and that the mortgage of the 25th May, 1857, was never in fact executed by Baker, and that the same did not operate as a lien on the lands embraced therein.

The cause having been put at issue, evidence was taken therein before the court at great length, the material points of which, so far as the questions decided are concerned, appear in the judgment.

Strong, for the plaintiffs.

Roaf, for the Commercial Bank.

A. Crooks and *Blake*, for the defendants Rigney and Brown.

For the plaintiffs, it was contended, that the execution of the mortgage in blank by signing the name and affixing the seal of the mortgagor thereto was sufficient, although the name of the mortgagee did not appear therein; and that the agent of the mortgagor having subsequently filled in the names and delivered the deed to the plaintiffs, under the written authority of the mortgagor, was a good delivery thereof, although such authority was not under seal. The interest of Baker at the time was only an equitable estate, and as such did not require a sealed intrument to charge it. An equity of redemption may be charged without seal. It may be admitted that to pass a legal estate by the grantor's attorney a seal is necessary to the instrument constituting the attorney. *Hudson* v. *Revett*, 5 Bing. 366; *West* v. *Stewart*, 14 M. & W. 47; *Hibblewhite* v. *McMorine*, 6 M. & W. 215; and Broom's Legal Maxims, 145-6, were referred to.

The proceeding to sue out an attachment with knowledge of the facts, was a most improper use of the provisions of the act of parliament. Baker, in the eye of the law, never was an absconding debtor: it is shewn that he left openly, with the knowledge of the community in which he resided, for the purpose of visiting Montreal, Boston, or any other place in which he might consider it probable that he would succeed in raising funds to discharge his liabilities.

Counsel for Rigney and Brown insisted upon the same objections as were raised by the plaintiffs as to the invalidity of the proceedings under the attachment, which they also contended had been abandoned by the attaching creditors, Baker having been permitted to assume control of his property after his return, and to continue his business in the same way as he had previously done.

For the Commercial Bank, it was contended, that the mortgage to the plaintiffs never was a valid subsisting charge at law; as a conveyance it was wholly void at law, and being void at law, would be void also in equity. No agreement is alleged or proved to execute a mortgage or create a charge by deposit of title deeds, or in fact do otherwise than was done. The delivery, if any such took place, was before the blanks were filled up, and the registration of the mortgage was effected upon the affidavit of a witness, who swore to the delivery by Baker himself: this alone is sufficient to shew that the plaintiffs relied alone upon the delivery by Baker; and McNider, agent of the plaintiffs, says he accepted the mortgage before the blanks were filled up.

So far as the question respecting the validity of the attachment is concerned, the only point for consideration is, whether there was fraud in the suing out of the writ as against other creditors; nothing turns upon the ground of the regularity or irregularity of that proceeding. Baker never having adopted any steps for setting aside that writ, this court will not now enquire into the fact whether the debtor was an absconding debtor or not.

Exp. *Hoover*, 1 Mer. 7; *Shepherd* v. *Titley*, 2 Atk. 348; Chitty's Archbold's Practice, 588; Shepherd's Touchstone, 313; *Amer* v. *Best*, 1 Vermont Rep. 308, were also cited.

SPRAGGE, V. C.—The principal question in this case is, whether the instrument which the plaintiffs claim to be a mortgage, and which bears date the 25th of May, 1857, was ever, and if ever, at what time, duly executed. The question is one of priority between the Montreal Bank, and the Commercial Bank, and the defendants Rigney and Brown.

The instrument in question, without the names of any party in the body of it, but with a space left for their insertion, was signed and sealed by the mortgagor Baker, and his wife, on the day of its date, and in that state attested by a subscribing witness. On the outside the words, "mortgage with dower" are printed; below this the word, "to," and underneath it in pencil, in the handwriting of Baker, are the words, "Bank of Montreal." The instrument was not then delivered, but in the state I have described was retained by Baker, and locked up in his desk. This was done on the eve of his departure for Montreal, and perhaps to Halifax, with a view to obtaining money to relieve his embarassments. At the latter place he wrote a letter of instructions, which is produced to a Mr. Lavis. A mortgage with similar blanks executed in the same way, and intended for the Commercial Bank, was also left by Baker in his desk.

In his letter to Lavis he informs him of the execution of these instruments, and instructs him to procure them, and fill up the blanks, as he should find it necessary; and to deliver them respectively to the agents of the banks at Belleville, delivering the one in question first to the agent of the Montreal Bank. The one intended for the Commercial Bank was offered to the agent, and refused, on the ground that it was invalid by reason of the blanks. The one offered to the Montreal Bank was accepted by its agent, McNider. It was delivered first, while in the state in which it was left, and again after the blanks had been filled up.

It is incontrovertible, I think, that the instrument in the state in which it was left by Baker was void; and that as first delivered to McNider, it was void. The question is, whether the filling up of the blanks, and subsequent delivery, gave it validity.

If the only thing remaining to be done had been the delivery of the instrument, it would be clear, I think, that delivery being a matter in *pais*, was authorised by a letter from Halifax, and was validly done. I think it is also clear, as a matter of fact, that the filling up of the blanks was in accordance with the instructions contained in that letter. The question is, whether Lavis, as agent appointed by parol, could complete the execution of this imperfect instrument by any authority less than under seal.

If a re-execution of the instrument by Baker himself, supposing him present, and not acting by attorney, had been necessary after the blanks were filled up, it would follow that Lavis had no authority to complete its execution. A formal re-execution by signing and sealing, or its equivalent, acknowledging signature and seal, would not be necessary, I apprehend, but a filling up of the blanks in the *presence* of the grantor merely, would suffice under the authority of *Hudson* v. *Revett*, 5 Bing 368, even as read by the court in *Hibblewhite* v. *McMorine*, 6 M. & W. 215. But it is a question whether in *Hudson* v. *Revett* the court held the presence of the grantor necessary; their language does not attach importance to that circumstance.

The deed in question in that case was a conveyance to trustees for the benefit of creditors; the sums due to them respectively being inserted in the deed; a blank was left for a very large amount due to one of the principal creditors, which it was agreed should be ascertained by the production of vouchers; the deed was executed with this blank, which it was agreed should be filled up when the vouchers were produced. The next day the vouchers were produced by the grantor, and the blank filled up, probably in his presence, with the smaller amount, which only he alleged was due.

The omission in that deed was certainly not of so startling a character as in the case in question, nevertheless the court held that it was quite impossible that the deed could have any operation while the blank remained in it. It was therefore void, and more than void it could not be.

Then how did the court get over the difficulty that the deed was inoperative and void as first executed, and became a valid deed without any re-execution? As I understand the case, in this way, that there was not a perfect execution of the deed on the first day; and that the delivery at that time was in the nature of an escrow, though not technically as an escrow, the delivery being to the grantee himself; that taking it, that there was a delivery of the deed as a deed, it was only a delivery upon condition that something was afterwards done, and that then, and not till then, it became a perfect deed.

No stress was laid upon the circumstance that the blank was filled up in the presence of the grantor, nor was that circumstance material in the view which the court took of the case. It would indeed be only evidence of assent, which itself is matter in *pais*, and could be done as well by an agent authorised by parol, as by the grantor in person; suppose, for instance, the grantor had given a power of attorney not under seal, to attend and have the blanks filled up with such a sum, and then to deliver the deed to the grantee, that would be a valid perfecting of the deed within the reasons of the decision; and even if the presence of the grantor had been relied upon.

Hudson v. *Revett* does not stand alone. The old case of *Zouch* v. *Claye*, 2 Lev. 35, is thus shortly stated in *Levinz*: "In debt upon an obligation, the case was thus: A. and B. delivered the bond to C., and after, and by the consent of all parties, the name and addition of D. was interlined, and D. also sealed the obligation, and delivered it; and if the obligation by this alteration was made void against A. & B. or not, was the question? But by Hale, and the whole court, adjudged that it was not, and that it is the obligation of all three.

In the still earlier case of *Markham* v. *Gonarstor*, Cro. Eliz. 626, it was at first held that the blank space left in the bond, afterwards filled up with the assent of the obligors, avoided the instrument; but this was subsequently reversed; Moor. Rep. pl. 547, and even when first heard, this distinction was taken by Popham, J., that if it had been appointed by the obligor before the ensealing and delivering thereof that it should be afterwards filled up, it might then, peradventure, have been good enough, and it should not have made the deed to be void; but being after, it shall avoid the deed—this distinction proceeding, I apprehend, upon the ground upon which *Hudson* and *Revett* was decided.

Zouch v. *Claye* was recognised as authority in *Watson* v. *Booth*, 5 M. & S. 228, where a bond to the sheriff was executed by four obligors, with a space left for the name of a fifth. In that state it was left in the hands of an agent of the obligors who had executed it, by whom the name of a fifth obligor was inserted in the blank space, and the additional obligor executed the bond, and it was delivered to the sheriff. It was held that before the insertion of the additional name, the holding of the bond by the obligor's agent, was in the nature of an escrow, and the addition having been made with the assent of the agent, was the same as if made with the assent of the obligors themselves, and so within the case of *Zouch* v. *Claye*; and the bond was held valid.

Hibblewhite v. *McMorine* is one of several cases in which it has been held that an assignment of shares in incorporated companies, which assignments are required by statute to be under the seal of the transferer, and therefore deeds, are void if the name of the transferee be left blank. That was the only point decided, though the language of Lord Wensleydale, by whom the judgment of the court was delivered, militates against such acts as were done in the case before me, by an agent not appointed under seal, being sufficient to make a valid deed. In regard to *Hudson* v. *Revett*, he observes: "A blank in a material part was filled up; but having been done in the *presence* of the party, and ratified by him, it was held that it was evidence of re-delivery."

Lord Wensleydale may have thought that the circumstance he adverts to was the proper ground upon which to place the decision; but according to the report of the case it was not placed upon that ground by the learned judges by whom it was decided. The circumstance of the blanks being filled up in the *presence* of the grantor, is not even alluded to by the judges, and it is not clear that the fact was so. Serjeant Wilde, who argued against the validity of the deed, said, that the deed was always out of the grantor's possession after the first execution; and the counsel who sustained the deed put the case both ways, whether the blanks were filled up in the grantor's presence or not. The learned judges

I take it, must have thought the circumstance either immaterial or not established.

Hudson v. *Revett* was again referred to, in the Court of Exchequer, in *West* v. *Steward* (14 M. & W. 47), when Baron Alderson's comment upon it was: "There the court considered it to have been executed originally as an escrow, and not absolutely executed until the blank was filled up."

The doctrine established by *Hudson* v. *Revett*, and *Markham* v. *Gonastor*, and *Zouch* v. *Claye*, I think is, that a deed containing blanks, executed by the grantor, although void at the time, may be perfected and rendered valid by the filling up of those blanks, with the assent of the grantor, or by insertion made in pursuance of directions given at the time of its execution; and *Watson* v. *Booth* establishes further, that such assent may be by agent appointed not under seal. The ground upon which I understand this to proceed I have already explained.

To apply it to this case: the deed, in its imperfect state, was placed by the grantor in the hands of his agent Lavis; not to deliver it immediately, but to hold it for a certain purpose, and then to deliver it; it was then in the hands of Lavis as an escrow. It matters not, according to the cases, whether the purpose for which it was to be held before delivery was something collateral to the deed, or something to be inserted in the instrument itself; Lavis held it for the purpose for which it was placed in his hands; caused that to be done in relation to it which he was instructed to have done, and delivered it. It may be that there was no good reason why the blanks should not have been filled up by Baker himself; but there can be no doubt how they were to be filled up. The names of the executing parties and the pencil endorsement clearly indicated that; in addition to which was the letter of instructions.

I cannot, in principle, distinguish this case from those to which I have referred. *Watson* v. *Booth* resembles it in its circumstances as well as in principle. It can make no difference. I think, that the delivery to Lavis, as an escrow, was not contemporaneous with the signing and sealing.

But it is objected that the deed was actually delivered by Lavis to the bank agent before the blanks were filled up; and that the deed having been registered upon the evidence of Gould, who only witnessed the execution by Baker himself, the bank must have rested upon that delivery. I do not think the registration upon Gould's affidavit can preclude the bank from insisting upon any delivery other than in his presence. Assuming that Lavis delivered the deed, and that McNider for the bank accepted it before the blanks were filled up. I think the bank may still insist upon a delivery by Lavis after the blanks were filled up; for the rule against a second delivery only applies when the first delivery is inoperative, as put by Perkins (sec. 154): "It is to be known that a deed cannot have and take effect at *every delivery* as a deed; for if the first delivery take effect, the second delivery is void." And so in *Hudson* v. *Revett*, Serjeant Wilde did not contend that there *could* be no second delivery, but that as a matter of fact there was no re-delivery; and Best, C. J., held that there was no perfect delivery by the grantor, because the deed itself was inoperative by reason of the blank that was in it. So here the first delivery could not take effect for the like reason; and the second delivery, which was proved, was a good delivery.

Of course I do not mean to say that there has been any good execution of the deed by Baker's wife. But I have come to the conclusion, after some hesitation, that the cases warrant me in holding, that there has been a perfect execution by Baker and his wife.

Something is said in the evidence, of the mortgage to the Montreal Bank being in the possession of Lavis on the evening of the 18th of June, the blanks having been filled up; but I am satisfied from the evidence that it had at that time been a second time delivered by Lavis; and if in his possession afterwards, it could not affect the completeness and validity of the deed.

Evidence has been given as to the exact time at which the mortgage was carried to the registry office for registration, and at which the attachment issued by the Commercial Bank, and under which that bank claims priority, was lodged in the sheriff's office. I incline to think that the mortgage was first in the registry office; but if not, I do not see how the attachment can prevail against it; if it was at that time perfectly executed, an unregistered deed is good against an attachment, unless there is some statutory provision on the subject which I have not seen.

In the view which I take of this case, it is unnecessary to consider some other points raised, at least so far as the plaintiffs' priority is concerned; but as between the Commercial Bank and Rigney and Brown, it is necessary to determine as to the validity of the attachment issued by the bank on the 19th of June; Baker's mortgage to Rigney and Brown having been given on the 17th of October, and registered the same day, and the judgment of the Commercial Bank upon their attachment having been recovered on the 7th June following.

Mr. Roaf contends that the only point open is, whether, in suing out the attachment, there was fraud on the part of those by whom it was sued out, as against other creditors; and that this court will not examine whether as a matter of fact Baker was an absconding debtor or not. If this be correct, that fact cannot be ascertained in any court as between those claiming priority in virtue of it, and other incumbrancers. The Commercial Bank, and Rigney and Brown are both brought into this court as incumbrancers. The bank's judgment is subsequent to the firm's mortgage, but the bank claims priority by reason of the attachment. Is it not open to Rigney and Brown to displace that claim, by shewing that the supposed fact upon which it is based had no existence. It would not be impeaching the regularity of proceedings in another court, but removing the grounds of an assumed priority. The fact is inquirable at law between the attaching creditor and the debtor, for one purpose, the question of costs; as to the debtor, the priority of creditors is nothing; and the writ of attachment is a summons as well; but he is allowed an inquiry for a purpose material to himself; and the inquiry then is, not whether circumstances as they appeared to the creditor, and those who made the further affidavit, were not such as might lead reasonable men to believe that the debtor was an absconding debtor, but whether in fact he was an absconding debtor or not. If as a fact he was not, no attachment ought to have been sued out, and the attaching creditor obtained his priority without right: and in a question of priority only inquirable into in this court, it would be anomalous, I think, if the fact could not be shewn, and shewn by those who have no other opportunity of shewing it. If it were not so, other creditors better informed as to the fact, not to say more careful and scrupulous in their proceedings, would be postponed; because they cannot place themselves in the same position as the attaching creditors, without taking the like proceedings, and upon the like affidavits; and this they could not do with a good conscience, and the result would be that a priority would be gained by the *error* of the attaching creditor: a priority which it is against good conscience that he should retain.

As to the facts necessary to constitute a debtor an absconding debtor—the 43rd and 44th sections of the Common Law Procedure Act are not quite consistent. By the former, the debtor must depart from Upper Canada with intent to defraud his creditors, but by the latter section, attachments may issue upon its being shewn that he has departed with intent to defraud the plaintiff of his just dues, or to avoid being arrested or served with process: in the Consolidated Statutes the same discrepancy is continued.

I have carefully read the evidence, and am convinced that Baker did not leave Upper Canada either to defraud his creditors or the Commercial Bank, or to avoid being arrested or served with process: but in good faith in order to procure moneys to pay his creditors, and among those the Commercial Bank.

I will refer to some of the prominent circumstances that lead to this conclusion. His leaving the mortgages in the Montreal and Commercial Banks, to be handed to them for their security, in the event of his failing to procure money on this side of the Atlantic; and which I have no doubt he *intended* to be valid and effectual, as in my judgment this one was, and the other would have been, if accepted. His directions to Mr. Collis, his Montreal agent, to apply the proceeds of consignments to meet the notes accruing due. His efforts at Montreal, Quebec, and Halifax, and in England, to raise money to pay his debts. His leaving not by stealth, but openly, and with the true object declared. His making provision for the conduct of his business during a tempo-

rary absence, with a view of resuming it upon his return, and its actual resumption and continuance as before, after his return.

If it were necessary to determine that the attachment was sued out upon affidavits made without sufficient reason for believing Baker to be an absconding debtor, and in the face of facts known to the bank agent, which ought to have led to a different conclusion, I think I should have been prepared so to determine. The bank agent had been to Stirling on the 15th or 16th, and had seen Lavis, and the state in which Baker had left his business, and had been offered the mortgage before he made the affidavit for the attachment. Indeed it would appear that the immediate motive for taking out the attachment was not so much to secure the estate of the debtor for the bank and other creditors, as thereby to obtain priority over the Montreal Bank. What took place on the evening of the 18th is evidence of this; when the bank agent and bank solicitor pressed it upon Lavis to keep the mortgage to the Montreal Bank in his hands till at least ten o'clock the following day, their object being in the meantime to lodge an attachment, with a view to obtaining priority. Upon the question of priority, therefore, between the Commercial Bank and Rigney and Brown, my opinion is, that the latter in respect of their mortgage are entitled to priority.

COMMON LAW CHAMBERS.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

The Queen v. The Trustees of School Section Number Twenty-seven, in the Township of Tyendinaga, in the County of Hastings.

Peremptory mandamus—Necessity for return—Attachment for contempt—Practice.

No attachment will lie for not making a return to a peremptory mandamus; it should be for not obeying the writ.

Such an attachment must be tested in term, on the same day as the rule on which it issues.

The rule *nisi* called upon the trustees of school section number twenty-seven in the township of Tyendinaga, in the county of Hastings, to show cause why an attachment should not issue against them. On an affidavit of service of this rule on A., B. and C., stating them to be trustees of said section, a rule absolute was granted following it in form, and thereupon an attachment issued against A., B., and C., *held* bad, as not warranted by the rules.

[July 29th, 1862.]

In this case a writ of peremptory mandamus issued on the 5th of July, 1861, returnable on the first day of Trinity Term then next, directed to the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings, commanding them to levy and collect from the freeholders and householders of the section a sum of money sufficient for the satisfaction of two judgments recovered against them by one John Waterhouse, and recited in the writ.

A former application for attachment had been made for not returning the writ of *mandamus nisi* issued in the same matter, which is reported in 20 U. C. Q. B. 528.

No return having been made, on the 27th of November, 1861, during Michaelmas Term, *Sisson* obtained a rule *nisi*, entitled "The Queen against The Trustees of School Section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," and calling upon "the trustees of school section above mentioned," to shew cause why an attachment should not issue against them for contempt in not making a return to the writ.

This rule was personally served on William Cross, James Glass, and Robert Gillespie, and in Hilary Term, 1862, on the 5th of February, *C. Robinson* moved it absolute, on an affidavit of service stating that on the 21st of January, 1862, the defendant did "personally serve William Cross and James Glass, both of them trustees of school section number twenty-seven in the township of Tyendinaga, in the county of Hastings, and that on the 22nd of January, 1862, he did also "personally serve Robert Gillespie, another of the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," with a true copy; and that the original rule was at the same time shewn to each of them.

On the 15th of February, during the same term, the following consent was given, endorsed on the copy of the rule *nisi:*

Hilary Term.

I hereby consent that the attachment on the mandamus issue upon the expiration of two months after the present term, the trustees paying the moneys collected upon the rate bill to M. Crombie, Esq., counsel for Waterhouse.

Wm. Ponton,
Counsel for Trustees.

Thereupon on the same day a rule absolute was granted, entitled "The Queen against The Trustees of School Section number twenty-seven in the township of Tyendinaga, in the county of Hastings," and ordering "that a writ of attachment be issued forthwith against the trustees of school section number twenty-seven in the township of Tyendinaga for contempt in not making a return to the peremptory writ of mandamus issued in this cause."

On the first day of May following a writ of attachment issued, tested on that day, and commanding the sheriff "that he attach James Glass, Robert Gillespie, and William Cross, the trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings, so that you may have them before our justices of our Court of Queen's Bench, at Toronto, on Friday the 30th day of May instant, being in the term of Easter, to answer to us for certain trespasses and contempts by them lately done and committed in our said court, and have you then and there this writ."

Upon this attachment the said William Cross was arrested on the 26th of May, and committed to the gaol of the county of Hastings, where he had remained up to the time of this application.

On the 22nd of July following, *M. C. Cameron* obtained a summons calling on her Majesty the Queen, and John Waterhouse, his attorney or agent, to shew cause why the writ of attachment, the arrest of the said William Cross thereunder, and all subsequent proceedings, should not be set aside for irregularity, with costs, and the said William Cross discharged from custody, on the following grounds, among others: 1. That the said writ was not warranted by the rule under which it was granted, the said rule authorising an attachment against the corporation styled: "The trustees of school section number twenty-seven, in the township of Tyendinaga, in the county of Hastings," and not against individuals by name, and on an attachment against the corporation no arrest of an individual could be made.

2. That the said writ of attachment was issued for an alleged contempt of the court in returning a peremptory writ of mandamus, which is no contempt, as no return is necessary; it is disobedience to the command of the writ that is a contempt, and no disobedience of the command is alleged in said writ or in the rule under which the same was granted.

3. That the said writ of attachment was irregular and void, being tested in vacation and not in term, and does not bear date of the day on which the rule under which the same was issued was granted.

4. That no rule to return the writ of mandamus was granted or served on said Cross.

5. That said Cross was arrested under said attachment on the 26th of May last, and was not produced in court on the return of said writ, nor was any motion on the return of said writ made against him, nor any order or rule of court in respect to him or his alleged contempt, and the said John Waterhouse, the prosecutor, did not move against him or require him to answer interrogatories, nor hath he done any thing in the matter since the arrest of the said William Cross.

C. Robinson shewed cause, citing Tapping on Mandamus, 346, 408, 422, 423, 424; Gude's Cr. Pr. 186; Bull N. P. 201; *Burdett* v. *Sawyer*, 2 U. C. P. R. 398; Rule of Court in England, 2 Q. B. H. 1844, referred to in Ch. Arch. Prac., 9th Ed., 1612, not adopted here; C. L. P. A., sec. 19.

M. C. Cameron, contra, cited *Regina* v. *Ledyard*, 1 Q. B. 619; *Rex* v. *Mayor*, &c., of Rye, 2 Burr. 798; Grant on Corporations, 231; Tapping on Mandamus, 461, Rule 4; Ch. Arch. Prac. 1612, rule 2, 1844.

Burns, J., held that the rule *nisi* should have called upon the trustees by name, and that the attachment, therefore, although in the proper form, was not warranted by it or by the rule absolute under which it was issued. 2. That the second objection was

entitled to prevail; and 3, that the attachment should not have been tested in term, on the same day on which the rule absolute was granted, but that this defect being amendable would not alone have been fatal.

He made the rule absolute, but without costs, owing to the consent given on the part of the trustees. The other objections were not noticed in the decision.

CURRY ET AL v. TURNER.

Writs against the body, lands and goods at same time—Proceedings in Chancery contemporaneously—Regularity of.

The plaintiffs having obtained a judgment against the defendant, on the 7th June last, issued a *ca. sa.* on the judgment, directed to the sheriff of the county of Oxford. He did not then place it in the sheriff's hands. On the 12th June he issued a *fi. fa.* goods to the sheriff of Oxford, which writ was on the same day returned *nulla bona*. On the 14th June he issued writs of *fi. fa.* against lands to the respective sheriffs of Oxford and Haldimand. On the same day (14th June), he filed a bill in Chancery to charge certain equitable interests of defendant in lands, which could not be directly reached through the writs at law. On the 16th September he for the first time placed his *ca. sa.* in the hands of the sheriff of Oxford, the writs against lands then being in his hands, and the proceedings in Chancery still pending. The *ca. sa.* was not properly styled in the cause, and was not tested in the name of the Chief Justice or other judge of the court from which it issued.

Held, that plaintiffs' proceedings violated the spirit of the law in charging defendant in execution on a *ca. sa.* whilst endeavoring to enforce a remedy against his lands through an execution issued since the *ca. sa.*, and since a *fi. fa.* goods returned *nulla bona*. Such being the case, an application to amend the writ of *ca. sa.* was refused, and the writ set aside for irregularity, with costs, defendant undertaking not to bring an action for the arrest.

Semble, the irregularities were amendable, and would on terms have been amended under ordinary circumstances.

(27th September, 1862.)

Jackson obtained a summons calling upon the plaintiffs in this cause to show cause why the writ of *capias ad satisfaciendum* issued in this cause and placed in the hands of the sheriff of the county of Oxford, should not be set aside for irregularity, with costs, or why the said writ should not be ordered to be withdrawn from the hands of the said sheriff for irregularity, with costs, on the ground that the said writ was not properly styled in the cause, and that it was not properly tested in the name of the Chief Justice or of any other judge of the court at the time when issued, and on the ground that the writ was waived and abandoned by the plaintiffs' issuing writs of *fieri facias* against goods and lands in this cause subsequently to the issue of the writ of *ca. sa.*, and that since the issue of the *ca. sa.* plaintiffs filed a bill in Chancery against the lands of defendant, and that the *ca. sa.* was not placed in the hands of the sheriff to whom directed until after the writs against goods and lands had been delivered to the sheriff.

Stevenson shewed cause.

The following cases were cited on the argument:—*Hodgkinson* v. *Whalley*, 2 C. & J. 86; *Dicas* v. *Warne*, 2 Dowl. P. C. 768; *Miller* v. *Parnell*, 6 Taunt. 370; *Andrews* v. *Sanderson*, 1 H. & N. 726; Story's Eq. Jur. sec. 1266; *Billings et al.* v. *Rapelje*, 2 U.C. Prac. 194; Con. Stat. U. C. cap. 22, sec. 252; *Haywood et al* v. *Duff*, 6 L. T. N. S. 433; *Knight* v. *Coleby*, 5 M. & W. 274.

The facts sufficiently appear in the judgment of the learned judge.

RICHARDS, J.—The first objection taken is, that there is a mistake in the style of the cause in the writ of *capias ad satisfaciendum*. This would not be of much consequence, and could be readily amended under ordinary circumstances.

The second—that the writ is tested in the name of Sir J. B. Robinson, who had ceased to be Chief Justice of the Court of Queen's Bench—is clearly an irregularity; and unless the plaintiffs are entitled to amend, the defendant is entitled to be discharged from imprisonment under the writ.

It is contended that the writ is a nullity, on the ground secondly taken, and cannot be amended. If it be necessary for the writ to be tested in the name of the Chief Justice, it is equally necessary that it should bear date on the day on which it is issued; and yet if there was an error in the date, I cannot doubt that it would be amendable.

I do not think that I should, under ordinary circumstances, hesitate to amend the writ on both points, and in this case would do so on payment of costs but for the other facts which appear, and which are taken as grounds for the defendant's discharge.

The facts and dates necessary to be considered are as follows: Judgment was entered on the 7th June, 1862, and a *ca. sa.* issued the same day. On the 12th June a *fi. fa.* against goods was issued, and placed in the hands of the sheriff of the county of Oxford, and returned by him *nulla bona* on the same day. On the same day two *fi. fas.* against lands were issued—the one to the sheriff of Oxford, and the other to the sheriff of the county of Haldimand. On the 14th June the writ against lands was placed in the hands of the sheriff of Haldimand, and on the same day a bill in Chancery was filed to reach defendant's equitable interest in certain lands in Haldimand. The bill recites the judgment in this cause; the execution against goods, and its return of *nulla bona*; the fact that defendant had an equitable interest in certain lands in Haldimand, and that the interest of the defendant in the said lands could not be sold under the execution at law against lands; but the plaintiffs were advised that such interest could be sold to satisfy the said judgment, under the order and by the process of that court (Chancery), and that defendant had no other property or means by which they could recover the monies by their execution at law. They thereupon prayed that the defendant's interest in the land might be sold for the satisfaction of their judgment. On the 18th June the plaintiffs, doubtless with a view of binding defendant's lands and making a notice under the Registry Act, registered a certificate in the registry office of the county of Haldimand, that they were taking proceedings against defendant in Chancery, in which some title or interest in his lands were called in question. On the 16th September plaintiffs placed the *ca. sa.* in the hands of the sheriff of the county of Oxford, the writ against lands to the sheriff of Haldimand being still in the sheriff's hands, in full force and effect, and not returned. The plaintiffs' attorney states that the writ of *fi. fa.* against lands was issued in order to bind the defendant's interest in said lands.

The general doctrine seems to be that plaintiff may issue a *fi. fa.* and *ca. sa.* together, and if nothing be done under the *fi. fa.* he may arrest the defendant on the *ca. sa.* But if anything is done under the *fi. fa.* which may make it necessary for the sheriff to defend himself under the writ, it must be returned and enrolled, and then a *ca. sa.* cannot be regularly executed until this is done. Bayley, B., in *Hodgkinson* v. *Whalley*, states there is no doubt that a *fi. fa.* and *ca. sa.* may issue together and be concurrent, for if nothing is done on either, no award of execution is entered on the roll. But if one is executed, a return of that must be entered before you can enter the award of another execution. Now, if both are executed concurrently the entry on the roll must be that both were awarded and issued on the same day, which would be irregular. It is clear upon principle that two executions cannot be acted upon at the same time. There was the execution against lands acted upon before the *ca. sa.* was placed in the sheriff's hands. The plaintiff says he placed it there to bind defendant's lands, and I believe when parties proceed in equity to enforce satisfaction of legal judgments out of the equitable interest of defendants in lands, they are obliged by the practice of that court to issue and place in the hands of the sheriff executions against lands. This the plaintiffs have done, and though they may not be able to sell the defendant's lands by virtue of the execution, yet the issuing of the writ and placing it in the sheriff's hands is a mode of reaching them through proceedings in another court. If after doing this and further endeavoring to bind the interest of the defendant in the lands by registering the fact of proceeding in Chancery with the County Registrar, a plaintiff were allowed to take a defendant in execution on a *ca. sa.*, it might be urged that such a proceeding could be used as an "engine of oppression," as is mentioned in some of the cases, quite as effectually as if he had, by advertising the lands for sale, done something under the writ against lands towards executing it, and then arrested the defendant under a *ca. sa.*

Under our statute I doubt if an execution against lands could properly issue without some proceeding equivalent to enrolling the return of *nulla bona* on the *fi. fa.* against goods. In practice such writs are not, I believe, issued until the execution against goods is produced and filed, with the return of *nulla bona*, by the proper officer, on it. If, therefore, that writ is to be considered as enrolled, then the *ca. sa.* must be void, because there must be a return of one before there could be an award of the other, accord-

ing to *Hodgkinson* v. *Whalley*, 2 C. & J. 86, and affirmed by *Andrews* v. *Saunderson et al*, 1 H. & N. 726.

On the whole I am of opinion that the plaintiff's proceedings have violated the spirit of the law, in charging the defendant in execution on a *ca. sa.*, whilst they are endeavoring to enforce a remedy against his lands through an execution issued since the *ca. sa.*, and since a *fi. fa.* against goods was returned *nulla bona*. Such being the case, I shall decline amending the writ, and it must be set aside for irregularity, with costs, defendant undertaking not to bring any action against any party, and the defendant is to be discharged forthwith from the custody of the sheriff of the county of Oxford in this action.

Summons absolute with costs.

COUNTY COURT CASES.

(In the County Court of the United Counties of Frontenac, Lennox & Addington, before His Honor KENNETH MCKENZIE, County Judge.)

SMITH v. SHAW.

Held, 1. That the "future owners and occupants," mentioned in the 24th section of the Assessment Act, are persons who become owners or occupants by purchase or otherwise between the making of the assessment and the return of the collector's roll.

2. That "*the persons who ought to pay the taxes*," mentioned in the 96th section of the Act, are persons whose names appear on the collector's roll as owners or occupants, or persons who have become owners and occupants by purchase or otherwise between the time of the making of the assessment and the return of the collector's roll.

3. That City and County Councils cannot legally pass a resolution under the 104th section of the act, to continue the levy and collection of unpaid taxes by distress after the return of the collector's roll, and that such roll must be returned at furthest by 1st March in each year.

4. That after the return of the collector's roll, municipalities must sue under the 102nd section of the Act, or proceed against the land.

5. That when goods are seized and money paid under protest to release them from seizure, an action will lie.

This action was brought by Sir Henry Smith against the defendant. The declaration contained two counts—one in trespass, the other the common money counts. The defendant pleaded not guilty by statute to the first count, and never indebted by statute to the remainder of the declaration.

The cause was tried at the March (1862) sittings of the court, before Mackenzie, Judge Co. C., when it appeared in evidence that the defendant, as collector of taxes for the city of Kingston, seized a pier glass of the plaintiff's, of the value of $50, on the 29th November, 1861, for arrears of taxes rated against Caroline Smith in the year 1850, in respect of premises owned and occupied by the plaintiff in Victoria Ward since 1851 or 1852 up to the time of the seizure. The plaintiff was obliged to pay to the defendant $36 and 55 cents to release his pier glass. He paid this amount under protest after his property had been seized by the defendant.

It appeared that the premises were occupied by Caroline Smith in 1850, and that the plaintiff had nothing to do with them until 1851 or 1852. The premises were assessed against Caroline Smith for the year 1850, according to the roll produced. The name of the plaintiff did not appear on the roll, in respect of these premises, for 1850. The taxes for 1850 against the premises were rated against Caroline Smith at £9 2s. 8½d., or $36 55c. The plaintiff paid all the taxes rated against the premises since he became their owner.

Caroline Smith was living within the city of Kingston since 1850. There was no evidence to show that the taxes of 1850 were demanded from her, or that a specific demand was made on the plaintiff. One of the witnesses stated that the defendant was appointed by the council of the City of Kingston special collector to collect back taxes. There was no further proof of the defendant's appointment. There was no resolution of the Council proved. The collector's roll for 1850 was put in evidence by the defendant, whereon Caroline Smith only stood charged with the taxes of that year. The roll of 1850 was delivered to the defendant by the City Chamberlain.

For the defence, *Agnew* objected that the plaintiff was not in a position to dispute the legality of the seizure, having paid the taxes instead of bringing an action of replevin.

The judge thought that the paper produced showed a seizure of the plaintiff's property by the defendant, which, taken with the fact that the plaintiff paid the money under protest, in his opinion amply supported the declaration.

The defendant then justified the seizure under the 24th section of the Upper Canada Assessment Act, and cited the 96th, 102nd, and 104th sections of the same act in support of what he did.

The judge told the jury that, in his opinion, the defence failed on several grounds—That there was no legal proof of a resolution having been passed by the city council of Kingston, under the 104th section of the said act, appointing the defendant a special collector. That he (the defendant) would require, under the 24th section, to shew that the premises were assessed against "the owner" and "the occupant" on the roll of 1850, and that the defendant had no right to seize the property of the plaintiff, whose name did not appear on the roll, and that he had no right under the roll of 1850 to proceed against the plaintiff as a subsequent occupant. *Agnew* objected to the judge's charge generally.

Verdict for the plaintiff for $36 55c.

Agnew, in April term, 1862, obtained a rule *nisi* calling upon the plaintiff to show cause why the judgment should not be arrested, on the ground—1st. That the action cannot be maintained within the meaning of the 2nd Vic., chap. 126; 2nd. That there is a misjoinder of counts; 3rd. That it should be alleged that the act complained of was done maliciously and without probable cause; that it discloses no cause of action, or shows such a trespass as would give a cause of action; 4th. That, as to the second count, that such a cause of action is not maintainable against the defendant as a public officer, and that the verdict being general he thought judgment should be arrested. Or why the verdict should not be set aside, and a new trial be had on the ground that, under the circumstances, nominal damages could only be recovered on first count, on the ground of misdirection; that the verdict was contrary to law and evidence, and on the ground of surprise.

In July term, 1862, *Sir Henry Smith* showed cause, and cited *Fraser* v. *Page*, 18 U. C. Q. B. 327; *Robertson* v. *Rapalje*, 4 U. C. Q. B. 291.

Agnew supported the rule.

MACKENZIE, Co. C. Judge.—All the grounds urged in arrest of judgment are inapplicable to that form of proceeding. When a verdict is entered generally on some counts that are good and some that are bad a *venire de novo* should be applied for. All the other grounds pressed in arrest of judgment are founded on an assumption that the defendant has been sued as a public officer. There is nothing in the declaration to show that he has been sued as a public officer. The court cannot arrest judgment but for a matter intrinsic appearing upon the face of the record; besides, the two counts are good in law, and nothing appears on the face of the record to show that they have been improperly joined.

I adhere to my ruling at the trial, as to the plaintiff's cause of action being sustained by evidence. I think that the paper signed by the defendant, and put in evidence at the trial, amply proves that the defendant seized the goods of the plaintiff, and that the plaintiff paid $36 55, under protest, to prevent his goods being sold. That is sufficient to sustain the declaration.

That part of the rule nisi which asks for a new trial on the ground of misdirection, and that the verdict is contrary to law and evidence, opens up the main question involved in the case, namely,—whether the defendant was justified in proceeding to collect taxes rated against Caroline Smith, in 1850, by distress and sale of the goods of the plaintiff, as a subsequent owner and occupant of the premises against which the taxes were assessed, the plaintiff's name not being inserted on the assessment or collector's roll of that year in respect of the same premises. I deferred giving judgment in this case, until the Court of Queen's Bench should pronounce its judgment in the case of *Holcomb* v. *Shaw*. That court has pronounced its judgment in that case, and the learned counsel for the defendant, Mr. Agnew, has furnished me with a copy of it. I have perused the learned and elaborate judgments delivered by the judges, with great interest and attention. That case decides the present case. The facts upon which the judgment in that case was pronounced, are similar to the facts of the present case. The defendant in that case is the defendant in this case. He was sued in that case for doing what he did in this case. Replevin was brought against him for seizing the property of the plaintiff. The defendant, as collector of taxes for the city of Kingston, avowed the taking of the goods of the plaintiff, to levy by distress and sale of the same, certain taxes rated

against Donald McIntosh, as occupant, and John Counter, as owner of the Kingston Marine Railway property in 1855, and certain other taxes rated against Hooker and Pridham, as occupants, and Alexander Campbell, as owner of the same property in 1859, which taxes remained due and unpaid at the time of the seizure in December, 1861; that the plaintiffs were the occupants at the time of the seizure, and had the goods seized in their possession on the same property. The avowry contained averments that the rolls of 1855 and 1859 were returned, and that the defendant was appointed collector, by resolution, instead of the collectors of 1855 and 1859. The plaintiff demurred to this avowry, on the ground that circumstances mentioned do not constitute a justification in law for taking the plaintiff's goods, in 1861, by way of distress for taxes rated against other parties in 1855, and in 1859. The court gave judgment for the plaintiffs on the demurrer.

McLean, C. J., said:—The defendant does not allege that the plaintiffs were the persons who ought to pay the rates in arrear, but assumes that because they were occupying the premises in the latter part of 1861, and had goods in their store house, they were the persons who ought to pay the taxes assessed and demanded in 1855, by some former collecter, as taxes due by McIntosh and Counter. Surely it did not require any great extent of judgment to point out that the rates ought to be paid by the parties who occupied or owned the premises during these years, and that they were the persons legally liable for them. Against them, the collector of 1855, after demanding payment, might at any time, after 14 days, have proceeded by distress, and he might have seized any goods which he could find, belonging either to the occupant or the owner, within the united counties of Frontenac, and Lennox and Addington. But, instead of the remedy against these parties being pursued within a reasonable period, the collection, in one instance, is deferred for six years, and in the other for two years, until the premises are owned and occupied by other parties, and they are attempted to be held liable for the taxes of previous occupants and owners, because they hold the premises. It is, I think, quite plain, that the defendant in the first place had no right to distrain without a demand by himself personally, as collector; and that if he had any right to distrain against any one under his appointment, the plaintiffs were not the persons who ought to pay the rates in arrear." In reference to the 104th section of assessment act, the learned Chief Justice observed: "That section was intended to give to the council power by resolution to authorize the same collector, or any other person in his stead, to continue collections which were being made, but which had not been completed at the time appointed for the return of the collector's roll. But to suppose that it confers upon a council the same power after the lapse of any number of years, seems to me to be most absurd. If that were so, then the 102nd section authorizing taxes which cannot otherwise be recovered, to be recovered with interest and costs as a debt due to the local municipality, and the 107th section, which makes taxes a lien on land, would be superfluous." Mr. Justice Burns makes the following observations on the 24th section of the Assessment Act: "The first matter for consideration is, what is the true meaning of the expression, that the taxes may be recovered from any future owner or occupant; and the expression in the 96th section, the collector shall levy the same with costs by distress of the goods and chattels of the person who ought to pay the same. Are they to be considered with reference to the time during which it may be said the collector's roll is in force for each year's taxes, or are they to be understood, as the defendant contends for in this case, as extending over any length of time? I entertain no doubt what the proper meaning is. By the 49th section the assessors are directed to complete their rolls in every year, between the 1st February and such day, not later than the 1st May, as the council of the municipality appoints. The assessor, of course, sets down in his roll the facts in regard to owners and occupiers, as he finds them at the time he makes the assessment. Between that time and the time the collector should return his roll under 103rd and 104th sections, the property assessed may have changed both ownership and occupancy by sale, devise, or in various other ways, and in such case the new owner or occupant may be the proper person or party to pay that year's taxes." Mr. Justice HAGARTY stated: "I am of opinion that after the formal return of the roll by the Collector, it is not in the power of the council to appoint any person to collect the unpaid taxes by distress and sale. Another course is pointed out by the statute to enforce payment—by the sale of lands."

The above remarks are nearly as applicable to the present case as they are to the case of *Holcomb* v. *Shaw*. The present defendant has assumed, erroneously, that he had a right in 1861 to distrain the goods of the plaintiff, for taxes rated against Caroline Smith in 1850, because the plaintiff owns and occupies in 1861 the premises which were assessed against Caroline Smith 12 years ago. And the City Council of Kingston assumed a right to pass a resolution in 1861, under the 104th section of the Act, to authorise the defendant to continue the levy and collection of the taxes rated against Caroline Smith in 1850, when in truth and in fact the roll of that year had been returned 10 or 11 years ago, without any levy whatever, so far as the taxes of Caroline Smith are concerned, being made or commenced. The interpretation of the law given by the Court of Queen's Bench, in *Holcomb* v. *Shaw*, must rule this case. That interpretation sustains the ruling at the trial in this case.

I hold, then, that the present plaintiff was not at the time of the seizure of his goods by the defendant, in November, 1861, "a future owner or occupant," within the meaning of 24th section of the Act; that he was not at that time "the person who ought to pay the taxes," within the meaning of the 96th section; and that the Council of the Municipality of Kingston had no authority in law to pass a resolution, under the 104th section, in 1861, to authorise the defendant to levy taxes rated against Caroline Smith, in 1850, by distress of the goods of the plaintiff; and that the defendant's seizure of his goods in November was illegal. By the 103rd section it is enacted that, "on or before the 14th December in every year, or on such day in the next year, not later than the 1st March, as the Council of the County or City may appoint, every collector shall return his Roll to the Treasurer of the Township or to the City Chamberlain, and shall pay over the amount payable to such Treasurer or Chamberlain;" and by the 104th section it is enacted that the said resolution (that is a resolution authorizing the collector, or any other person in his stead to continue the levy and collection of unpaid taxes) shall not alter or affect the duty of the collector to return his roll." In reading the two sections together as they should be, it will appear that the roll must be returned at furthest by the 1st March in the year after the assessment is made, and that after the return the municipal council has no authority to appoint any one to collect any of the unpaid taxes by means of a distress and sale of goods. Another course is pointed out by the statute to enforce payment after that period by sale of lands under the 107th and the following sections, or by an action of debt in the name of the municipality under the 102nd section. The present plaintiff could not lawfully be treated in November 1862 "a future owner and occupant" in respect of the assessment of 1850 under the 24th section, because his name does not appear on the Assessment Roll of that year, and there is no evidence to shew that he became owner or occupant of the assessed premises before the roll of that year was returned. Neither could he be treated as the person "who ought to pay the taxes" of 1850 under the 96th section, as he is not the person who was taxed on the roll of that year, and did not become "the owner or occupant" of the premises during the currency of the roll of 1850. The taxes could not be lawfully demanded from him as the person taxed under the 74th section by the collector, and they have not been demanded from Caroline Smith so far as we know; consequently the collector could not in law proceed to distrain any goods and chattels under the 96th section. The plaintiff is a stranger to the roll of 1850 as regards the premises assessed against Caroline Smith, and was a stranger to the premises themselves until after the time appointed by law for the return of the roll, and in the absence of proof to the contrary it must be presumed that the roll was returned at the proper time.

According to the broad and sound principles of law laid down by the Court of Queen's Bench in the case of *Holcomb* v. *Shaw*, the present rule must be discharged. It becomes, therefore, unnecessary to consider the other points discussed upon the argument.

Rule discharged.

QUARTER SESSIONS CASES.

[*In the Quarter Sessions of Frontenac, Lennox and Addington.*]

IN THE MATTER OF THE APPEAL BETWEEN CATHARINE HENNESY, APPELLANT, AND THOMAS OSSIER, RESPONDENT.

Conviction—Form of name—Informant.

Held, that the name of the informant or complainant must in some form or other appear on the face of a conviction.

The appellant was convicted on the 4th August 1862 by M. P. Guess, Esq., under the 254th and following sections of the Upper Canada Municipal Institutions Act, for selling spirituous or malt liquors on Sunday. The appellant appealed to the last Quarter Sessions for Frontenac, Lennox and Addington. The conviction returned to the Sessions did not show who the the complainant or informer was. The adjudicating part of it was in the following words: "Catharine Hennesy is convicted before me, for that she being the keeper of a place where, by the laws of Upper Canada, liquors are or may be sold by retail, did by herself, her servants or agents within 21 days next before the said 4th August, 1862, between the hours of seven of the clock on Saturday night and eight of the clock on Monday morning thereafter, sell spirituous or malt liquors, or permit spirituous or malt liquors to be there drunk, contrary to the statute.

At the hearing of the appeal, *O'Reilly* for the appellant, took several exceptions to the conviction.

1st. That the name of the complainant or informer was not stated in the conviction:

2nd. That the offence was laid in too broad and uncertain terms;

3rd. That no day was stated when offence was committed.

B. M. Britton for the conviction.

MACKENZIE, Chairman Q. S—In Dickinson's Quarter Sessions, 876, it is laid down as law that "the informer's name should appear in all cases, that the party may know his accuser."

In the case of *King* v. *Smith*, 5 M. & S., 188, this was held absolutely necessary in all cases where any part of the penalty was given to the informer by statute, he being then, as an interested informer, incompetent as a witness.

It is stated in Paley on convictions, 59: "The name of the informer should be stated in all cases. It is indispensable in those cases where any part of the penalty is given by statute to the informer, in order that the conviction may appear to be founded upon other evidence than that of the informer himself, who is, in such cases, incompetent to give evidence. And in cases where the penalty is given by the statute to the owner of the property injured, by way of compensation, it has been held, ought to appear by some means on the face of the conviction."—

The 257th section of the statute under which the appellant has been convicted, directs that one half of the penalty imposed by the justice, shall be paid to the informant or complainant, and the other half to the Treasurer of the Municipality, where the place referred to is situated. In the general act respecting summary convictions and orders, a complainant or informant is contemplated as the prosecutor in summary proceedings. And the Upper Canada Act respecting appeals in cases of summary convictions, cap. 114 of the Con. Stat. U. C., gives the right of appeal to complainants as well as defendants; and the Quarter Sessions in determining the matter of appeal, may order either party to pay costs. And the form of the oath given in the statute to be administered to the jury who are to try the matter of appeal, shows that there must be two parties to a conviction made under the summary jurisdiction by a Justice of the Peace. The form of the oath given, is as follows: "You do solemnly swear that you will well and truly try the matter of complaint of C. D. against E. F., and a true verdict give according to the evidence." And by the 4th section of the act lastly referred to, it is enacted that "any appellant may abandon his appeal by giving the opposite party notice in writing, six days before the sessions appealed to."

In the face of these authorities and enactments, it is difficult to hold the present conviction valid. The name of an informant or complainant is not mentioned from the beginning to the end of the conviction. And from all that appears on the face of the conviction, there may not have been a complainant or informant at all. I think that the name of the informant or complainant should appear in some form or other on the face of the conviction.

I think the present conviction is bad in law, by reason of the name of the informant not appearing on the face of it.

It must therefore be quashed.

Conviction quashed with costs.

LOWER CANADA REPORTS.

MCDOUGALL V. ALLAN ET AL.

Merchant Shipping Act—Liability of owners for Loss of Passengers, Jewellery, &c.

Held:—In an action against the owners of a sea-going ship for the loss of jewellery forming part of the luggage of a passenger, a plea, (based upon the 503rd clause of the Merchant Shipping Act) alleging that the articles lost were "Gold, Silver, Diamonds, &c., &c.": that the loss happened without the privity or fault of the owner, and by reason of robbery, embezzlement, &c., and that the passenger not having inserted in a Bill of Lading or otherwise disclose in writing the true nature and value of such articles, &c., the owners were not liable for the loss, will not be dismissed upon demurrer.

(30th December, 1862.)

PER CURIAM.—The action is brought by a passenger in one of defendants' vessels from Glasgow to Montreal, loss and non-delivery on arrival, of part of her luggage, consisting of jewellery, watches, &c., to the value of £120. The declaration is in the common form of actions against common carriers in such cases. The defendants by their plea admit their quality of common carriers, that the plaintiff was such passenger with her luggage, but they allege their ignorance of the happening of the loss of the articles referred to, which consisted of gold, silver, diamonds, watches, jewels or precious stones, that the loss was without their actual privity or fault, and by reason of robbery, embezzlement, making away with or secreting the articles lost, and that when plaintiff put her luggage on board the vessel she omitted to insert in a bill of lading, or otherwise to declare in writing to the owners or master of the vessel, the true nature and value of those articles. The essential grounds of the plea rest upon the provisions of the Merchant Shipping Act of 1854, and to this plea the plaintiff has demurred, urging their common law liabilities as carriers, and denying the applicability, in defendant's favour, of the limitation of responsibility under that Act as regards her, a passenger with her luggage, amongst which were the lost articles which she had a right to have with her, and were covered by her fare, and which the defendants were bound to deliver to her at Montreal. The hearing is upon the demurrer.

The clauses of the Merchant Shipping Act of 1854, having reference to this case, and to the limitation of ship-owner's responsibility are as follows: "503. No owner of any sea going ship or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity, of or to any of the following things, that is to say,

1. Of or to any goods, merchandise, or other things taken in or put on board any such ship, by reason of any fire happening on board such ship.

2. Of or to any gold, silver, diamonds, watches, jewels or precious stones, taken in or put on board any ship, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his bill of lading, or otherwise disclosed in writing to the master or owner of such ship, the true value of such articles "to any extent whatever."

Before proceeding further it may be proper to observe that the Act relieves the ship-owner alone, not the master: that the relief extends in the most general terms, namely, to any extent whatever: that it applies to every loss or damage that may happen, without the owner's actual privity or fault, to either *goods*, *merchandise*, or *other things* generally, or to the special effects *gold*, *silver*, &c.: that it applies generally to all of them in both categories, when the loss or damage occurs by fire on board of the carrying vessel, and that it applies to the *gold*, *silver*, &c., particularly, when the loss happens by robbery, &c., unless the owner or shipper of the goods put on board, shall have made the owner or master aware of their nature and value, by an act in writing at the time of the shipment. The first sub-section affords general relief against loss or damage by fire to goods and things generally, and must necessarily include a passenger's luggage, changing in this particular the common law responsibility, which made the carrier liable for the loss of goods by fire, though the fire was not

occasioned by any actual negligence of the carrier, and did not arise upon his premises, the carrier being considered as an insurer, and liable for all losses and in all events, except by the act of God, and the Queen's enemies. Chitty, Carriers, p. 39.

The second sub-section affords relief against loss by robbery, &c., to things within the descriptive enumeration, unless the limitation be neutralized and destroyed by the owner or shipper making the written declaration in the bill of lading or otherwise, at the time of the shipping of the articles. In this case there was no declaration, and therefore the Statute would of course have its operation of relief for loss occasioned by robbery, &c. The general enumeration of gold, silver, jewels, &c., covers special articles of the general description. This statutory designation or enumeration would appear to have been made as a particular protection, because the effects enumerated being of great value in small bulk, the facility to rob and make away with them is far greater than of goods of less value but greater bulk. This protection against loss by robbery, &c., was not accorded to the carrier by the common law. On the contrary, he was liable for all such losses upon grounds of public policy, because such a mode of loss might by consent and combination be carried on in such a manner that no proof could be had of it. Chitty, Carriers, p. 41.

Moreover the want of actual privity or fault by the ship-owners in the loss, is of itself made a general limitation of responsibility under the Statute. No ship-owner shall be liable to make good any loss or damage that may happen without his actual privity or consent, to any extent whatever, instead of their previous liability to the extent of the value of the ship and freight.

The plaintiff rested her demurrer upon the common law altogether, irrespective of the Shipping Act, namely, upon the carrier's responsibility to safely carry such luggage of passengers as was usual for them to travel with, whether that luggage was of necessity or for convenience, or of mere personal adornment, and what is deemed to be included in the passage fare; she objects against the application of the Shipping Act to her case, that by its terms and intendment it was confined to merchandize, and to owners and shippers of merchandize on freight, and she supported her pretension by reference to reported cases, and by analogy, to the British Carriers' Act, 1 Vic., cap. 86, whose terms and provisions were to some extent similar to those of the Shipping Act.

It may be observed *in limine* that the analogy attempted to be derived from the Carriers' Act does not hold. It is not in force in this province, whilst the Shipping Act is; several of the provisions of both Acts are exorbitant of, and opposed to, the common law responsibility of the carrier. The Carriers' Act applies to carriers by land, the other to carriers by sea. Their intents are not in common. The object of the former was two-fold, 1st, to apprize the receiver of the goods of the nature of the article delivered to him in order that he might give it a proportionate degree of attention and care. This in principle applies also to the Shipping Act. And 2nd, to give the carrier an increased compensation, fixed by the carrier in his tariff of rates, for the additional risk and danger incurred by him. This is not the Shipping Act. Both acts contain some common provisions, chiefly the requirement of the notice of the nature and value of the effects shipped or delivered to be carried, and the *onus* imposed upon the deliverer and shipper to give that notice. They differ in several essentials. 1st. The great extent of the enumerated particular articles in the Carriers' Act; the few articles specified in the Shipping Act. 2nd. The former addresses itself to effects contained in any parcel or package to be carried for hire, or to accompany the person of the passenger in any public conveyance; the latter only refers to particular effects taken or put on board of the sea-going vessel by their owner or shipper. 3rd. The former requires the carrier to affix in his receiving office a notice of the increased rate of charge to be paid to him, and also requires him to give a receipt in writing for the goods delivered to him; the latter act requires none of these. 4th. The former gives no protection against the loss of effects by the felonious acts of the carriers' servants; the latter does protect the owner, not the master, against such loss so happening without his actual privity or fault. 5th. The mere oral declaration of notice by the deliverer to the carrier of the nature and value of the effects will satisfy the former Act in this particular, but the latter Act requires the insertion to be in the bill of lading, or in some other written declaration, given to the ship-owner or master, by the owner or shipper. 6th. The Carriers' Act limits the responsibility for loss to £10; the Shipping Act relieves *to any extent whatever*. The difference between the Acts is so very marked that an argument upon their analogy cannot apply, nor could it be made to rest upon reported cases resting mainly on the Carriers' Act. The plaintiff's pretension that the Shipping Act is a merchandize or freight Act is founded upon this, that it is merely a consolidation of the 26 Geo. III., ch. 86, and of the subsequent enactments *in pari materia*, which it is said were of that description, and did not excuse or relieve the ship-owner from his common law responsibility for the loss of passengers' luggage. This necessarily involves the chief point of the demurrer. Chitty says, p. 282, that so soon as a person has become a passenger, the carrier is bound to receive with him in the absence of any contract or custom to the contrary, a reasonable quantity of personal luggage or baggage, and that with respect to such luggage the duties or responsibilities of a common carrier attach to him, and that the luggage is to be carried without extra charge, the carrying of it being accessory to the principal contract to carry the passengers. This liability for loss is restricted to the *personal* luggage of a passenger; under this term Parke, B, "comprises clothing and every thing required for the passenger's personal convenience, and *perhaps even a* small present had he such with him, or *a book* on the journey *might be also* included in that term." Pollock, Ch. B., says, the charter of the G. W. R. Co. specifies *articles of clothing*, which ought to include all things necessary to the toilet, and Chitty, p. 286, remarks, "it would appear reasonable that *all articles which it is usual for a person to travel*, whether they be articles of necessity, convenience, or amusement, should be included in the term luggage, and *perhaps* a reasonable sum of money for the purposes of travelling."

Formerly the received doctrine was that carriers by land or water were not liable for the baggage of passengers, unless a distinct price was paid. It was placed on the ground that the carrier is liable only in respect to his reward, and that the compensation should be in proportion to his risk. But now by common usuage sanctioned by the Courts, a reasonable amount of luggage is deemed to be included in the fare of a passenger. The Courts will however not allow this custom to be abused, and under pretence of baggage permit articles to be included not within the scope of the terms or intents of the law. They will not permit the carrier to be defrauded of his just compensation, nor subjected to unknown hazard. Hence when a trunk containing valuable merchandize was taken on board of a steamboat and deposited with baggage, and lost, it was held that the carrier was not liable." "The ordinary baggage trunk of the traveller, containing the *usual general conveniences belonging to him as a traveller*, fall within the customary form, and to be stowed away in the place where such articles are mostly deposited. Otherwise the carrier is doubly wronged; 1st, he is deprived of his just reward for carrying goods, and 2nd, he is prevented from exercising proper precaution against the dangers to which the property may be exposed. Thus the carrier is exempt when the baggage consists of an ordinary travelling trunk in which there is a large sum of money, such money is not considered as included under the term baggage. But money taken *bonâ fide* for travelling expenses and personal use, may properly be regarded as forming part of a traveller's baggage, but to such reasonable amount only as a prudent man might deem necessary and proper for such purposes." Upon the whole it may be gathered that the luggage of the passenger must be reasonable luggage, that is, "usual conveniences belonging to a traveller," "which it is usual for him to travel with," and "which are contained in the ordinary traveller's trunk." Tested by these limitations what is the statement of the loss specified in the plaintiff's declaration? "Certain articles of personal adornment and jewellery to her belonging, to wit: one gold necklace, one coral necklace, one silver thistle pin, one pair of cut coral bracelets, one thick gold chain, one soft gold chain, one jet shawl pin and chain, one jet necklace, one brilliant and emerald shawl-pin in form of a wreath, one coral pin, one pure yellow stone, one large brilliant cross, gold back, the centre stone being out, one large enamelled mourning ring with engraving of the date of the death of Wm. Whiteman,

one gold ring blue stones opened with hand, one ring set in pearls, two plain gold rings, one locket with portrait in military costume, on the back a tombstone inlaid in pearls, one large oval brooch, three shades of light hair set in pearls, five small gold lockets, one large gold band bracelet with stones turquoise." This is the list of articles which the declaration owns "to have *belonged to the plaintiff, and part of which were family jewels, and therefore highly prized by her as such, apart from its intrinsic value; the whole of the value of* £120," "and which amongst other goods and effects were contained in a certain large trunk, the said trunk part of her baggage." This description and enumeration by no means appear to be of "the usual general conveniences of a traveller," or "what is usual for him to travel with and are usually contained in the ordinary traveller's trunk," or "articles of clothing which include all things necessary to the toilet," or "clothing and every thing required for the passenger's personal convenience." They are very much more than these, and do not seem to fall within that description of luggage protected by the common law responsibility of the carrier as passenger's luggage. But if they were actually luggage to be carried with her, the question remains, does the Shipping Act relieve the ship-owner in such case as this?

It is conformable to the principle of the common law that responsibility of a carrier may under it be abridged by the special terms of the acceptance of the goods. Exemptions which leave the common law rule in force as to all besides, and it being the business of the carrier to bring his case distinctly within them, they are to be strictly interpreted. If the goods are lost or damaged whilst in the control of the master, the *onus probandi* is upon him to prove that the loss was occasioned by some cause for which the law will excuse him; *prima facie* the obligation of safety is upon him. The common law is thus well put by Molloy, B., "The master is answerable if any of the goods are lost or purloined, or sustain any damage, hurt or loss, whether in the haven or just before or upon the seas when she is on her voyage." See Plander's notes. "If there be any exception to this responsibility at sea, it proceeds from the special provisions in the charter party or bill of lading, and not from any suspension of the rule; such exemption is strong evidence of the acknowledged law which rendered them necessary. In short it must be regarded as a settled point in English law that the masters and owners of vessels are liable in port and at sea, and abroad, to the whole extent of inland carriers, except so far as they are exempt by the exemption in the contract, charter party, or bill of lading, *or by statute.*" Both the modern and ancient writers admit the possible abridgment of the common law responsibility of carriers by sea and land, either in contracts implied or understood between the parties, or by the operation of Statute laws. The common carrier has two distinct liabilities, the one for losses by accidents or mistakes where he is liable as an insurer, the other by default or negligence where he is answerable as an ordinary bailee: he may restrict his liabilities as insurer, and protect himself against misfortune, but by the public policy of the common law he cannot do so for negligence. The carrier's restriction by express or special contract rests upon the common law, and is productive of no evil consequences. So if the Statute makes the restriction, that is the contract between them; there is no implication or inference in this act which is specific and certain as a contract, there can be no controversy between the parties. It is manifest that the Shipping Act has intervened betwixt the ship-owner and the common law, and has to a certain extent made a restrictive contract in his favour. What is the construction to be put upon its provisions? There are but very few reported cases upon this Act, but the language is so precise and at the same time so general, that difficulty of construction need not arise. No owner of a sea-going ship shall be liable to any extent whatever, for loss or damage that may happen without his actual privity or fault, or to any of the following things, gold, silver, diamonds, watches, jewels, or precious stones, taken on board. The object of the Act, observes Lord Ch. B. Abinger, in *Gillis* v. *Potter*, 10 M. & W., 72, was to impose upon the shipper the *onus* of giving notice to the ship-owner of the nature of the goods intrusted to him to carry, and Alderson, B., "there can be no doubt that under this Statute parties are required to state in their bill of lading, &c., the true nature and value of the goods which they carry, provided these consist of gold, silver, watches, jewels, &c.," and further Martin, B., remarked, "otherwise we should put a most refined and artificial construction on very plain words." "What the Legislature pointed out there was, that the ship-owner was to have full notice of what was the value that the other party put upon this property. By the Carriers' Act the carrier is to be made acquainted with the estimated value of the article, in order that he may, by charging the increased rate, protect himself. At all events the Statute requires the party to state the nature and value &c., it is impossible but that we ought to give every statute, as far as we can, a construction consistent with the obvious sense of its language. The Legislature has pointed out two things to be stated, &c." It has been already observed that the Carriers' Act restricted the responsibility without notice to £10 of value; the Shipping Act gives the full relief from *any extent whatever.* The preamble the limiting responsibility section employs the general words, "the following things." By the first clause of the section, the owner's limitation of responsibility is given for goods, merchandize, or other things lost by fire on board. This is as general as possible, and passenger's luggage is not excepted. By the 2nd clause of the section, the same limitation of responsibility is extended to him for particular effects, set out in terms as general, gold, watches, jewels, &c. Effects of these descriptions are *goods, merchandize,* and *things,* as well as articles of personal use, and yet there is no exception in favour of passengers losing them. The limitation is strengthened by the requirement upon the *owner* or *shipper* to insert the nature and value not alone in the bill of lading, a purely mercantile document, but in some written declaration made by the owner or shipper. The effect of the statement in the bill of lading or in the written declaration is to deprive the ship-owner of the excuse or relief from responsibility, to keep the effects safely at all events; the failure or omission of the passenger to make the statement on the other hand, presumes him to have taken the risk upon himself so far as the ship-owner is concerned. As remarked above, by the common law, *prima facie,* the obligation of safety is upon the carrier, but, where the Statute gives him the exemption, the common law to that extent is controlled and done away. Upon full consideration of this matter, the demurrer cannot be sustained and must be rejected; the case rests upon facts the proof of which may or may not support the declaration. The plea cannot be rejected as bad in law.

Demurrer dismissed.

Torrance & Morris, for plaintiff.

Ross & Ritchie, for defendants.

VICE ADMIRALTY COURT.

(Before the Hon. H. Black, C. B., J., Vice Admiralty Court.)

The "James McKenzie."

Rule of Navigation with regard to steam vessels approaching each other on different courses.

A steamer going up the St. Lawrence at night, on a voyage from Quebec to Montreal, saw the light of another steamer coming down the river, distant about two miles; and when at the distance of rather more than half a mile took a diagonal course across the river in order to gain the south channel, starboarding her helm, and then putting it hard to starboard. The steamer coming down having ported her helm on seeing the other, a collision ensued.

Held, That the vessels were meeting each other within the meaning of the act regulating the navigating of the Waters of Canada, (22 Vict. c. 19), and the steamer going up the river was solely to blame for the collision in not having ported her helm.

(11th August, 1862.)

This was a cause of damage brought by Pierre Plante, the owner of the steamer *Fashion* against the steamer *James McKenzie,* to obtain compensation for a loss arising from a collision between these two vessels in the river St. Lawrence, about three quarters of a mile above Lavaltrie island.

The following was the judgment of the court.

On the 27th June, 1861, the steamer *Fashion,,* of 200 tons burthen, and about forty-five horse power, owned by and in charge of Pierre Plante, the promoter, as master, left Montreal at about nine o'clock in the evening, without cargo, and drawing about five or six feet water; having on board Joseph Paquin, a branch pilot for and above the harbour of Quebec, as pilot, and having the lights by law in the position which the act requires. In the pros-

ecution of her voyage to Quebec she passed down the north channel, between the Verchères islands and the north shore as far as the eastern end of those islands. She then took the main channel and the proper course for that purpose. At this point the north channel and the south channel, or that on the south side of the Verchères islands, merge into one, and they together form one channel of about three quarters of a mile in width for vessels such as those concerned in the present case. At the same time, the *James McKenzie*, a steamer of about 400 tons, and about one hundred and twenty horse power, and having in tow a barge, partly loaded, so as to draw between nine and ten feet water, was proceeding on her voyage from Quebec to Montreal; having a pilot on board, and proper lights in the position required by law, on board the steamer and her tow. It was then between eleven o'clock and midnight, the night was cloudy, but the lights of vessels could be easily distinguished, according to the statements in the pleadings and evidence, at the distance of from one to two miles. The *James McKenzie* intending to take the south channel shaped her course accordingly for it, the *Fashion* keeping towards the south. In this position the vessels saw each other. The people of the *James McKenzie* say they saw the *Fashion* at the distance of about two miles, and that when the distance between the vessels was rather more than half a mile, the *Fashion* appearing to them to be proceeding in a direct course down the river, the *James McKenzie* took a diagonal course across the river in order to gain the south channel, which is said to be safer and better, starboarding her helm for that purpose. The *Fashion*, on seeing the *James McKenzie*, ported her helm, in order to pass the *James McKenzie* on the port side, and to the right hand of the middle of the channel, as the law requires in such cases; and as she approached the *James McKenzie*, the *Fashion* put her helm hard-a-port in order more effectually to avoid her. The *James McKenzie* on the other hand kept her helm to starboard, and afterwards put it hard-a-starboard. Both vessels appear to have stopped their engines, but too late. The *James McKenzie* struck the *Fashion* on the port side about forty feet from the stem, doing her great damage, and sinking her in about four fathoms of water.

The two vessels were undoubtedly meeting each other within the meaning of the act regulating the navigation of Canadian Waters, (22 Vict. c. 19), and that act expressly says, "Whenever any vessel, whether a steam or sailing vessel, proceeding in one direction, meets another vessel, whether a steam or sailing vessel, proceeding in another direction, so that if both vessels were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both vessels shall be put to port so as to pass on the port side of each other; and this rule shall be obeyed by all steam vessels, and by all sailing vessels —whether on the port or starboard tack, and whether close-hauled or not—unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and as regards sailing vessels on the starboard tack close-hauled, to the keeping such vessel under command." (Sec. 8.) And that, "Every steam vessel, when navigating any narrow channel, shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such steam vessel." (Sec. 9.) And also that, "If any damage to person or property arises from the non-observance by any vessel of any of the foregoing rules such damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of such vessel at the time, unless the contrary be proved, or it be shewn to the satisfaction of the court, that the circumstances of the case made a departure from the rule necessary, and the owner of the vessel in all civil proceedings, and the master or person in charge, in all proceedings, civil or criminal, shall be subject to the legal consequences of such default." (Sec. 13.)

The *Fashion* obeyed the law by porting her helm, and taking the proper side of the channel; and if the *James McKenzie* had done the same, the collision would have been avoided. By her own statement the *James McKenzie* was crossing the course of the *Fashion*, which vessel was where she had a right to be; and though it is probable the *James McKenzie* believed she could pass safely by taking the course she adopted, yet as this course was not required by law, she adopted it at her peril, and is responsible for the damage which resulted from its adoption. There was no absolute necessity even for her taking the south channel at all, there being water enough in the north; or, she might have stopped until the *Fashion* had got into such a position that there could have been no possible risk of collision, by the *James McKenzie's* crossing her course in order to take the south channel: but she did not choose to do so, and preferred taking the risk which led to the collision. She did this without necessity, for there was nothing whatever in the circumstances to render a departure from the rule necessary in order to avoid immediate danger. I must therefore pronounce for the damage, and refer the amount to the registrar and merchants for their report. (The *Duke of Sussex*, 1 W. Rob. 274. The *Sylph*, 2 Spinks. Ecc. and Adm., Rep. 75.)

Jones and Hearn, for *Fashion*.
Lielievre, Counsel.
Holt and Irvine, for *James McKenzie*.

ENGLISH REPORTS.

BETTS V. MENZIES.

(*Reported by* JAMES PATERSON, Esq., *of the Middle Temple, Barrister-at-Law.*)

(From the *Law Times.*)

Patent—Novelty—Prior specification without particulars—First patent impracticable—Construction of specifications—Question of law.

The construction of two specifications, alleged to be on the same subject, is not a pure question of law. Even if there be identity of language in the specifications, yet, if there be terms of art in one and also terms of art in the other, it is impossible to predicate with certainty that they describe the same identical external object, unless it is ascertained that the terms of art used in the one have precisely the same signification and denote the same external objects at the date of the one specification as they do at the date of the other. Therefore evidence is required on these points.

An antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless it is ascertained that the former disclosed a practicable mode of producing the result which is the effect of the subsequent discovery. Thus a notion that tin and lead might, by means of pressure, be so combined as to form a new and useful material, without giving information how to attain that object, is no ground for invalidating a subsequent patent giving that information.

(June 5, 1862.)

This was appeal from a judgment of the Ex. Ch., affirming a judgment of the Q. B.

The action was brought by the app. Betts for the infringement of a patent granted to the plt. on the 13th Jan. 1849, for a new manufacture of capsules, and of a material to be employed therein, and for other purposes. The deft. pleaded that the plt. was not the true inventor; that it was not a new manufacture; that Her Majesty did not make such a grant; that there was no enrolled specification; and lastly, not guilty.

The cause came on to be tried before Erle, C. J., when it appeared that a specification of Thomas Dobbs was enrolled on the 12th Sept. 1804. The plt. had, on the 30th Nov. 1848, made his discovery, and immediately applied for a patent, but it was not granted till the 13th Jan. 1849; that in the interval between the application and the grant of the patent, the plt. had manufactured a number of capsules according to the said invention, but the same were not intended to be sold or delivered to the public, nor were they sold and delivered till after the patent was granted.

The specification of Thomas Dobbs, dated 1804, claimed the invention of "a new article of trade, which I denominate Albion metal, and which I apply to the making of cisterns, linings for cisterns, covering and gutters for buildings, boilers, vats, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance." The material part of the specification was as follows:—

"Now know ye, that in compliance with the said proviso, I, the said Thomas Dobbs, do hereby declare that my said invention consists in plating, coating, or uniting lead with tin, and also the various alloys or mixtures, as the case may require, which, when done, I denominate Albion metal, and which I apply to the manufacturing of cisterns, linings for cisterns, covering and gutters for buildings, boilers, vats and linings, coffin furniture, worms for distillers, and such other things as require to be made of a flexible, a wholesome, or a cheap metallic substance."

"The operation of coating or plating lead with tin, or coating or plating alloyed lead with tin, or with alloyed tin, to make Albion metal, I perform by various methods, as hereafter described; that is to say, I take a plate or ingot of lead, or alloyed lead, and a plate of tin, or alloyed tin, of equal or unequal thicknesses, and laying them together, their surfaces being clean, pass them between the rolls of a flatting or rolling mill with what is technically called a hard pinch, so as to make the metals cohere. If after the first passage of the plates or pieces of metal between the rolls, the plates or pieces do not sufficiently cohere, I pass them a second or third time, or more, between the rolls, until a sufficient degree of cohesion is produced.

"N.B.—It will be useful, if not necessary, to have the rolls and the metals hot when the cohesion of the metals is to be effected by their passage between the rolls, especially when the alloyed pieces or plates are used. When lead or alloyed lead is required to be coated or plated on both sides with tin or alloyed tin, I apply a plate of tin or alloyed tin on each side the plate or piece of lead, or alloyed lead, and pass them between the rolls of a mill under the circumstances aforementioned; or the same may be effected by taking a plate which is already coated or covered on one side with tin, or alloyed tin, which I double with the lead side inwards, and pass it through the rolls, as before described, to obtain the proper degree of cohesion. I also make Albion metal by the following method: I cast a plate or ingot of lead, or alloyed lead, and as soon as it is set or congealed, I cast tin or alloyed tin upon it, or under, or on all sides of it, which will cohere with the piece of metal first cast, and the Albion metal thus prepared may be wrought or flattened, by the usual means of rolling, hammering, or pressing."

The material parts of the plt.'s specification, dated in 1849, were as follows:—"The new manufacture of a material to be employed in the manufacture of capsules and for other purposes, consists in combining lead with tin, by covering the lead with tin over one or both surfaces of the lead, and reducing the two metals in their conjoined state into thin sheets, of a thickness suitable for the purposes to which they are to be applied. And, for the purpose of so preparing lead by covering the same with tin, as aforesaid, I first cast the molten lead in an ingot mould of cast-iron, or other suitable material, and constructed in the usual manner of ingot moulds for metal, and of suitable internal dimensions for producing ingots of lead which (for the manufacture of the material for capsules) may be between four and five inches wide by about three quarters of an inch thick, and about thirty inches in length, with a few inches at one end of each ingot gradually reduced in thickness in the manner of a wedge. I also cast tin either in similar ingots, of the same or nearly the same dimensions as the aforesaid ingots of lead, or the tin may be cast into long thin strips of nearly the same width as the aforesaid ingots of lead, and between one-quarter and one-sixteenth of an inch in thickness and several feet in length. And, having thus obtained the lead and the tin in suitable states for beginning the rolling, or laminating, each of the two metals separately, between a pair or pairs of revolving cylindrical flatting rollers, of the construction usually employed for rolling or laminating ductile metals, I pass and repass the lead, one or more times, through or between such rollers; that is to say, rolling and re-rolling the ingot of lead as many times as may be requisite for reducing the lead to about one-fourth of an inch in thickness, and thereby the ingot of lead will become greatly elongated. And in like manner I roll and re-roll the tin as many times as (according to its original thickness when cast as aforesaid) may be requisite for reducing it to about one-twentieth part of the the thickness to which the lead is reduced by rolling as aforesaid, whatever that thickness may be. The lead and the tin having been thus reduced to their proper relative thicknesses, and their widths being nearly alike, and even surfaces of each of the two metals having been obtained by the aforesaid rolling, then, in case it is intended to cover both sides of the lead with tin, I extend a long strip of the thin tin (so reduced to relative thickness as aforesaid) flatways upon a smooth table, and lay a shorter strip of the lead (so reduced to relative thickness as aforesaid) very evenly upon the extended tin, with one end of the said strip of lead conforming with one end of the said long of strip of tin, and then I fold back the tin over the other end of the lead (being that end thereof which still retains some of that wedge-like form of the original casting of the ingot of lead already mentioned) and, consequently, the tin when so folded will apply to both surfaces of the lead; I then cut off the long strip of folded tin to correspond with the length of the lead, and I smooth down the tin with any convenient wooden rubber, or otherwise, so as to take out all wrinkles in the tin, and bring it very evenly into superficial contact with the lead, and with the two bordered edges of the strip of tin, conforming everywhere with the two bordered edges of the lead, so as to insure that the tin shall cover the lead as completely as can be done; I then take up the lead and tin together from off the said table, and present the folded end of the tin to a pair of revolving flatting rollers, which are set so as to subject the two metals to a very considerable pressure, and that pressure, at the same time that it reduces the thickness and elongates the two metals, will also cause their surfaces to adhere together, and then I repass the conjoined metal again and again between the said rollers for further reduction and elongation, and at every succeeding time of so repassing the adhesion of the two metals will become more complete, and when the strip of conjoined metals is thus become elongated to a considerable length, I find it is convenient, for further repetitions of the rolling, to gather up the said strip (as fast as it comes out from between the said pair of flatting rollers) into a spiral coil, by means of a roller which is suitably disposed behind that pair of rollers, and is turned round by an endless strap motion, so as that the said roller will wind and coil up the strip around it into such a coil; and then that roller, with the said coil thereon, can be removed to the front of another pair of flatting rollers, which by their motion will draw off and unwind the strip from its said spiral coil as fast as the conjoined metal passes through between the said flatting rollers, which rollers should be made of hard cast iron, in the manner of what are called chilled rolls, and highly polished, in order to give a very smooth surface to the tin of the conjoined metals by the rolling or flattening action of the said pair of flatting rollers. And note, I provide a small cistern of water beneath the said roller which has the said coil around it, so that when the same is removed to the front of the pair of flatting rollers, as aforesaid, the lower part of such coil will be immersed in the said water, in order that the conjoined metal may become wetted on its surfaces before it enters between the said pair of flatting rollers; and such wetting tends to prevent the tin on the surface of the conjoined metal from adhering to the rollers, as it might otherwise do occasionally. And I repeat such rolling of the strip of conjoined metals between the same or another like pair of chilled and highly polished flatting rolls, two, three, or more times, as may be requisite for reducing the said strip of conjoined metals to the required thinness. . . . . And the mode of proceeding, when only one side of the lead is to be covered with tin, is the same in all respects as hereinbefore described, except as to applying the tin to only one side instead of both sides of the lead at the time when a thin strip of tin is applied to a thicker strip of lead, as hereinbefore described, but that strip of tin should be folded back a short distance over that end of the lead which has the wedge-like form, and the folded end of the tin should be presented between the pair of revolving flatting rollers when the lead and tin together are to be subjected for a first time to the pressure of those rollers, and make the two metals adhere together, as already explained, for the said folded end of the tin around the wedge-like end of the lead will insure that the two metals will enter properly together between the rollers. And my said new material being made in plates or sheets of adequate thickness and size, may be employed for other purposes for which thin sheet lead or tinned iron or sheet zinc or sheet tin have been commonly employed, such, for instance, as lining cisterns or wine coolers, which are to contain water, and for lining boxes, chests, or cases for packing or safe keeping of articles which require to be kept dry or protected from insects; or on a still larger scale for lining larger water cisterns, and other purposes, in substitution for the thicker sheet lead used by plumbers. In most such cases it will be sufficient to have one side only of the lead covered with tin. And the perfection of my said new material will depend in a great measure upon the soundness of the casting of the tin in the ingots to avoid specks of sand or dirt flaws or honeycomb hollows in the ingots; and the same, in some

degree, of the lead, for as the conjoined metals are to be very much extended in the operations of laminating, and the tin on the surface or surfaces will be reduced extremely thin by those operations, any minute defects in the soundness of the castings will become extended, so as to cause visible blemishes in the tin surfaces of the conjoined metals; hence the casting of the ingots should be conducted with every care and precaution commonly practised for obtaining soundness; and the same of the laminating operations, and, in particular, care should be taken to avoid dirt getting between the tin and the lead when they are pressed together, for the first time between the pair of flatting rollers, for obtaining the first adhesion of the two metals; also, any air which cannot make its escape from between them will remain imprisoned, so as to form blisters, which will render the adhesion imperfect at the places of such blisters. To avoid blisters, the tin should be carefully smoothed down upon the lead, as already mentioned, without leaving wrinkles containing air, of which portions may get imprisoned; and the surfaces of the said pair of rollers, between which the lead and the tin are passed together for the first time as aforesaid, should move with a slower motion than is suitable for the other pair or pairs of rollers between which the subsequent lamination of the conjoined metals is to be performed, after their adhesion has been produced by repeated operation of the first mentioned pair of rollers, the slower motion of which will better allow the air to make its escape from between the lead and the tin. The fragments of my new material left unworked into capsules, or otherwise beneficially employed, are carefully reserved for melting down along with lead for casting future ingots, which will thereby acquire a very small proportion of tin, but not enough to make any material difference from pure lead. I am aware that it has been proposed to cover lead with tin, by applying the tin, when in a state of fusion, to the lead, when adequately heated, so that the adhesion of the two metals would be produced by agency of heat with complete fusion of the tin; but the adhesion of the two metals in my new material is produced by agency of mechanical pressure. And I wish it to be understood that I do not claim the exclusive use of the several processes hereinbefore described or referred to of casting, cutting and rolling, except when the same are employed for the purposes of my said invention; and I hereby declare that I claim as the invention intended to be secured by the said letters patent, firstly, the manufactures of the new material, lead combined with tin, on one or both of its surfaces, by rolling or other mechanical pressure, as herein described; secondly, the manufacture of capsules of the new materials of lead and tin, combined by mechanical pressure, as herein described."

A great deal of evidence was given as to Dobbs' specification, and its alleged worthlessness.

It was contended, on behalf of the defts., that a verdict should be entered for defts. on the issues respectively, that the plt. was not the true and first inventor, and that the alleged invention was not a new manufacture, on the following grounds:—1. That the plt. had manufactured large quantities of capsules for sale before the date of the patent, and that the invention was not a new manufacture at the time of the grant. 2. That plt.'s invention as claimed, or some material part of it, was included in the specification of the said Thomas Dobbs' patent granted in 1804. 3. That if the proportions of the metals to be employed are material, the plt.'s specification was defective and ambiguous in not pointing out the proportions of tin and lead to be employed when the combined metal was to be used for other purposes than capsules, and in leaving it uncertain what proportions were to be used in such cases. 4. That the plt.'s specification is ambiguous and uncertain in not distinguishing between what was new and what was old, and efpecially in reference to the said invention of Thomas Dobbs of 1804.

The learned judge overruled the said objections, but gave the defts. leave to move to enter a verdict for them on these grounds.

The jury found a verdict for the plt. on all the issues joined.

In Easter Term, 1859, the defendant's counsel applied for and obtained a rule *nisi* to set aside the verdict and enter a verdict for the defts. on the four grounds above stated; and the same came on for argument on the 28th and 30th May; and after hearing the arguments on both sides the court ruled against the defts.' objection on the first point, but made the rule absolute to enter a verdict for the defts. on the issues raised by the first and second pleas, and gave judgment for the defts.

On appeal to the Ex. Ch. the court was divided, but the majority affirmed the judgment. Pollock, C. B., Martin, Channell, Bramwell, BB., and Keating, J., were the majority, and Williams and Willes, JJ. the minority.

The plt. now appealed to the House of Lords, and four of the judges attended the argument.

Macaulay, Q. C., *Grove, Q. C.* and *Udall*, for the plt. Betts, contended that the judge was right in leaving the case to the jury the evidence. The question whether the plt.'s patent was made void for want of novelty by the publication of Dobbs' specification, was a question partly of law and partly of fact, and therefore the court was not competent to decide the question without admitted facts. Before such questions could be decided the technical terms used by Dobbs must be explained, and what were the nature and properties of the metals in their different states as used by him, so as to see whether they correspond to the operations performed by the plt. It cannot be that the question whether Dobbs' specification invalidates the plt.'s patent is one of pure law, independent of evidence; otherwise a patent taken out on mere conjecture by one who never performed and never could perform the operation he indicates, would yet invalidate a patent afterwards taken out by one who actually succeeded in the operation. The specification of Dobbs could therefore never invalidate the plt.'s patent, unless it were proved or admitted that Dobbs' was a practicable patent; and whether it was practicable was a question for the jury. It was impossible to ascertain the meaning of Dobbs' patent without evidence: (*Bush* v. *Fox*, 5 H. of L. Cas. 707; *Muntz* v. *Foster*, 2 Web. P. C. 93; *Betts* v. *Menzies*, 8 E. & B. 923; *Thomas* v. *Foxwell*, 5 Jur. N. S. 87.)

Mellor, Q. C. and *Hindmarch, Q. C.*, for the resps., contended that the construction of Dobbs' specification was for the court, and the plain construction showed that the plt.'s patent was not new. Besides, the plt.'s patent was ambiguous and uncertain, in not pointing out the proportions of tin and lead to be employed in the operation: (*Holmes* v. *North-Western Railway Company*, 12 C. B. 831; 2 H. & N. 81; *Booth* v. *Kennard*, 2 E. & B. 956.)

At the conclusion of the arguments, the House put the following question to the learned judges—Can the court pronounce Betts' patent to be void, simply on the comparison of the two specifications without evidence to prove identity of invention, and also without evidence that Dobbs' specification disclosed a practicable mode of producing the result, or some part of the result, described in Betts' patent? There was another question which was not material. The learned judges answered the question in the negative.

The LORD CHANCELLOR.—My Lords, in this appeal the app., who was the plt. below, brought an action against the resps. for an infringement of his patent. The date of that patent was the 13th Jan. 1849. One of the issues raised in the action was the alleged want of novelty in the invention of the plt. The jury found a verdict for the plt. on all the issues. The defts. had leave reserved to them to enter a verdict for themselves on the issues founded on the first and second pleas. The second plea was, that the plt.'s invention, or a material part of it, was included in the specification of a patent granted to one Thomas Dobbs in the year 1804. The Court of Q.B. were of opinion that, on the second plea, the rule ought to be made absolute. The plt. appealed to the Court of Ex. Ch., where, by a majority of the judges, the judgment of the Q. B. was affirmed. From that judgment so affirmed, the present appeal is brought to your Lordship's house. My Lords, the question was very learnedly and ably argued before your Lordships, assisted by several of the learned judges, and your Lordships thought fit to put to them two questions. Upon a reconsideration of those questions, I think it will appear that probably the first becomes immaterial to be considered, supposing the second question was answered in the negative. All the judges have concurred, for reasons which I think must be extremely satisfactory to your Lordships, in answering the second question in the negative. There does not appear to have been quite the same unanimity of opinion with regard to the answer to be given to the first question; but, in reality, the second question being

answered in the negative, the first question can hardly be said to arise. My Lords, the second question was this: "Can the court pronounce Betts' patent to be void simply on the comparison of the two specifications without evidence to prove identity of invention, and also without evidence that Dobbs' specification disclosed a practicable mode of producing the result, or some part of the result, described in Betts' patent?" The answer of the learned judges involves, therefore, two conlusions which are extremely material to the patent law. One is this, that even if there be identity of language in two specifications, remembering that those specifications describe external objects, even if the language be *verbatim* the same, yet if there be terms of art found in the one specification, and also terms of art found in the other specification, it is impossible to predicate of the two with certainty that they describe the same identical external object, unless you ascertain that the terms of art used in the one have precisely the same signification and denote the same external objects at the date of the one specification as they do at the date of the other. And, my Lords, this is obvious; for if we take two specifications dated as the present are, one in the year 1804 and the other in the year 1849, even if the terms employed in the one were identical with the terms employed in the other, supposing that each of them contains a term of art—we will assume it to be a denomination of some engine, some instrument, some drug, or some chemical compound—it might well be that the thing denoted by that name in 1804 is altogether different from the thing denoted by that name in 1849. If it were necessary to enter into such a subject I could give numerous examples, say, from chemistry, of things that were denoted by one name in 1804, and which have retained the same denomination, but which by improved process of chemical manufactures are at present perfectly different in their results, their qualities and their effects from the things denoted by the same names forty or fifty years ago. It is perfectly clear therefore, that if you compare two specifications, even if the language be the same, you cannot arrive at a certainty that they denote the same external object and the same external process, unless you enter into an inquiry, and ascertain as a fact that the things signified by the nouns substantive contained in the one specification are precisely the same as the things signified by the same nouns substantive contained in the other. In all cases, therefore, where the two documents profess to describe an external thing, the identity of signification between the two documents containing the same description must belong to the province of evidence, and not to the province of construction. My Lords, I pass on to the next conclusion, which is involved in the answer of the learned judges to your Lordships' question, and that conclusion I think is also of great importance to the law of patents, because it results from that opinion that an antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless you have ascertained that the antecedent specification discloses a practicable mode of producing the result which is the effect of the subsequent discovery. My Lords, here we attain at length to a certain undoubted and useful rule. For the law laid down with regard to the interpretation of an antecedent specification is equally applicable to the construction to be put upon publications or treatises previously given to the world, and which are frequently brought forward for the purpose of showing that the invention has been anticipated. The effect of this opinion I take to be this, if your Lordships shall affirm it, that a barren general description probably containing some suggested information, or involving some speculative theory, cannot be considered as anticipating, and as therefore avoiding for want of novelty, a subsequent specification or invention which involves a practical truth, which is productive of beneficial results, unless you ascertain that the antecedent publication involves the same amount of practical and useful information. Now, my Lords, it will be evident, upon a comparison of these two specifications, that the one was a mere general suggestion, while the other is a specific, definite, practical invention. It is possible that a suggestion such as that contained in the one may lead to the discovery of the invention contained in the other. But it is the latter alone which really does add to the amount of useful knowledge; it is the latter alone which by its practical operation confers a benefit upon mankind within the meaning of the patent law. In the present case there was not only no evidence to show that that which was continued in Dobb's specification was capable of practical operation, but in reality that conclusion was negatived by the verdict of the jury. Therefore, my Lords, concurring as I entirely do in the conclusions which have been arrived at by the judges in answer to the second question, it results as a necessary consequence that the decision of the Court of Q. B., and of the Court of Ex. Ch. ought to be reversed, and that the rule *nisi*, made absolute by the Court of Q. B., ought to be discharged. My Lords, I move your Lordships, therefore, to embody these conclusions in your present order.

Lord Brougham.—My Lords, in the course of the argument I had and expressed considerable doubts on various parts of the case. Upon the whole, I consider those doubts as answered by the learned opinions of the learned judges, and I agree with my noble and learned friend's proposition.

Lord Cranworth.—My Lords, the only question in this case is, whether the plt.'s invention was new. The jury found that it was. He is therefore entitled to judgment in his favour, unless, as a matter of law, the jury could not, on the evidence before them, lawfully come to the conclusion at which they arrived; in other words, unless there was evidence before the jury which made it their duty, as a matter of law, to find that the invention was not new. The argument for the resps. was, that the absence of novelty was established conclusively by the production of Dobbs' specification; that in the face of that specification the jury could not find in favour of the plt. And this was the opinion of the Court of Q. B., and afterwards of Ex. Ch. But I agree with the able opinions of the minority of the judges in the Ex. Ch., and of the learned judges, whose assistance we had at the argument of this case, that the judgment below was wrong. It may be true that two specifications may be so entirely identical that the judge may be warranted in telling the jury as a matter of law that they cannot find the second invention to be new, though that was not decided in *Bush* v. *Fox*, for there the jury had found as a matter of fact that the mode of working the two inventions was the same. But here not only are the two specifications not identical, but in the earlier of them there is no trace of that which constitutes the very essence of the plt.'s invention, namely, the relative thickness of the tin and the lead, and the mode of rolling and laminating each metal separately before they are placed together and then made to cohere by being rolled and laminated jointly. Dobbs' specification disclosed no more than his notion that tin and lead by means of pressure be so combined as to form a new and useful material. But it gave no information as to how that object could be attained, and there was evidence to show that Dobbs had never been able, in working according to his specification, to succeed in making the metals unite. There was therefore an essential difference between the two specifications which fully warranted the jury in finding a verdict for the plt. as they did. The case has been so fully and ably discussed in the opinions of the learned judges and commented on by my noble and learned friend on the woolsack, that I shall content myself with simply saying that I concur in the motion, that judgment be given for the plt. below who is the app.

Lord Wensleydale.—My Lords, the result of the very full and able opinion delivered by my Lord Chief Baron on the questions propounded by your Lordships, and of the written opinions of the consulted judges, with which we have been supplied, is, that the unanimous judgment of the Court of Q. B. and the judgment of the majority of the Court of Ex. Ch. ought to be reversed. I concur entirely in the propriety of this course. It appears to me, without entering into all the questions which have been discussed at the bar, and on most of which the learned judges have delivered their opinions, that my noble and learned friend who has addressed the House has put the case on a ground which is quite satisfactory, and it appears to me it is perfectly unanswerable. The jury having found that the plt.'s invention was new unless the production of Dobbs' specification without any other evidence conclusively showed that it was not, the patent must be good. Now, I am clearly of opinion that the mere production of Dobbs' patent, in which he makes public his notion that lead and tin might be usefully combined in a new material by mechanical pressure, without any statement or proof how that object could be attained and a practical result secured, is insufficient to show that he had

made prior discovery, and was an inventor. If nothing was set out in the plea but the plt.'s and Dobbs' prior patent and specification, it would, I think, be unquestionably bad. It is not a disclosure of an invention. I agree entirely with Williams and Willes, JJ. in their opinion given in this case, in the Court of Ex. Ch., that the mere publication of a notion that a particular article might be made, without any information or means of knowledge communicated to the public, does not preclude a subsequent first inventor of those means from taking out a patent. Very early in the argument it appeared to me that, without some evidence to show that Dobbs' patent is capable of a practical application, and would produce some useful effect, it was inoperative to affect Betts' invention and to render his patent invalid. And it is much to be regretted that this view of the case was not fully discussed at an earlier period. Judgment reversed.

UNITED STATES REPORTS.

NEW YORK SUPREME COURT.

BLOSSOM ET AL. v. CHAMPION ET AL.

The title to property in things moveable can only pass from the owner by his own act and consent, except in cases only where such owner by his voluntary act confers upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner or agent.

It is not in the power of a common carrier or bailee to change the title to merchandise shipped on board a vessel, or intrusted for storage by the delivery of a bill of lading or storage receipt for such merchandise to some person not the *bona fide* owner thereof or possessed of the apparent right of ownership, or of disposal as agent.

The subsequent purchase of such bill of lading or storage receipt, transferred in good faith for a valuable consideration will confer no title to the merchandise therein mentioned to the purchaser.

The opinion of the court was delivered by

LEONARD, J.—Property in things moveable can only pass from the owner by his own act and consent, except in those cases only where such owner had by his own voluntary consent or act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of despoal as agent. (*Saltus* v. *Everitt*, 20 Wen., 267; *Brewer* v. *Peabody*, 3 Kern., 122.)

A bill of lading does not represent goods or merchandise when shipped on board a vessel, unless it has been delivered to the true owner of the merchandise. It is not in the power of a common carrier or bailee to change the title to merchandise shipped on board of a vessel, or entrusted for storage by the delivery of a bill of lading or storage receipt for such merchandise to some person not the *bona fide* owner thereof, or possessed of the apparent right of ownership, or of disposal as agent. Even the subsequent purchase of such a bill of lading or storage receipt, transferred in good faith for a valuable consideration, will confer no title to the merchandise therein mentioned upon the purchaser. It may create a liability against the vessel and owners, or in the case of a storage receipt, against the bailee to the extent of the damage sustained by the purchaser, but the title to the merchandise is not affected.

There may be cases also wherein the true owner would be estopped from alleging his title against the holder of a bill of lading, by reason of some act or misconduct on his own part.

In the present case the plaintiffs sold their merchandise to be paid for in cash on delivery. They caused it to be shipped on board the vessel of which the defendant, Champion, was master, and took receipt therefor, which they continued to hold at the time this action was commenced. The purchaser had no actual possession, and no *indicia* of ownership.

The lighterman who delivered the merchandise on the defendant's vessel sometimes spoke of it in the hearing of the mate who signed the receipts as the property of the purchaser, but it was not in the presence, nor did it come to the knowledge of the plaintiffs.

The plaintiffs were not wanting in carefulness to fortify themselves with all the usual evidence taken in such cases to establish and preserve their rights as owners.

The purchaser never paid for the merchandise so shipped, and had no *indicia* of any kind, to represent posession or ownership by him.

The casual remarks let fall by third parties, or by the purchaser or his agents in the presence of the mate, or of the owners of the vessel gave no authority to them to make delivery of the bill of lading to a party not having the usual evidence upon which bills of lading were customarily delivered.

The evidence was not disputed, although admitted under exception on the part of the defendant as to its validity, that a custom has long prevailed at the port of New York to deliver bills of lading for merchandise shipped for transportation, only to the party holding the receipt of the master or agent of the vessel, which is usually signed and handed to the lighterman or carman at the time of the shipment.

There were some exceptions to this custom, not, however, interfering with its general uniform character. As, for instance, that bills of lading were sometimes delivered without the surrender of the shipping receipt, where the shipper was considered of undoubted responsibility, and guaranteed that the receipt should be produced when called for; also, that bills of lading were sometimes delivered to like persons before the goods were in fact placed on board upon a guarantee that they should be shipped in due season.

In these cases there was a waiver of the strict rights of the vessel and her owners, and a confidence and credit was given which might involve a liability and loss. The uniform character of the custom was not interfered with, but these instances were exceptions arising from agreement and confidence.

The existence of this custom afforded a security to the plaintiffs that they would be able, by retaining the possession of the shipping receipts, to continue the possession of their merchandise until the condition of the sale was complied with by the payment of the price according to the agreement of the vendee, or to use the expressive language of one of the witnesses to hold the receipts in one hand, and receive the check with the other,—the vendor was to hold the shipping receipts till the money was paid, and possession of these was considered sufficient.

It cannot be admitted that the vendors have lost their title because they did not, while the goods were going on board, send word to the master or owners of the vessel that the goods had been sold conditionally upon payment of the price, and that no bill of lading must be delivered to any other party until the goods had been paid for. Such a practice is not customary. The custom which did exist warranted the belief that no such notice was necessary.

It is clear that if the vessel or her agents had adhered to the well-known usage of delivering bills of lading only upon the production and surrender of the shipping receipts, or if they had paused to enquire who was entitled to the bills, that no loss would have occurred.

It is urged, however, that an agreement had been made between the agents of the vessel and the vendee (Woodhull) for the freight of such merchandise by him, and that none of the same kind should be carried for other parties on the ensuing voyage, and that the merchandise in question having been shipped with the sanction of the vendee, and apparently by his direction under such agreement, that the agents of the vessel can not be held to have made a careless or improper delivery of the bills of lading therefor to the vendee, and that the vendors are censurable for suffering the delivery of the merchandise on board in such a manner as to lead to the assumption by the agents that there was no question as to the absolute ownership of the vendee.

It would be quite as reasonable for the vendors to complain that they were not notified of this agreement for freight, as for the agents of the vessel to complain that they had not been informed of the conditional nature of the sale of the merchandise.

It is assumed in the ordinary transactions of commerce that parties are acting honestly and fairly, and it would also be impossible to inform others of agreements apparently affecting only the parties to them. Neither party had any right to expect any such information from the other. The plaintiffs had no knowledge, so far as the evidence shows, of the existence of any such agreement for freight.

However the case might be considered under other circumstances, the want of this knowledge is an answer to the charge of carelessness or want of fairness on the part of the plaintiffs in respect to

the omission to notify the agents of the vessel of the condition of the sale before the delivery of the merchandise on board. Nor does it appear that they were aware that the vendee had anything to say to the agents of the vessel in respect to the shipment.

There is still less reason to censure the plaintiffs for an omission to notify the agents of the vessel that the sale was a conditional one, when it is observed that the defendant delivered bills of lading to the vendee before the merchandise was actually on on board the vessel, and that an advance of $11,000 had been obtained thereon by the vendee from third parties on the same day that they were obtained.

It appears also that the vendee was in insolvent circumstances for some years. This was a circumstance calling for caution by all parties who were dealing with him when he required credit.

It would seem that the agents of the vessel relied exclusively upon their knowledge of the character of the shipper (Woodhull) for integrity and fair dealing, and that they delivered the bills of lading to him in the trust and confidence which they had that he would ship the merchandise as agreed, and surrender the shipping receipt when requested. This confidence was misplaced, and they have suffered loss from that cause, and not for the reason that the plaintiffs did not inform them of the terms upon which the merchandise was agreed to be sold; a notice wholly unusual, and which the defendant could not expect.

It is urged that the custom above mentioned is invalid, among other reasons, because it tends to establish the negotiability of a new and unusual instrument in writing. Some of the witnesses state the custom to be that the bills of lading are delivered to the party who presents the shipping receipts, but the statement more accurately given, I think, by the other witnesses, is that the custom is to give the bills only to the party on the surrender of the receipts. Sometimes the surrender of the receipts is waved where the responsibility of the parties are well known. Such instances are like the present one where confidence or credit is given to some well-known party.

Some of the witnessess state that the bills are given to the person who presents the receipts unless suspicion is awakened.

There can be no conclusion drawn from the whole evidence that the receipts are negotiable, or that the holder of them is entitled to bills, without further question as to the right of the holder. The receipts amount to a strong presumption that the holder is entitled to bills of lading for the merchandise mentioned in the receipt, but the presentation of them does not preclude further inquiry.

On the other hand, if the shipper, or any other person demanding bills, were unable to exhibit and surrender the shipping receipt, it would present a strong case for suspicion, and the owners or agents should make inquiry before delivering the bills.

The custom seems to be uniform, well known, and not unreasonable.

It does not invalidate the custom, because the vessel cannot be compelled to give receipts, or the shipper to take them.

The shipper may still insist that he will ship only by such vessels as will give receipts, and the vessel may also refuse to receive freight unless the shipper will receive receipts, or conform to the custom. It is a custom that tends to the protection of the shipper as well as the shipowner. The safeguard might be increased to shippers and owners by inserting in the receipt a clause declaring that bills of lading shall be required only upon the surrender of the receipts.

There was no error in admitting the evidence of the custom mentioned, or in the submission of the case to the jury, so far as the defendant is concerned.

Evidence of the insolvency of Woodhull was material to ascertain whether credit was given by the plaintiffs to him in respect to the possession of the merchandise, or by the defendant in respect to the delivery of the bills of lading.

This, taken with other evidence in the case, afforded some ground to enable the jury to determine whether the one party or the other had given credit to Woodhull.

In the absence of any new inducement the plaintiffs would not probable abandon the condition for which they had stipulated in making the sale to an insolvent purchaser.

The agents of the vessel had given credit to an insolvent dealer with them to a certain extent, in agreeing to rely upon him to deliver a large amount of merchandise covered by the bill of lading and had bound themselves to give him the exclusive right to ship a particular kind of merchandise for the ensuing voyage. They might have had faith in his personal character for integrity, inducing them to overlook his want of pecuniary responsibility, with slender additional security, but there is no reason to believe, from the evidence, that the plaintiffs had any such faith.

The exception in this respect is not well taken.

The defendant gave evidence of the amount of the freight that would have been earned had the merchandise so put on board been carried to its destination, and the loss and expense arising from the delay of the ship in taking it out, and restoring the cargo which had been displaced in removing the plaintiffs' merchandise.

The Judge was requested at the trial to charge that the defendant Champion was entitled to be allowed for these items, if the jury should find for the plaintiffs upon their claim for the merchandise so shipped. The judge declined so to charge, and the accepted to the ruling.

The voyage has not yet commenced. The ship has not yet broken ground.

The question does not appear to be free from doubt, whether a shipper who has contracted for freight may not remove his shipment under such circumstances without payment of any freight affording only a full indemnity to the vessel for the breach of his contract for freight. The vessel might fill up with cargo on the same or better terms, and sustain little or no damage.

The following cases are adverse to the claim of the vessel: 3 Gray R. 92, Bailey v. Damon; 5 Binn. R. 392, 401, Clewson v. Long.

In the present case there was no contract between the plaintiffs and the vessel or her owners. The plaintiffs were willing, and offered to permit the merchandise to be carried by the vessel for their account on the same terms as it had been received. The defendant, Champion, however, refused to recognize the title of the plantiffs, or to deliver them bills of lading. The plaintiffs claim of title has been sustained by the jury, under the charge of the court.—The defendant was wrong in denying the plaintiffs' ownership.

The plantiffs were under no obligations to permit their merchandise to leave the port or to remain in the vessel, while their title was denied.

Under such circumstances there can be no legal foundation for demanding freight, damages for breach of any freight contract, or for the delay of the vessel, or the reasonable expenses to which the vessel or her owners were subjected by the plaintiffs, in recovering the possession of their merchandise, unjustly witheld. This exception was not well taken.

The sum of $2,000, part of the advance obtained by Woodhull on the bills of lading delivered to him, was afterwards paid to other parties on general account, and by them paid to the plaintiffs without knowledge of the source from whence it was obtained and has been by the plaintiffs applied on account of other indebtedness.

The refusal of the judge to charge so as to give the defendant Champion the benefit of this payment was correct, and the exception in that respect is not well taken.

The defendant has no ground of complaint as to the rulings at the trial or the manner of the submission of the case to the Jury.

In some respects the charge was more favorable to the defence than the Judge was required by law to make.

The judgement should be affirmed with costs.

The result to which we have here arrived is not in harmony with the former decision General Term in this case (reported 28 Barb. 217), but the evideuce in respect to custom was not then before the Court; and as that is a material and controlling fact in the case as now presented, we do not consider the former conclusion as authority controlling our present views.

D. Lord, for the appellant; G Dean, for the respondents.

MONTHLY REPERTORY.

COMMON LAW.

EX. DUKE v. ASHBY. *Jan.* 16.

Ejectment—Landlord and Tenant—Estoppel—Title.

In ejectment by landlord against tenant, on proviso for re-entry in a lease, reciting and "subject to" a former lease to another party, the tenant cannot dispute the landlord's title.

EX. C. YEATMAN v. DEMPSEY.

Contract implied—Agreement to appear at trial without subpœna—Cause of action—Damages.

The plaintiff, with the view (known to the defendant) to obtain a divorce from his wife on the ground of her having been insane at the time of the marriage, employed the defendant, a medical man, to observe her, and also to enquire into her past history and procure evidence of her insanity at the time of the marriage, and to make it available in the suit, and the defendant was to be paid for what he did. The defendant did not appear at the trial, and, his evidence being necessary, the plaintiff was in consequence obliged to withdraw the record.

Held that this was evidence of an undertaking to appear and give evidence at the trial without a subpœna, and also evidence of substantial damage to the plaintiff.

Q. B. WINTER v. WINTER.

Gift of chattel inter vivos—Constructive delivery.

In a gift of a chattel *inter vivos* it is not necessary that there should be any formal delivery of the chattel by the donor to the donee; it is sufficient if the donee takes possesion of the chattel as owner, in pursuance of the gift.

Q. B. MELLOR v. SHAW ET AL.

Master and servant—Injury to servant from personal negligence of master—Joint liability of co-proprietors.

Where a master of a coal mine authorized his workmen to use the shaft while it was in an unsafe condition to his knowledge, and an injury resulted therefrom to one of the workmen, who was using the shaft without knowledge of the danger.

Held that the master was liable for personal negligence.

Held also, that where one of two partners in a coal mine acts as manager, and is guilty of personal negligence, his co-partner is jointly liable for the injury resulting from such negligence.

C. P.

WILTON v. THE ROYAL ATLANTIC MAIL STEAM NAVIGATION CO.

Carriers—Luggage—Passenger.

A ticket was taken by an agent for the plaintiff as a passenger by the defendant's ship, from New York in America to the United Kingdom. On the ticket was this condition: "The ship will not be accountable for luggage goods or other description of property, unless bills of lading have been signed therefor; each passenger allowed 20 cubic feet of luggage free, but no jewellery, bullion, &c., will be carried as luggage." No bill of lading was offered to the plaintiff. The ship was lost and with it the plaintiff's luggage on the voyage, by the negligence of the defendant's servant.

Held, that the stipulation for a bill of lading as a condition for the defendant's being accountable was absolute, and that they were not liable for the loss of any part of the plaintiff's luggage, the stipulation for 20 cubic feet of luggage free being an exemption from the charge so far and no farther, leaving the passenger either to get a bill of lading for all for which he intended to make the ship accountable, and at the same time giving him the option of taking luggage under his personal control without a bill of lading, but in that case carrying it at his own risk.

Q. B. PATERSON v. HARRIS.

Marine insurance—Policy on a share in an Electric Telegraph Co.—Perils of the sea.

A, previous to the attempt to lay down an electric cable between Ireland and America, had insured his share in the Atlantic Telegraph Co. The policy was in the usual form of marine insurance, with the addition of a special agreement that the insurance "should cover and include the successful working of the cable when laid down," The cable was laid down, but proved inefficient, partly by reason of an injury which it had undergone previous to the shipment, and partly through natural effect of the action of the sea.

Held, that the underwriter was not liable to indemnify A. against the loss resulting from the injurious effects of the ordinary and natural action of the sea-water upon the cable as loss caused by "perils of the sea."

Held also, that although the policy was expressed to be effected on A's "share in the Electric Telegraph Co.," it was in effect on the cable itself; and accordingly that a loss of 870 miles of the cable by the "perils of the sea" came within the policy."

REVIEW.

THE WESTMINSTER REVIEW. New York: Leonard, Scott & Co. We are in receipt of the October number of this valuable quarterly. It is at all times acceptable. The contents of the number before us are:—1. Essays and Reviews. 2. The British Sea Fisheries. 3. Railways: their cost and profits. 4. Gibraltar. 5. The Encyclopœdia Britannica. 6. Idées Napoléoniennes. 7. The Religious Difficulties of India. 8. The Slave Power.—The *first* is a slashing article against the real or supposed bondage of the clergy of the Anglican Church. Freedom of thought and freedom of action are advocated with the usual ability which characterizes the productions of writers who contribute to this Review. The *second* is an interesting article on the British Sea Fisheries. Its aim is to expose "the awful waste of fish life" incident to the present system, and to bring about economy. The *third* exposes the mismanagement of Railways, entailing great losses where considerable profits should be forthcoming. The conclusion at which the writer arrives is, that the leading defect of the present system is the absence of a direct interest on the part of managers in diminishing the expenses and producing profits. The remaining articles are of more or less interest. We have not time to particularize them. One, in praise of the new edition of the Encyclopœdia Britannica, will meet with the approbation of all who possess or have seen that marvellous combination of industry and talent.

GODEY'S LADY BOOK.—The number for December is received. It is enough to say that the number is fully equal, if not superior to any of its predecessors. This magazine must be a treasure to those for whom it is designed.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

WILLIAM REYNOLDS, of the Town of Guelph, Esquire, to be a Notary Puplic for Upper Canada.—(Gazetted October 18, 1862.)

FREDERICK THOMAS JONES, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public for Upper Canada.—(Gazetted October 25, 1862.)

CORONERS.

WILLIAM SPRINGER, of the Village of Ingersoll, Esquire, M.D., to be an Associate Coroner for the County of Oxford.—(Gazetted October 18, 1862.)

DAVID KELLY, of the Village of Orillia, Esquire, M.D., to be an Associate Coroner for the County of Simcoe.—(Gazetted October 18, 1862.)

JOHN MACK AULT, of Dereham, Esquire, M.D., to be an Associate Coroner for the County of Oxford.—(Gazetted October 25, 1862.)

TO CORRESPONDENTS.

A SUBSCRIBER—Your communication omitted, for two reasons: 1. Your real name not sent to us. 2. Question put of no general interest; you must take the advice of counsel upon it.

DIARY FOR DECEMBER.

1. Monday ..... Last day for notice of trial County Court.
7. SUNDAY..... *2nd Sunday in Advent.*
9. Tuesday..... Quarter Sessions and County Court Sittings in each County.
11. Thursday..... Sittings of Court of Error and Appeal commences.
13. Saturday..... Last day for coll. of money for School Teach. Last day for serv. [of writ for York & Peel Assizes.
14. SUNDAY..... *3rd Sunday in Advent.*
21. SUNDAY ..... *4th Sunday in Advent.*
22. Monday..... Nomination of Mayors.
23. Tuesday ..... Declare for York and Peel Assizes.
25. Thursday..... CHRISTMAS DAY.
28. SUNDAY..... *1st Sunday after Christmas.*
30. Tuesday..... End of Municipal year. Last day on which rem. half of Gram [School Fund payable. Last d. for not. of trial Y. & P. Assizes

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

DECEMBER, 1862.

THE LAW OF SEDUCTION.

The action for seduction is in form a fiction,—in substance a snare. It is pregnant with inconsistencies; it cannot be defended on principle; it is most unsatisfactory in practice.

The aim of the law is to furnish a remedy for every wrong. Some wrongs are of such enormity as to be deemed public wrongs, and as such treated as crimes, and so punished. Others, of apparently minor import, are left to be redressed at the instance of the sufferer in action for compensation.

It is not right for a man to have connection with a woman against her will—this is a public wrong, and punishable as a crime. It is not right for a man to have connection with a woman by artifice—this is a private wrong, and punishable by action.

To defraud another of his property is a crime, but to defraud a woman of her virtue, as the law stands, is something less than a crime.

Marriage is the state in society to which all women look forward. To attain this state, character is necessary: the loss of character is the loss of earthly prospects. No compensation can be awarded adequate to the loss of virtue under such circumstances.

The injury is at least twofold—pain which the woman suffers from shame—and loss of reputation. The sense of shame must be strong indeed when we know it frequently causes the woman to destroy her offspring—to murder her own flesh and blood. The loss which she sustains by the ruin of her reputation defies computation. The consequence at times is a life of prostitution, loathsome disease—in a word, a living death.

Besides, there is an injury to her family. Nothing is so destructive of domestic comfort and earthly happiness as the ruin of a fond daughter or a loved sister. The contemplation of it is awful. The realization of it is maddening. The complication of miseries which arise from this cause cannot be computed.

We do not assert that in all cases the man only is to blame; but we do assert that in the majority of cases he is the sole delinquent.

In what manner therefore does the law afford redress for this wrong? It neither punishes the wrong doer as a criminal, nor gives an action to the woman, who is the real sufferer.

It is true that an action lies against the wrong doer, but not at the instance of the woman seduced, nor for her seduction, but at the instance of her parents, for the loss of service arising from the fact of seduction followed by pregnancy.

The foundation of the action at common law is loss of service. The mere relationship of parent and child is not sufficient to support the action. There must be the real or presumed relationship of master and servant: the action at common law is not maintainable without some proof of loss of service. (*Thompson* v. *Ross*, 5 H. & N. 16.)

Slight evidence of service is sufficient, such as milking of cows, pouring out tea, or the performance of similar domestic duties. (*Bennett* v. *Allcott*, 2 T. R. 168; *Carr* v. *Clark*, 2 Chit. R. 261; *Mann* v. *Barrett*, 6 Esp. 32.)

If the daughter live with her parents, the relationship of master and servant is presumed (*Maunder* v. *Venn.*, M. & M. 323); but if living in the service of another at the time of the seduction her parent cannot at common law maintain the action. (*Dean* v. *Peel*, 5 East. 45.)

The consequence is that a great hardship arises. The law based on fiction works real injustice. For the seduction of the daughter of the rich man, who resides with her father, and whom the law presumes to be the servant of her father, though she perform no service whatever beyond that of living in luxury at his expense, the law provides a remedy. But for the seduction of the daughter of the poor man, whom necessity compels to be the servant of others, at common law there is no remedy whatever. (*Carr* v. *Clark*, 2 Chit. R. 260.)

The master himself with whom she is hired may be her seducer, and as no loss of service arises therefrom to her father or mother, the action at common law cannot

be sustained. (*Harris* v. *Butler*, 2 M. & W. 539; *Davis* v. *Williams*, 10 Q. B. 725.)

The daughter may be the chief source of the support of a widowed mother or aged father; her ruin while in service may be starvation to her parents; and yet the law of England is powerless to afford redress.

In a recent case the daughter of a widow was seduced. The daughter had gone into service in the family of one Ross, where she received wages as a domestic servant. While in the service of Ross, his son seduced her. The mother brought her action, but the action was held not to be maintainable, though it was shown that in the evenings, the daughter, with the consent of her mistress, made shirts for her mother, who was a shirt maker, and so assisted her mother to get an honest livelihood. Pollock, C. B., said, "We are all agreed that there was no service in this case. The service must be a real genuine service, such as a parent, master or mistress, may command. Here the girl did work for her mother by the consent of the lady who was her true mistress. It was argued that if a daughter making tea in the house of her parent is a sufficient service to entitle the parent to sue for the loss of such service, a parent might sue in the case of a domestic servant going home on Sunday evenings and making tea there. But here there was merely a permission, which might at any moment have been withdrawn. The entire services of the girl belonged to her master. However painful it may be that there should be a wrong without a remedy, we must leave the law as we find it. We cannot make that a service which was no service. The rule therefore will be absolute to enter a nonsuit." (*Thompson* v. *Ross*, 5 H. & N. 16.)

So in a still more recent case. The daughter had, till 1854, resided with her father and mother. In that year the father, owing to pecuniary difficulties, left them and went to lodge elsewhere. Then the daughter took a house in her own name, in which she carried on the business of a milliner, and thereby helped to maintain her mother and the younger members of the family. During 1856, when on a temporary visit to the house of a sister, she met the defendant and was seduced by him. The furniture in the house belonged to the father. He occasionally visited his family there, and contributed something towards their support. Still the action was held not to be maintainable. Williams, J., said, "However painful it is to make the maintenance of an action of this sort depend upon services rendered by the daughter, still as the law is so we are bound by it." (*Manly* v. *Field*, 7 C.B. N.S. 96.)

The rule in the United States is somewhat different. There, it is held that a father may maintain an action for the seduction of his daughter, though at the time of the seduction in the service of a third person, provided the service be under such circumstances that he is in a position to reclaim her services at his pleasure. The reason is that the consent of the father to his daughter's absence, and to her appropriating her wages to her own use, is treated as a mere license revokable at any time. (*Martin* v. *Payne*, 9 Johns. 387; *Hornketh* v. *Barry*, 8 Serg. & R. 36; *Bolton* v. *Miller*, 6 Indiana, 262.) It is not so clear that a widowed mother has under similar circumstances the same right—the authorities are conflicting on the point. (*South* v. *Dennison*, 2 Watts, 474; *Roberts* v. *Connelly*, 14 Alabama, 241; *Sargent* v. *Anon*, 5 Cow. 106; *Parker* v. *Mesk*, 3 Sneed. 34.)

In Upper Canada, however, the legislature has made an attempt to place the law on a more satisfactory footing than it is either in England or in the United States. On 4th March, 1837, our legislature passed the 7th Wm. IV. cap. 8, entitled "An Act to make the remedy in cases of seduction more effectual," &c. It recited that in some cases the law failed in affording redress to parents whose daughters were seduced, and enacted that the father, or in case of his death the mother, of any unmarried female who might be seduced after the passing of the Act, and for whose seduction such father or mother could sustain an action in case such unmarried female were at the time dwelling under his or her protection, shall be entitled to maintain an action for seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with any other person upon hire or otherwise. In furtherance of the spirit of the Act, it was also enacted that upon the trial of any action for seduction brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary. (Con. Stat. U. C., cap. 77, sec. 1, 2.)

The effect of our act is apparently to rest the action rather on the relationship of parent and child than of master and servant. There is no doubt that it is more consonant with reason than the common law rule which still prevails in England, and to some extent still prevails in the United States. It is strange that the English legislature have not either abolished the action or made it more effective than it is there at present. One would expect, as the action there is rested solely on loss of service, that no damages could in the action be recovered beyond compensation for loss of service. Such however is not the case. The judges, who cling with such tenacity to the common law foundation of the action, have with strange inconsistency permitted the claim to damages to go much beyond mere loss of service. In England, as well as in

the United States and in Upper Canada, damages may be given for loss sustained by the parent in being deprived of the society and comfort of a virtuous child, and for the distress and anxiety of mind caused by her seduction. (*Irwin* v. *Dearman*, 11 East. 24; *Andrews* v. *Askey*, 8 C. & P. 7.)

One effect of our statute has been to make the action of very frequent occurrence. In many instances the action, though brought in the name of the parent, is brought without the knowledge of the parent. It is in such cases the action of the daughter; and though substantially the plaintiff, she is allowed to enter the witness box and swear the case through, while under our law, which prevents parties to the record being witnesses on their own behalf, the defendant is not able to say a word on oath in contradiction of her story. The defence of such an action under such circumstances is peculiarly difficult.

The action is easily brought, easily proved, and most difficult to be met. If the defendant were allowed to give his story in the box, the jury could judge between the alleged seducer and the person seduced. Without his oath in all probability there is no evidence to offer, and, in the absence of evidence for the defence, a verdict for the plaintiff is almost a matter of certainty. Should the seduced be a person of doubtful character, the defendant, with a view to impeach her credibility or lessen damages, may be tempted to put witnesses in the box. This, however, as the law stands, is an experiment fraught with danger. The jury perhaps, more influenced by the tears of the young woman or the eloquence of her counsel than by the evidence of her accusers, may disbelieve the testimony of the latter, and, because of the supposd attempt "to blacken her character," swell the damages.

In conclusion, we hesitate not to say that the action in its present form is a delusion. It is supposed to be the action of the parent, but in nine cases out of ten is the action of the daughter. It is supposed to be for loss of service to the parent, but is either for loss of virtue by the daughter, or, worse still, for the wages of prostitution. The daughter is in such cases the actual plaintiff. On her part the action is a claim for damages. When a woman is deprived of her virtue her moral character is generally shaken. Perhaps, she has nothing left but to make as good a speculation as her altered circumstances will admit. Her real seducer it may be is a young man of buoyant expectations but no substance. Her speculation is much more likely to pay if she can only get a jury to believe that a man of property, who perhaps innocently was once or twice in her company about the time of her seduction, is her seducer. If a married man so much the better — he is the more likely to pay handsomely in order to prevent the exposure of a trial, however innocent he may be of the charge. We do not say that this *is* always the case. But we do say that, as the law stands, it *may* be the case in numberless instances. The temptation is great, and we fear that some women are bad enough to give way to that temptation. When chastity goes truth frequently follows. When marriage is out of the question, a good round sum of money is not to be despised. We are satisfied that in this way injustice is often done. Some remedy is needed. We think the action ought either to be abolished, and the offence, like rape, made criminal, or the law be so amended as to allow the defendant to give his testimony in answer to the oath of the seduced.

SELECTIONS.

ACCIDENTS TO SERVANTS.

In the United Kingdom, where manufactures have become the main business of life, and have reached an extent and importance unknown and undreamed of in former ages, the various questions between master and servant have acquired a legal prominence which in less busy communities they will probably never be able to attain. Among these the liability of the master or employer in cases of corporeal injury to the employed must always stand pre-eminent, since on its proper solution may depend the health and even the lives of thousands of human beings. The vast development of machinery has given birth, within the last few years, to a hundred new and unexpected dangers, and the workman walks unarmed in the midst of perils like a man with naked feet dancing in a labyrinth of sword blades. Although the masters are the class who profit most by the progress of manufactures, it must be remembered that the employed and the whole nation benefit by it also. Thus we should not be dealing practically with the question if we were to throw upon the employers the whole burden of the dilemma. Let us try to examine very briefly the present law on the subject, and consider whether there is anything wanting, and what measures have been or may be suggested by way of amendment.

It is natural and proper that if a workman is injured by pure accident, the master should incur no liability. Accordingly, in such cases, the law has never interfered, and the workman's only protection is to demand higher wages in proportion to the risk. But it frequently happens that injuries do not arise from pure accident, but from negligence of the master, negligence of the fellow servant, or negligence of the employed himself. In the first of these cases the law supplies a remedy, but in the other two it refuses to interfere. Moreover, the remedy in case of negligence of the master is fettered by two very unfortunate conditions; for first, the negligence must be personal on the part of the master, and secondly, the injured person must have shown no negligence himself. It results from the former rule that the injured man has only a very limited protection against defective machinery and dangerous modes of working, and from the latter that if he acquiesce too readily in any irregularity, his own laches will deprive him of his remedy against those of his master.

Thus, in considering the law as it now stands, we have three complaints to make; the first, that if a workman is injured by the negligence of a fellow-servant he has no remedy against the master; and further that he is to a great extent deprived, under certain circumstances, of his remedy in case of negligence on the part of his employer. The first point was established, not without some contest, by the cases

of *Hutchinson* v. *The York, Newcastle and Berwick Railway Company*, 5 Exch. 343; and *Barton Hill Coal Company* v. *Reid*, 6 W. R. 664—decided apparently upon the general principle that a workman enters into the contract with his eyes open and is aware of the risk he will have to run. It may be urged in opposition to this view, that he is aware of the necessary and ordinary risk, but that the risk arising from a fellow-servant's negligence is unnecessary and special. A master is responsible to any chance passer-by for injuries caused by his servant's carelessness, and there is nothing, we submit, in an ordinary contract for service, which should deprive an injured workman of the protection which that responsibility affords to other people.

The hardship as regards the second point consists in this, that in case of injury from defective machinery, the workman, for the technical reason of want of privity, cannot get damages as against the maker, (*Winterbottom* v. *Wright*), 10 M. & W. 108); and as the master has not usually caused the defect by personal negligence, there is, as a general rule, no possibility of obtaining damages at all. It may be doubted whether this conclusion of law is based on sound principles. In reason and justice the responsibility must be *somewhere*, and there seems to be no valid argument why it should not reside in the man who ordered the machinery, and who ought to have selected a competent person to make it.

We must briefly allude to the third point. We shall say nothing of the simplest instances of *mixed* negligence, where the master and the injured servant are equally guilty, although even in these cases something might perhaps be done to apportion the blame; but the mere absence of protest on the part of the servant certainly ought not to shield the master who provides imperfect machinery, or otherwise places the workman in unnecessary danger. Since the decision in *Holmes* v. *Clark*, 10 W. R. 405, it appears to be a question for a jury, whether absence of protest amounts to negligence; and this arrangement, although likely to be satisfactory in most instances, may be a source of cruel hardship if there should be tyranny on one side or timidity on the other.

Considering the immense importance of sound animal power in a country which lives entirely by labour, it is evident, apart from any consideration of morality, that public policy demands every care for the preservation of the lives and health of working men. If our lust for wealth or our love of industry compels us to invite comparatively ignorant men to employments of a necessarily perilous nature, we should be prepared to give them all the benefit of our knowledge, and we should shrink from no responsibility which the nature of our position imposes upon us. It can scarcely be said that we act this honest and manly part so long as we refuse to recognise constructive negligence and permit the servant to suffer for the master's having defective machinery. It is evident that the workmen can have no control over the machinery or the mode of working; they must obey their hierarchy of rulers, which rises rank above rank till it culminates in the master himself; and as they have no voice in importing new engines or new methods, it is not fair that they should bear all the risk that such importation involves. With regard to injuries by a fellow servant, the law is again somewhat harsh, for it deprives the employed of a right to which any stranger would be generally entitled. We may add that acquiescence ought to be very clearly proved if it is to be accounted equivalent to negligence, for it is certain that it may well be the result of improper influence, and that most workmen would sooner put up with much danger and inconvenience rather than risk their places by making any objection or remonstrance.

If the bill introduced by Mr. Ayrton on this subject has passed, the various hardships to which we have alluded would, as far as we can see, have been provided against. We do not indeed assert that no further legislation would have been required, for there never was an Act of Parliament so perfect as entirely to defy evasion; but the several cases which we have noticed would have been dealt with, and to the best of our judgment we think they would have been dealt with effectually. It is highly desirable at any rate that Parliament should lay down some rules on the subject, and as the Bill of Mr. Ayrton seems calculated to meet the principal difficulties of the case, we shall have great satisfaction in seeing it re-introduced at the earliest possible opportunity.—*Solicitor's Journal.*

SELECTIONS FROM THE OLD REPORTERS AND TEXT WRITERS.

It is actionable to call a counsellor "a daffy-down-dilly," (Rol. Ab. 55.) if there be an averment that the words signify an ambidexter; or to say of an attorney, that "he hath no more law *than Master Cheney's bull*," (Sid. 327; S. C. 2 Keb. 202.) even although Mr. C. actually have no bull; for if that be the case, as Keeling, C. J., observed, "the scandal is the greater." And it is quite clear that to say that a lawyer has "no more law than a goose," is actionable; (Sid. 127.) and the reporter adds a quære, Whether it be not actionable to say a lawyer "hath no more law than the man in the moon!"

So also to say to a man, "You enchanted my bull;" (Sid. 424.) or "Thou art a witch," or that a person "bewitched my husband to death," (Cro. Eliz. 312.) is clearly actionable. Quære, Whether it be not also actionable to say to or of a young lady, "you enchanted me," or "She enchanted me," or, as the case may be, "She enchanted my brother, my dog," &c., or "She's a bewitching creature," or to put the exact point, "She's quite bewitched poor Tom."

On the other hand, you may say if you please of another, "That he is a great rogue, and deserves to be hanged as well as G. who was hanged at Newgate;" because this is a mere expression of opinion; and perhaps you might think that G. did not deserve hanging (T. Jones, 157). So also you may say of any Mr. Smith that you know, "Mr. Smith struck his cook on the head with a cleaver, and cleaved his head; the one lay on the one side, and the other on the other;" because it is only to be *inferred* that thereby the cook of Mr. Smith died, and this in the reported case was not averred (Cro. Jac. 181). *A fortiori*, you may say, "Mr. Smith threw his wife into the Thames, and she never came up again;" or "Mr. Smith cut off Tom's head and walked with it to Worcester;" because this is all inference; and his cook, wife, or Tom, as the case may be, for all that the court knows, may be still alive.

Swinburne, part 4, sect. 6. art. 2, mentions a bequest of a legacy to a person, on condition of his drinking up all the water in the sea; and it was held, that, as this condition *could not be performed*, it was void. The condition *to go to Rome in a day*, which Blackstone mentions in his Commentaries as void, as impossible to be performed, may soon perhaps cease to be so, and consequently become good, since railroads are introduced upon the Continent.

In 1 Rol. Ab. 45, it appears that in the country, when men passed cattle, it is usual to say "God bless them!" *otherwise they are taken for witches.*

By the old law of England, if a man married a woman that was a Jew, or a Christian woman married with a Jew, it was felony, and the party so offending was to be burnt alive (3 Inst. 89; and see Fleta, lib. 1, c. 35). It has been doubted whether an idiot can contract matrimony. In *Styles* v. *West*, 3 Jac. K. B., it was adjudged that an idiot might consent to marriage and have legitimate issue (Shep. Gr. Abr. tit. Ideot. 1 Sid. 112). And Lord Coke has said that an idiot shall be endowed (Co. Litt. 187). "But particularly," says Shepherd, "if he have so much knowledge that he can read or learn to read by instruction and information of others, or can measure an ell of cloth, or name the days of the week, or beget a child son or daughter, or such like, whereby it may appear that he

has some light of reason, then he is no idiot naturally." (See Termes de la Ley.)

A writ was *ad respondendum J. S. et fidei Uxori ejus.* The defendant pleaded in abatement of the writ, because the name of the wife was Faith in English, and pretended it should be *Fidi.* Rhodes said he knew a wife who was called Troth, and named Trothia in Latin, and well; and the writ was adjudged good in the former case (Goldsb. fol. 86).

A. gives *B.* such a stroke as befells him to the ground, *B.* draws his knife and holds it up for his own defence. *A.* in haste to fall upon *B.* to kill him falls upon *B.*'s knife, whereby he is wounded to death; he is *felo de se*, for *B.* did nothing but what was lawful in his own defence (3 Inst. 54). So if a gun be discharged with a murderous intent at *J. S.*, and the piece break and strike into the eye of him that dischargeth it, and killeth him, he is *felo de se;* and yet his intention was not to hurt himself. If one persuade another to kill himself, and is present when he doth so, he is a murderer: but *quære*, if *A.* lay impoisoned fruit for a stranger, and his father or mother come and eat it, whether this is not petty treason, because it is not *crimen paris gradus* (See Bac. Elem. 59, 60).

If *I. S.* counsel or command one to kill a man, and he kill another, or to burn one man's house, and he burn another's, or to steal a horse, and he steal a cow, or to steal a black horse, and he steal a white one, or to steal a goldsmith's plate from him going to such a fair, and he go to his shop in Cheapside, and rob him there, and break open his house to do it,—in these cases the counsellor shall not be accessory, because this is another felony (Plowd. 475). But if one command a felony, and it be done in another fashion, time, or place only, than it was commanded, he may be accessory to it. As if one bid another to rob *J. D.* on Shooter's-hill, and he does it on Gad's-hill, or to rob him one day, and he does it another day, or to do it himself, and he does it by another, or to kill him by one poison, and he does it by a sword,—in all these cases he shall be accessary (Plowd. 475; and see Stamf. 1. 45). If one counsel a woman to murder the child in her body, and after the child is born alive, and then murders it in the absence of him that gave her the counsel, in this case he is an accessory (Dy. 185; Plowd. 475).

If *B.* have a right of entry into his house, he ought to have a common entrance at the usual door, and shall not be put to enter at a hole, a back-door, or a chimney; and if they leave the common door open and make a ditch, so that *B.* cannot enter *without skipping*, the condition is broken. So if I am obliged to suffer *J. S.* to have a way over my land, and when I see him coming I take him by the sleeve and say to him, "Come not there; for if you do, I will pull you by the ears," the condition is broken (Latch, 47).

If a legacy be given to a child unborn in the womb, and the birth prove monstrous, *i. e.* very contrary to the common form and shape of mankind, as with a crow's-beak instead of a nose, or with the face of an ass instead of a better, in such an ill-favored case, the legacy is void. Otherwise, if it is born only with some of the less principal members imperfect or supernumerary, as with half a thumb, or two thumbs, or six fingers on a hand, or the like; but if the birth (not accidentally) be imperfect as to its integrals, or defective as to its more noble and principal parts and members, as but with one eye, or one hand, although the creature hath life, the legacy hath none; for albeit an amplification of the natural form shall not prejudice, yet a mutilation thereof will.—*Note*, this extends not to hermaphrodites, who are not excluded a single capacity; for that sex which most prevails with them in nature shall likewise prevail in law, as to the legacy bequeathed (Orphan's Legacy, 475).

One Becher, a gentleman of the Middle Temple, was returned in an attaint; and before the return of the pannel he became a minister of the church; and at the day of the return he appeared and prayed to be discharged, according to the privilege of those of the ministry. But the court allowed not of his prayer, because he was a layman at the time of his pannel made; and so he was sworn (Becher's case, 4 Leon. 90).

One Howel Gwin was convicted of forging a deed by putting a dead man's hand to it, and condemned to 100*l.* fine, and to stand in the pillory two hours before the hall door.—Memorandum, he cut off a dead man's hand, and put a paper and a seal into it, and so signed, sealed, and delivered the deed with the dead hand, and swore that he saw the deed sealed and delivered (Styles, 362).

A man and his wife had lived a long time together; and the man having at length spent his substance, and living in great necessity, said to his wife that he was now weary of his life, and that he would kill himself, the wife said that she would die with him; whereupon he prayed her that she would go and buy some ratsbane, and they would drink it together; which she accordingly did, and she put it into drink, and they both drank of it. The husband died; but the woman took salad oil, which made her vomit, and recovered. *Quære, if murder* in the wife (Moor. 754).

A horse whereon a man is riding, cannot be distrained for rent. But C. J. Keeling was of opinion that such a horse may be distrained damage feasant, and that he shall be led to the pound with his rider upon him (1 Sid. 440).

Clobor's wife complained against him in the Spiritual Court, *causa sævitiæ*, for that he gave her a box on the ear, and spate in her face, and whirled her about, and called her a *damn'd whore.* This was not by libel, but verbal accusation, reduced after to writing. The husband denied it; but the court ordered him to give her four pounds every week, *pro expensis litis*, and alimony; whereupon he moved for a prohibition, suggesting that he chastised his wife for a reasonable cause, as by the law of the land he well might; after which she went from him; and that they were reconciled again, which took away the former *sævitiæ* as reconciliation after elopement. Richardson, C. J., said, that they could not examine what was cruelty and what not. But without doubt the matter alleged is cruelty, for spitting in the face was punishable by the Star Chamber: but if Clobor had justified, and set forth a provocation by the wife to give her reasonable castigation, that would be some color for a prohibition (Hetley, 149, 150). And see *Agar's* case, (2 Brownl. 36.) where it seems to have been held, that a husband has a right to beat his wife, and call her any name he pleases.

A man may justify the battery of another in defence of his wife, *for she is his chattel* (2 Roll. 546).

If a man assault me, I am not bound to attend until he strikes, but I may lay on before in my own defence; for it may be I shall come too late afterwards (2 H. 4, 8, per Cur).

In one case a man may choose his father; it is this: if a man has a wife, and dies, and within a very short time after the wife marries again, and within nine months hath a child, so as it may be the child of the one or the other; some have said that in this case a child may choose his father. *Quia in hoc casu filiatio non potest probari;* for avoiding of which question and other inconveniences, the law before the conquest was, *sit omnis vidua sine marito duodecim mensibus et si maritaverit, perdat dotem* (Co. Litt. 8, a).

A man may plead *not guilty*, yet tell no lye; for by the law no man is bound to accuse himself; so that when I say *not guilty*, the meaning is as if I should say, by way of paraphrase, I am not so guilty as to tell you: if you will bring me to a tryal and have me punished for what you lay to my charge, prove it against me (Selden).

A. says to *B.*, "One of us is perjured." *B.* says to *A.*, "It is not I." And *A.* says, "I am sure it is not I." *B.* shall have an action for these words, for the subsequent words show apparently that he intends him (*Coe* v. *Chambers*, 1 Roll. 75).

Justice Twisden said, he remembered a shoemaker brought an action against one, for saying he was a cobbler; and though a cobbler be a trade of itself, yet it was held the action lay in Chief Justice Glyn's time (1 Mod. fol. 19).

When an execution is lawfully begun, or hath a legal commencement, this diversity was taken and agreed for law in *Sir William Fish's case.* Sir William was looking out of his window, and the sheriff *per fenestram*, delivered to him a *capias ad satisfac.* to take the said Fish and apprehend him, and Fish escaped from him, and the sheriff broke the door of his house, *maintenant*, and re-took him; and adjudged lawful, because there was a lawful beginning of the execution before, which was presently pursued (Palmer, 53).

A sheriff cannot, upon private process, rush into a house, which by craft, as knocking at the door, &c., he procured to be opened unto him, and then the first entry was held unlawful; for the opening of the door was occasioned by craft, and then used to the violence intended (Hob. fol. 62).

If one shall the second time, use any conjuration or witchcraft to provoke love in a maid, this will be felony (1 Jac. cap. 12).

A man entered into a condition not to sell his wife's apparel; and held a good bond, though it was moved to be against law, and contrary to the liberty of a husband, so to oblige himself; but Coke held it clearly good; as if one should oblige himself to a stranger, to pay to his wife yearly 20*l.*; this without question is good (*Smart* v. *Watson*, 1 Roll. Rep. 334).

An adulterer takes away another man's wife, and puts her in new clothes: the husband may take the wife with her clothes; for it is as it were a gift of the said appparel unto her. Besides, the more worthy thing draws to it things of less worthiness; as a base mine where there is ore, shall be the King's, for the worthiness of the ore (Finch's Law, 22, 23. And see Cro. Car. 344).

A wife cannot feloniously take her husband's goods; and though she so take 'em, and deliver 'em to a stranger, yet no felony in the stranger. And if a feme covert say of J. S., he stole my plate out of my chamber, although she may not have plate of her own, yet because in common speech 'tis well known that the wife accounts her husband's goods her goods, yet the words are actionable (Cro. Car. 52). Yet for all this she cannot dispose of her husband's goods; and therefore 'twas adjudged, in *Stephen's case*, that where a wife played at cards, and lost 40*l.* of her husband's money, that the husband should recover it again in trover against the gamester (1 Sid. 122; 1 Keb. 340). *Quære*, what remedy has the gamester if he loses to the wife? Or will the law construe it a gift of the money to her, &c.?

'Twas moved to quash an indictment of forcible entry, because the addition of the parties was in English sail-weaver, confectioner, &c.: but the court overruled it; for many persons *have been hanged that have had no other addition* in their indictment. *Note*, it is the constant practice to put them in English in indictments (*Rex.* v. *March*, 1 Sid. 101).

If I make J. S. my attorney, and he (the warrant of attorney still continuing) is made a knight, yet the warrant of attorney is not determined, though the word knight, which is now part of his name, be not in it (Owen, 31).

Libel for calling a man a knave, prohibition lies, *because* in the time of Henry VI. knave was a good addition (Week's case, Latch, 156; 1 Sid. 149).

It was resolved by the court, that negroes are by usage *tanquam bona*, and shall go to the administrator until they become Christians, and thereby they are infranchised. This was upon a special verdict in an action of trover; the jury finding that negroes are usually bought and sold in India (*Butts* v. *Penny*, 3 Keb. 785).

So trover lies for monkeys, because they are merchandise, and valuable, without showing they are tame or reclaimed (2 Cro. Car. 262).

In the time of popery if a stranger had taken my goods and offered them to an image in a consecrated ground, this had made as good exchange of the property of my goods as if I had sold them in market overt; but if I found the goods after in the wrong doers possession, I might take them again (34 H. 6; 10 Co. 91).

If the wife of an attorney of the King's Bench be arrested, she ought not to claim the privilege of that court, not to put in bail to the action, as her husband may; but he must put in bail for her, and for want thereof she shall go to prison. (Stiles, Prac. Reg. 446).

A writ of conspiracy for indicting one for felony, does not lie but against two persons at the least; therefore you shall not have such a writ against husband and wife, because they are but one person, and one cannot be said to conspire with himself (F. N. B. 116 K).

One said of a justice of the peace, "he is a logger-headed, a slouch-headed, and a bursen-bellied hound." This is no cause of indictment before justices of the peace in their sessions, partly for want of jurisdiction, and partly because the words are not actionable. This was assigned for error after judgment (1 Keb. 629).

Justice Dodridge says, it has been wittily observed, that all words which end in "ment" shall be taken and expounded according to the intent; as parliament, testament, arbitrament, &c. (Latch, 41, 42).

It has been held that Sain John and Saint John are several names: so are Elizabeth and Isabel; so Margaret, Marget, and Margerie; so Gillian and Julian; so Agnes and Anne; so cousin and cozen; so Edmund and Edward; so Randulphus and Randal; so Randulphus and Randolphus; and so Randolph and Ranulph (See Anderson, 211, 212. 2 Cro. 425, 558. 2 Roll. 135). So also Miles and Mils are not one name. (Stiles, 389). But Piers and Peter are one name (2 Cro. 425). So Saunder and Alexander; so Garret, Gerrard and Gerald. (2 Roll. 135). So Joan and Jean (2 Cro. 425). So Jacob and Jaacob (1 Mod. 107. 3 Keb. 284). And James and Jacob are several names; yet Jacobus is Latin for both, and will serve for either of them (2 Roll. 136).

Cooper brought an action upon the case against Witham and his wife, for that the wife maliciously intending to marry him, did often affirm that she was sole and unmarried, and importuned *et strenue requisivit* the plaintiff to marry her; to which affirmation he gave credit, and married her, when *in facto* she was wife to the defendant; so that the plaintiff was much troubled in mind, and put to great charges, and much damnified in his reputation. He had a verdict, but no judgment; for by Twisden J. the action lies not, because the thing here done is felony: no more than if a servant be killed, the master cannot have an action *per quod servitium amisit, quod curia concessit* (1 Sid. 375).

One Carey brought an action of trespass *vi et armis* against Stephens, for casting wine upon his velvet doublet; and well brought, though he might have had an action on the case. (Noy, 48.)

In Fox's Book of Martyrs, there is a story of one Greenwood, who lived in Suffolk, that he had perjured himself before the Bishop of Norwich, in testifying against a martyr who was burned in Queen Mary's time: and had therefore afterwards by the judgment of God, his bowels rotted in him, and so died. But it seems this story was utterly false of Greenwood, who after the printing of the Book of Martyrs was living in the same parish. It happened after, that one Booth, a parson, was presented to the living of that parish where this Greenwood dwelt: and some time after in one of his sermons, happenned to inveigh severely against the sin of perjury, and cited the passage out of Fox, that Greenwood was a perjured person, and was killed by the hand of God: whereas in truth he was present at the sermon; and therefore brought an action on the case for calling him a perjured person: and the

defendant pleaded *not guilty;* and Wray, C. J., laid it down, that being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously. (2 Cro. 91; 1 Roll. 87.)

John Walter, Knight, Lord Chief Baron, a profound learned man, and of great integrity and courage, being Lord Chief Baron by patent Primo Caroli *quamdiu se bene gesserit*, fell into the king's displeasure, and being commanded to forbear the exercising of his judicial place in court, never did exercise from the beginning of Michaelmas Term quinti Caroli, until he died, viz., the 18th of November, 1630. But because he had that office *quamdiu se bene gesserit*, he would not leave his place, nor surrender his patent without a *scire facias* to show what cause there was to determine or forfeit it, so that he continued Chief Baron until the day of his death. (Cro. Car. 203.)

Jacob Hale, the famous rope-dancer, had erected a stage in Lincoln's Inn Fields: but upon petition from the inhabitants, there was an inhibition from Whitehall. And upon complaint to the judges that he had erected one at Charing Cross, he was sent for into Court, and the Chief Justice told him he understood it was a nuisance to the parish; and some of the inhabitants being in court, said it occasioned broils and fightings, and drew so many rogues to that place that they lost things out of their shops every afternoon. Hales said, that in 8 Car. 1, Noy prayed a writ to prohibit a bowling-alley erected near St. Dunstan's Church, and had it. (1 Mod. 76; and see 2 Keb. 846.)

One Cox was confined *ad curiam visus, Franc. plegii et baronis*, because he put on his hat in the presence and in contempt of the Court of the Lord, and said, "he cared not what he could do," and hindered the business of the Court *incivilitier se gerens*. (1 Keb. 451 and 465.)—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

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DIVISION COURTS.

We regret that, owing to the indisposition of the gentleman engaged in the compilation of the "Division Court Manual," we are without copy for publication in this number. We hope in our next issue to make up for lost time.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

HOLCOMB ET AL. V. SHAW.

Taxes—Collection of after return of collector's roll—Pleading—Consol. Stats. U.C., ch. 55, secs. 24, 96, 103, 104, 110, 111, 112.

After the collector's roll for the year has been formally returned the municipality cannot appoint any one to collect the unpaid taxes by distress; their collection belongs to the treasurer.

In an action of replevin the defendant avowed, setting out the assessment of certain taxes in the city of Kingston for the year 1855 and 1859, the delivery of the collector's rolls to the collector for those years, and their return by him, with the taxes hereinafter mentioned appearing unpaid: that he, the defendant, was duly appointed by resolution of the council, instead of the collector for those years, to collect certain taxes remaining unpaid after the return of said rolls: that certain persons named were set down and assessed on said rolls as owner and occupant of certain real property for a sum mentioned, payment of which was duly demanded by the collector of those years: and that at the said time when, &c., (being in 1861,) the defendant took the goods in question as a distress for such taxes, the same being in the plaintiff's possession on the premises so assessed. *Held*, on demurrer, that the avowry shewed no defence, the council having under the circumstances no authority to make such appointment.

The plaintiffs in answer to the avowry pleaded several pleas denying the assessment of the several parties as alleged, to which the defendant replied, so far as it might be intended to rely on any error in said assessments, that the collector's rolls for said years were made out by the clerk from the assessment rolls as finally passed, and the assessments in question correctly transcribed. *Held*, on demurrer, replication bad.

Replevin, for an iron safe, office chairs and tables, &c., alleged to have been taken by the defendant on certain premises known as the Marine Railway Wharf and Stores, situated at the foot of Gore and Earl streets, in the City of Kingston. Writ issued on the 4th December, 1861.

Avowry, that in the year 1855 the assessed yearly value of the whole ratable real and personal property, in the municipality of the city of Kingston, after the final revision of the assessments for the said year, 1855, was £77,000, and in the same year 1855, the mayor, aldermen, and commonalty (now the council of the corporation) of the city of Kingston, in council assembled, passed a by-law, sealed with the seal of the said municipal corporation, and signed by O. S. Gildersleeve, mayor, and head of the said corporation, who presided at the meeting of the said council at which the said by-law was passed, and by M. Flanagan, clerk of the said municipal corporation, authorising the raising of certain sums of money for the lawful purposes of the said municipality by the levying and collection in the said year, 1855, of certain rates therefor, as follows, namely, &c., (specifying the sums required for different purposes and respective rates therefor,) and also in the said year, 1855, the mayor, aldermen and commonalty (now the council of the corporation) of the said city Kingston in council assembled, passed another by-law, sealed, &c., as before, and authorising the levying and collection in the said year, 1855, of a certain other rate of seven pence in the pound upon the said assessed yearly value to raise the sum estimated and required by the board of common school trustees of the said city of Kingston, in the said year, 1855, to be provided by the said mayor, aldermen, and commonalty of the city of Kingston, for the said year, 1855, the said several rates so authorised to be levied and collected in and for the said year, 1855, being together equal to 8s. 2d. in the pound, on the said assessed yearly value of £77,000.

And the defendant avers that in the year 1859 the assessed yearly value of the whole ratable real and personal property in the said municipality of the city of Kingston, after the final revision of the assessments for the said year, 1859, was $315,135, and in the said year, 1859, the mayor, aldermen, and commonalty (now the council of the corporation) of the said city of Kingston in council assembled passed a by-law, sealed, &c., and authorising the raising of certain sums of money for the lawful purposes of the said municipality by the levying and collection in the said year, 1859, of certain rates therefor, as follows, namely, &c., (specifying as before,) being together equal to nineteen and three quarter cents in the dollar upon the said yearly assessed value of $315,130.

And the defendant further avers that the clerk of the said municipality of the said city of Kingston for the said years 1855 and 1859, made out collector's rolls, as required by the assessment laws in force in the said years in Upper Canada, for each ward in the said city in each of the said years for the collection of the said rates, in accordance with and founded upon the said several by-laws in that behalf, which rolls were duly delivered to the collector for the said respective years, and returned by said collector as required by law, the taxes hereinafter mentioned appearing in the said rolls for the said years for Sydenham ward, in the said city of Kingston, on the return thereof as remaining unpaid: and the defendant further avers that at the said time when, &c., he was a collector duly and by a resolution in that behalf of the said council of the said municipality appointed by said council instead of the collector for the said respective years, to collect certain taxes remaining after the said return of said rolls unpaid, and amongst others the collector's rolls for Sydenham ward, for the said years 1855 and 1859, were delivered to the defendant, that he, the defendant, might collect the taxes remaining unpaid therein from the person or persons who ought to pay the same, which unpaid taxes in said rolls for said Sydenham ward for the said years 1855 and 1859, included and contained the taxes hereinafter

mentioned; and the defendant avers that it became and was his duty, in virtue of his said appointment and office, to collect the taxes hereinafter mentioned of and from the person or persons who ought to pay the same. And the defendant avers that on the collector's rolls for Sydenham ward aforesaid, in the said city of Kingston, for the said year 1855, Donald McIntosh and John Counter are set down and assessed as occupant and owner respectively, as, for, and in respect of certain real property situated in the said ward, being a part of the real property in the said ward known as the Marine Railway property, which was occupied by the said Donald McIntosh in the said year 1855, and therein assessed at the yearly value of £100; and the said several rates hereinbefore particularly mentioned as authorised to be levied and collected in the said year 1855, under the said by-law passed by the said council in that year, and contained and set down in the said rolls, amounting in all, as is hereinbefore stated and shewn, to three shillings and two-pence in the pound, did on the said assessment of £100 yearly value come to and make the sum of £15 16s. 8d., which was the tax for the said year 1855, rated, assessed, and set down on the said roll for the said ward to and against the said Donald McIntosh as occupant, and the said John Counter as owner, of the said part of the aforesaid real property, known as the Marine Railway property, so occupied in the said year 1855, by the said Donald McIntosh as aforesaid.

And the defendant further avers that the said Donald McIntosh and John Counter, in the said year 1855, were both residents of and within the said municipality, and that they did not nor did either of them send children to, or support by subscribing thereto, any separate school for protestants or coloured persons, within the said municipality in the said year 1855, and that they did not, nor did either of them, on or before the first day of February, in the said year 1855, give to the clerk of the said municipality notice that they or he were or was Roman Catholics or a Roman Catholic, and supporters or a supporter of a Roman Catholic Separate School, within the said municipality.

And the defendant further avers that payment of the sum of £15 16s. 8d. taxes, as aforesaid, so payable by the said assessed persons, or either of them, was duly demanded in the manner required and prescribed by law, by the collector of the said municipality for the said year 1855; and the defendant further avers, that at the said time when, &c., the said real property, in respect of which the said assessment was made to and against the said Donald McIntosh and John Counter, was occupied by the said plaintiffs, who were occupants thereof within the meaning of the assessment laws in force in Upper Canada, and who then had thereon and in their possession the said goods in the declaration mentioned; and the defendant says that the said sum of £15 16s. 8d. taxes, as aforesaid, then still being unpaid, and fourteen days having elapsed from the time payment of the same had been duly demanded as aforesaid, without the same having been paid, he, the defendant, at the said time when, &c., and in the performance of his duty in that behalf, and justly, &c.. took the said goods in the declaration mentioned, the same being then on the said premises in respect of which the said assessment was made and in the said plaintiffs' possession thereon, as he lawfully might, as and for and in the name of a distress for the said sum of £15 16s. 8d. taxes aforesaid, so rated, assessed, and imposed as aforesaid, and remaining due and unpaid at the said time when as aforesaid, and so assessed and set down in the said roll, to and against the said Donald McIntosh and John Counter, as, for, and in respect of the said real property, as the occupant and owner of the same as aforesaid, in and for the said year 1855, as appears by the said roll. Wherefore the said defendant prays judgment, and a return of the said goods, with his damages, &c., according to the form of the statute in such case made and provided, to be adjudged to him.

The avowry contained a statement in the same terms as to the assessment for the year 1859, for part of said Marine Railway, against Hooker & Pridham as occupants, and Alexander Campbell as owner, and that the amount being unpaid, being $138 25c., the defendant seized the said property as a distress for the same. There was also set out in the avowry a distress made by the defendant for an amount of rates assessed in 1859, against R. M. Rose and Alexander Campbell, as occupant and owner of another part of the said Marine Railway property; and the return of the collector's roll by the collector of rates for 1859, the amount appearing unpaid thereon after demand made according to law by the collector for that year, were stated in the same manner in all respects as with respect to the assessment of 1855.

The plaintiffs pleaded eight pleas to the avowry, as follows:

1. That the said clerk of the said municipality of the said city of Kingston for the said years 1855 and 1859, did not make out the collector's rolls, as required by the assessment laws in force in the said years in Upper Canada, for each ward in the said city in each of the said years, as in the said avowry of the defendant is alleged.

2. That the collectors for Sydenham ward for each of the said years 1855 and 1859 did not duly return the said collector's rolls for the said respective years, as required by law, as in said avowry is alleged.

3. That Donald McIntosh and John Counter were not set down and assessed on said collector's roll for Sydenham ward, in said city of Kinston, for said year 1855, as occupant and owner respectively, for and in respect of certain real property described in said avowry, as is therein alleged.

4. That the sum of £15 16s. 8d., mentioned in said avowry of the defendant as the tax for the said year 1855, for the said premises, was not rated, assessed, and set down to and against the said Donald McIntosh as occupant, and the said John Counter as owner of the same, as in the said avowry is alleged.

5. That in the collector's roll for Sydenham ward for the said year 1859, Hooker & Pridham and Alexander Campbell are not set down and assessed as occupants and owners respectively for and in respect of certain real property in said avowry described, as is therein alleged.

6. That the sum of $138 25c. mentioned in the said avowry as the tax for the said year 1859 for the said premises, was not rated, set down and assessed in said last mentioned collector's roll, to and against the said Hooker & Pridham as occupants, and the said Alexander Campbell as owner of the said land, as in the said avowry is alleged.

7. That on the collector's roll for Sydenham ward for the said year 1859, R. M. Rose and Alexander Campbell are not set down and assessed as occupant and owner respectively as and for certain real property in the third part or count of the said avowry mentioned, as is therein alleged.

8. That the sum of $59 25c., mentioned in the said part or count of the said avowry as the tax for the said year 1859 for the said premises, was not rated, assessed and set down in said last mentioned collector's roll, to and against the said R. M. Rose as occupant, and the said Alexander Campbell as owner, of the said land, as in the said avowry is alleged.

They then demurred to the three parts or counts of the avowry as bad in substance, on the ground that the circumstances mentioned do not afford a justification in law for taking the plaintiffs' goods in the year 1861, by way of distress for taxes assessed in 1855 against Donald McIntosh and John Counter (or in 1859 against Hooker & Pridham, and Alexander Campbell, or against R. M. Rose and Alexander Campbell) inasmuch as the remedy for the recovery of taxes by distress of goods is only given by law against the persons who have been assessed for such taxes, and from whom the same have been demanded, and not against future owners or occupants, and it appears from the avowry that Donald McIntosh and John Counter, and not the plaintiffs, were the parties assessed for 1855 for said taxes, (and Hooker & Pridham, and Alexander Campbell, and R. M. Rose and Alexander Campbell, for 1859,) and from whom the payment thereof was demanded.

That the remedy by distress for taxes did not at the time when, &c., exist against any person whatever, because it does not appear that the collector for the years 1855 or 1859 did, on or before the 14th of December, in either of these years, return his roll to the city chamberlain, nor that any resolution was passed by the council of the city of Kingston appointing any other latter day for the return of such roll to the city chamberlain, and because pending such return the city council had no power to appoint a person instead of the collector to collect the unpaid taxes by distress; and because, if any such person could ever have been appointed by resolution, it should have been immediately after the day fixed

for the return of collector's roll for each of the said years, and not after the lapse of several years.

A further objection was urged to that part of the avowry relating to the rates for 1855, assessed against McIntosh as occupant, and John Counter as owner, that it does not appear by the avowry that the word "owner" was added to the name of John Counter or Donald McIntosh on the assessment roll, or the word "occupant" to either name, and that therefore the taxes for 1855 cannot by law be recovered in any way from those who have since that year owned or occupied such property; and a similar objection was taken to the other parts of the avowry.

The defendant replied to the first, third, fourth, fifth, sixth, seventh, and eighth pleas to the avowry, so far as it may be intended to rely under the same, or one, or either of them, upon any supposed defect or error committed in or with regard to the said assessments in the rolls, or so far as any such defect or error may be objected against the validity of any said assessments, that the collector's rolls for Sydenham ward, for the said years 1855 and 1859, in the introductory part to and in the avowries mentioned, were made out by the said clerk from the assessment rolls for said ward for the years 1855 and 1859, as finally passed by the respective courts of revision for the said city of Kingston, for the said years respectively, and amended by the judge of the county court of the united counties aforesaid on appeal, and certified by the said clerk, and the said assessments mentioned in said avowries are correctly transcribed from the said assessment rolls, as contained therein, into the collector's rolls as aforesaid.

The plaintiffs demurred to this replication, on the grounds.

1st. That the said replication seeks to raise an immaterial issue.

2nd. That it is a departure from the defendant's avowry in this, that it admits the truth of the pleas, which are direct traverses of allegations contained in the defendant's avowry.

3rd. That the mere fact that the collector's roll is correctly transcribed from the assessment roll is of no avail where both rolls are equally defective.

Albert Prince and *Kirkpatrick* for the plaintiffs.

Read, Q.C., and *Agnew*, contra, cited *Jarvis* v. *Brooks*, 11 U. C. Q. B. 290; *Newberry* v. *Stephens et. al.*, 16 U. C. Q. B. 65; *McBride* v. *Gardham*, 8 U. C. C. P. 296; *Spry* v. *McKenzie*, 18 U.C.Q.B. 161; *Fraser* v. *Page*, Ib. 327; *McLean* v. *Farrell*, 21 U. C. Q. B. 441.

[Hagarty, J., referred to *Sargant* v. *The City of Toronto*, 12 C. P. 185, not then reported.]

Consol. Stats. U. C., ch. 55, secs. 9, 19, 21, 22, 23, 24, 26, 61, 93, 96, 97, 99, 102, 104, 110, 111, 112, were referred to in the argument.

McLean, C. J.—The defendant shews by his avowry that certain rates were assessed in 1855 against Donald McIntosh and John Counter, and in 1859 against Hooker and Pridham, as occupants, and Alexander Campbell as owner of part of the Marine Railway premises, and R. M. Rose as occupant and Alexander Campbell as owner of another part of the same premises, and he alleges that the collector's rolls containing the assessment against these several parties for the years mentioned were duly returned, and that on such rolls the amount assessed against the parties respectively appeared to be due and unpaid:—that being so due and unpaid he was appointed collector, and the rolls shewing the same to be due were placed in his hands to enable him to collect such arrears from the *person or persons who ought to pay the same*:—that the same having been demanded from the parties whose names appeared on the collector's roll, and the same remaining *fourteen days unpaid* after such demand *by the collectors* for 1855 *and* 1859, and the plaintiffs *being in possession* of the premises for which the rates were due, and the goods being on the premises, the defendant seized them by way of distress for such rates.

The 94th section of the act for the assessment of property Consol. Stats. U. C., ch. 55, requires that a collector shall call at least once on the person taxed, or at his place of residence or place of business, if within the municipality, and shall demand payment of the taxes payable by such person. Then the 96th section provides that if payment be not made the collector may, after the lapse of fourteen days after such demand, levy the same, with costs, by distress of the goods of the person who *ought to pay the same*, or of any goods and chattels in *his possession* wherever the same may be found within the county.

The defendant states his own appointment as collector, instead of the collectors for 1855 and 1859, but he does not allege that he ever made any demand of the rates in arrear from the person who *ought to pay the same*, though he had no authority to collect from any one but the person *who ought to pay* the amount assessed. He contents himself with alleging that the collectors for 1855 and 1859 demanded the rates from the parties whose names were on the roll, and because fourteen days expired after their several demands, and the taxes were not then paid, he seized the goods of the plaintiffs on the premises. The defendant does not allege that the plaintiffs were the persons who *ought to pay* the rates in arrear, but assumes that because they were occupying the premises in the latter part of 1861, and had goods in their storehouse, *they were the persons* who ought to pay taxes assessed and demanded in 1855 by some former collector as taxes due by McIntosh and Counter, and in 1859 as taxes due by the occupants and owner in that year. Surely it did not require any great extent of judgment to point out that the rates ought to be paid by the persons who occupied or owned the premises during these years, and that they were the persons legally liable for them.

Against them the collector of 1855, after demanding payment, might at any time after fourteen days have proceeded by distress, and he might have seized any goods which he could have found within the united counties of Frontenac, Lennox, and Addington, belonging either to the occupants or the owner. But instead of the remedy against these parties being pursued within a reasonable period, the collection in one instance is deferred for a period of six years, and in another nearly two years, until the premises are owned and occupied by other parties, and they are attempted to be held liable, *because they hold the premises*, for the taxes of previous occupants and owners. They are not only regarded as the persons who ought to pay the taxes due by others six years ago, which might have been otherwise collected long since, but it is not even thought necessary by the defendant that he should make a demand of them from the plaintiffs before proceeding to distrain. Now it is, I think, quite plain that the defendant in the first place had no right to distrain without a demand by himself personally as collector, and that, if he had any right to distrain against any one under his appointment, the plaintiffs were not the persons *who ought to pay* the rates in arrear.

The defendant alleges that he was appointed to collect the rates in arrear, instead of the collectors for 1855 and 1859, and he professes to be *continuing* the levy and collection of the taxes unpaid to these collectors; but in my opinion section 104 of the Assessment Act gives no power (after the rolls have been returned to the collectors) to the city council, after a lapse of *several years*, to appoint a person instead of the former collectors to *continue* their proceedings.

That section was intended to give to the council power, by resolution, to authorise the same collector, or any other person in his stead, to continue collections which were being made, but which had not been completed at the time appointed for the return of the collector's roll. But to suppose that it confers upon a council the same power, after the lapse of any number of years, seems to me to be most absurd. If that were so, then the 102nd section, authorising taxes which cannot otherwise be recovered to be *recovered with interest and costs* as a debt due to the local municipality, and the 107th section, which makes taxes which have accrued on land a lien on such land, having preference over *any* claim, lien, privilege, or incumbrance of any party, except the Crown, and not requiring registration to preserve it, would be superfluous. If so summary a mode of proceeding could be adopted, and the party in possession at the expiration of any number of years could be held responsible, the longer, and more expensive, and more dilatory mode would seldom be adopted for the recovery of taxes in arrear.

Having failed to collect the taxes of 1855 and 1859, the only mode of proceeding, as it appears to me, was by action against the persons who ought to pay them, and if the taxes are shewn to be unpaid after every legal exertion to recover them before the return of the collector's roll, the lands remain liable, and may be sold on execution as in any other suit, no matter who may have become the owner in the meantime.

I think it is quite clear that the plaintiffs are entitled to judgment on the demurrer to the avowries.

As to the demurrer to the replication of the defendants to the several pleas of the plaintiffs, and the issue thereby intended to be raised in reference to the *assessment* rolls, it appears to me that the plaintiffs are equally entitled to judgment. The plaintiffs simply take issue on the various facts set forth in the avowry, some of which are facts which operate in favour of the plaintiffs, but the defendants certainly can have no right to raise any other issue not raised by the pleas.

BURNS, J.—It does not appear to me the defendant has shewn any legal authority in the avowry pleaded for distraining the plaintiffs' goods. He relies chiefly, first upon the 24th section of the Assessment Act, Consol. Stats. U. C., ch. 55, which enacts that "when the land is assessed against both the owner and occupant, the assessor shall on the roll add to the name of the owner the word "owner," and to the name of the occupant the word "occupant," and the taxes may be recovered from either, or from any future owner or occupant, saving his recourse against any other person; and secondly, upon the provisions of the 104th section, giving the council power to appoint the collector or any other person to collect taxes where the collector has failed or omitted to collect the taxes by the 14th of December in each year.

The first matter for consideration is what is the true meaning of the expression, that the taxes may be recovered from any future owner or occupant, and the expression in the 96th section, "*the collector shall levy the same with costs, by distress of the goods and chattels of the person who ought to pay the same.*" Are they to be construed with reference to the time during which it may be said the collector's roll is in force for each year's taxes, or are they to be understood, as the defendant contends for in this case, as extending over and covering any length of time, so that the plaintiffs' goods are liable to be distrained upon for taxes assessed to another person in respect of the property six years before, and the property having passed through the hands of several persons, perhaps, in the meantime? I entertain no doubt what the proper meaning is.

By the 49th section the assessors are directed to complete their rolls in every year between the 1st of February and such day, not later than the 1st of May, as the council of the municipality appoints. The assessor of course sets down in his roll the facts in regard to owners and occupiers as he finds them at the time he makes the assessment. Between that time and the time the collector should return the roll, under the 103rd and 104th sections, the property assessed may have changed both ownership and occupancy, by sale, devise, or in various other ways, and in such cases the new owner or occupant may be said to be the proper person or party to pay that year's taxes.

The 105th section directs that the collector shall state in his return of the roll the reason why he could not collect that year's taxes, and if there be no property to distrain, should say so. The land is not thereby excused those taxes, for the 107th section enacts that it shall be a special lien upon it, and therefore it would be incumbent upon a purchaser to make enquiry, for the land itself would be liable to be sold, but that is a very different matter from distraining a purchaser's goods after a lapse of half a dozen years for the unpaid taxes.

The avowry states that the collector for the years now claimed returned the rolls as required by law. The 111th section of the act enacts that after the collector's roll has been returned no more money on account of the arrears then due shall be received by any officer of the municipality to which the roll relates, and the 112th section declares that the collection of the arrears shall thenceforth belong to the treasurer of the county alone. If the provisions of the statute have been carried out in respect to the non-payment of the taxes for 1855, the treasurer of the county may now be taking the steps he is directed to do to sell the land, at the same time that the defendant, under the authority he says he has from the municipal council of Kingston, is selling the goods of the plaintiffs for the same taxes.

This brings me to the next matter for consideration, namely, the allegation in the avowry, that in the year 1861 the defendant was appointed, by a resolution of the council, to collect the unpaid taxes remaining upon the rolls of 1855 and 1859, and to collect them from the person or persons who ought to pay the same. The defendant relies upon the 104th section as the authority for the council deputing him now to make collection of those taxes, and it would seem that it is imagined, by combining such an authority with what is enacted in the 24th section of the act, that a power exists by which, as exercised in the way stated here, the goods and chattels of a stranger may be rendered liable to the unpaid assessments against another person, after the lapse of any number of years.

The provisions of the 103rd and 104th sections, when combined in the same act, are not altogether consistent with each other. The first of these names the 14th of December in each year, or not later than the 1st of March in the next year, as the council may appoint, when the collector shall make his final return of the roll to the treasurer, whereas the latter section says that in case the collector does not collect the taxes by the 14th December, or such other day appointed by the council, the council may by resolution authorize the collector, or any other person in his stead, to continue the levy and collection of the unpaid taxes, but no such resolution shall alter or affect the duty of the collector to return his roll. These provisions were consistent enough with each other when they were respectively enacted, because they were enacted in different years. The first was by 16 Vic. cap. 182, sec. 46, and that gave the council authority to extend the time of payment of the taxes from the 14th of December to the 1st of March in the following year, and for the time of making the final return of the roll to such period. The second provision, which was enacted by 18 Vic. cap. 21, sec. 3, gave the council authority to extend the time for making the return still further, and authority also to appoint another person instead of the collector of the year to collect the unpaid taxes. In order, however, to show that it was the same years roll that was being dealt with, and reading the two sections together, as they should be, that it was a provision for extending the time of collection and final return of the collector's roll, the legislature use the expression that the new or additional power given to the council was in order to continue the levy and collection of the unpaid taxes, but that authority should not alter or affect the duty of the collector to return his roll. We have acted upon that view of the subject in the several cases cited in the argument, and have held that so long as the collector held the roll not returned, and time given, his authority to collect remained in force.

In the present case it is admitted that the collectors for the years 1855 and 1859 have returned the rolls of those years according to law, but it is contended that the council has the authority to appoint a person, notwithstanding the return of the roll, to collect the unpaid taxes of those years, and make the goods of a stranger to the lands assessed in those years liable for it. It is unnecessary in this case, I think, to express any opinion to what extent the legislature meant the 24th section and the power given to the collector by the 96th section to be carried, in making the goods of persons other than those appearing upon the assessment roll liable for the taxes, beyond the time within which the collector should return his roll, for the case may be decided upon the effect of the 110th, 111th and 112th sections of the act, which place the power of collecting unpaid taxes after the roll has been returned in other hands than the collectors of the municipality. After the collector's return of the roll the municipal council of Kingston had no authority to appoint any one to collect any of the unpaid taxes; the duty of collecting the unpaid taxes from the land belonged to the treasurer.

HAGARTY, J.—The avowry distinctly avers that the collector's rolls for the years 1855 and 1859 respectively were returned by the collector as required by law, and that after the return thereof the defendant was appointed by the council as collector to collect the taxes unpaid thereon.

I am of opinion that after the formal return of the roll by the collector, it is not in the power of the council to appoint any person to collect the unpaid rates by distress and sale. Another course is pointed out by the statute to enforce payment, by sale of the land.

Mr. Justice Burns has entered fully into these points, and I concur in his opinion.

The plaintiffs do not apparently rely on this bar to the defendant's proceedings, as their demurrer does not object to the avowry on this ground, and in their pleas they actually traverse the fact of the rolls being returned as alleged in the avowry.

We cannot, however, pass over the statement, fatal as we deem it to the defendant's justification.

Judgment for the plaintiffs on demurrer.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*)

Smart v. The Niagara and Detroit Rivers Railway Co.

Special endorsement—Summons—Balance on account stated—Interest.

Held, that an endorsement on a writ of summons as follows: "1861, Dec. 31st. To balance of account due and owing by the within-named defendants at this date for work and labour done and performed by the plaintiff for the defendants at their request, and for moneys paid by the plaintiff for the defendant at their like request, $5,950 47," with the usual claim for interest from that date, was a sufficient endorsement to entitle the plaintiff to sign judgment on default of appearance, and on a motion to set aside the judgment, &c., the indulgence was granted on payment of all costs, and giving security for the debt.

D. B. Read, Q.C., obtained a rule to show cause why the judgment signed in this cause should not be set aside with costs, on the ground that the claim of the plaintiff, as endorsed on the writ of summons, is not such a claim as might be specially endorsed on such writ so that final judgment could be signed thereon, and because such judgment was obtained without the knowledge of the defendants, their officers, attorneys or agents, and in breach of faith and violation of certain promises made by the plaintiff to the president of the said railway company, and that the plaintiff has or had no right of action against the defendants for the sum sued for, or for which judgment is signed, or any part thereof, the same not being due by the defendants to the plaintiff, and because the defendants have a good defence on the merits and on grounds disclosed in affidavits and papers filed, or why the defendants should not have such relief on grounds disclosed in affidavits and papers filed without imposing the terms of giving security for the amount of the judgment and costs as required by an order made in this cause on the 24th June, 1861, by the Hon. Mr. Justice Richards.

He moved on the affidavits used on the application in Chambers, all of which on both sides were before the court.

On hearing the parties at Chambers, an order was made on the 24th June, 1862, by Richards, J., that the judgment and all subsequent proceedings in this cause be set aside on the defendants giving security to the satisfaction of the deputy clerk of the crown at Woodstock for the amount of the said judgment, within four weeks from the date of that order, and upon payment of the costs of the said judgment and subsequent proceedings, and of opposing that application, within the said time, and upon payment of the costs of any action brought by the above-named plaintiff on the said judgment; and this order was without prejudice to an application being made next term to the full court to set aside the said judgment and all subsequent proceedings if the defendants should not take advantage of the terms of that order, proceedings in this cause being stayed during the above limited period of four weeks, and also being stayed in any of said actions on said judgment for the said time.

The special endorsement on the writs was as follows: "1861, Dec. 31. To balance of account due and owing by the within named defendants at this date, for work and labour done and performed by the plaintiff for the defendants and at their request, and for moneys paid by the plaintiff for the defendants at their like request. $5,950 47.

"The plaintiff claims interest on £1,487 12s. 4d. from the 31st day of December, 1861, until judgment. *N.B.* Take notice, &c., and the sum of £5 for costs."

Beard showed cause to the rule, referring to *Standing* v. *Torrance*, 4 U. C. L. J. 235; *Rodway* v. *Lucas*, 10 Ex. 667; *Hodsoll* v. *Baxter*, 1 E. B. & E. 884, C. L. P. Act, 48 sec.; *Knight* v. *Pocock*, 17 C.B. 177; *Bayntun* v. *Satchell*, 17 C.B. 383; *Maltby* v. *Murrells*, 8 H. & N. 819; *Bank of Upper Canada* v. *Vanvochis*, 2 U.C. Prac. Rep. 383; *Hawkins* v. *Hessell*, 12 M. & W. 777; *Leigh* v. *Baker*, 2 C. B. N. S. 367; *Mearns* v. *Grand Trunk Railway Co.*, 6 U. C. L. J. 62.

Read, Q.C., contra, cited *McKinstry* v. *Arnold*, 4 U.C. L. J. 68; *Buell* v. *Whitney*, 11 U.C. C. P. 240; *Rogers* v. *Hunt*, 10 Ex. 474.

Draper, C. J.—I agree with the view taken by my brother Richards, of the right of the plaintiff to sign judgment for want of an appearance, the writ having been specially endorsed with a claim of a balance of an account for work and labour. This, as expressed, appears to me a liquidated demand. There might be more question as to the claim for interest, but it has become so settled a practice to allow interest on all accounts after the proper time of payment has gone by, and particularly upon the balance of an account which imports that the accounts on each side are made up and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorsement; and I feel the less inclined to interfere because the objection is patent on the face of the roll, and a writ of error will therefore lie, as in *Hodsoll* v. *Baxter*, E. B. & E. 884, where Watson, B., observes that the intention of the legislature was to comprehend all cases except claims for unliquidated damages; and further, because there seems to me to have been a want of attention amounting to indifference or even neglect, to the plaintiff's repeated applications, and a careless mode of dealing with letters and papers, which has created uncertainty in the leading affidavits filed on the part of the defendants, and which deprives them of much of that weight which might otherwise have been given to them. And apart from this consideration, these affidavits, when examined in connexion with those of the plaintiff, fail to satisfy me that the neglect to appear to the writ, and to make whatever defence the company have, is at all answered or accounted for.

As to the terms of the order, they are no more than just to the plaintiff, because as to the costs the defendants ought to pay them as a condition of indulgence; and as to security, it is not suggested that there will be the slightest difficulty in procuring it, and it is the only mode of preserving to the plaintiff the advantage he has obtained in the event of its finally appearing that he has a right to recover.

I think the order should, however, be so far varied as to give the defendants fourteen days further time from this day to fulfil the conditions imposed, and with that direction I think the present rule should be discharged, the defendants to pay the costs of the rule.

Per cur.—Rule discharged.

Modeland et al. v. Maguire.

Apprentice—Partnership—Dissolution of—Release of apprenticeship by—Pleading.

The declaration claimed damages by reason of the defendant's son, who was bound to plaintiffs under articles of apprenticeship, absenting himself.

Pleas, 1st. *Non est factum.* 2nd. That before breach of the covenant the defendants dissolved partnership.

Upon demurrer, *held* bad, for not shewing that the apprentice was bound to the defendants as partners, and that by a dissolution it would render the service impossible, and thereby cancel the obligation.

The declaration alleged that the defendant by his deed bearing date the 18th of August, 1856, covenanted to and with the plaintiffs that John Maguire his son, an infant under the age of twenty-one years, should well and faithfully serve the plaintiffs as an apprentice to the trade or calling of a waggon maker, and that the said John Maguire should not absent himself from the service of the plaintiffs for the period of three and one-half years, from the 18th day of August, 1856.

Breach, that the said John Maguire did wrongfully absent himself from the service of the plaintiffs during the period last aforesaid, for a long time, to wit, for the space of twenty months, contrary to the terms of the said covenant.

1st *plea.*—*Non est factum.*

2nd *plea.*—The defendant says that at the time the said deed was made the plaintiffs were partners in the business of waggon makers, and as such carried on the said business. And the defendant further says, that before any breach of the said covenant the said plaintiffs dissolved partnership, and were no longer engaged in the said business as partners, and therefore the said John Maguire could not serve them as apprentice, as in the said covenant provided.

Demurrer.—That said second plea does not shew that the said son of defendant was bound to serve plaintiffs as partners.

That said plea does not shew that one of the partners was incapable of teaching said apprentice, and refused to do so.

Cameron, Q. C., for plaintiff, cited *Lloyd* v. *Blackburn*, 9, M. & W. 363; *The King* v. *Peck*, 1 Salk. 66; *Baxter* v. *Burfield*, 2 Strange 1267; *Inhabitants of Buckington* v. *The Inhabitants of St. Michaels Sebington*, 2 Lord Raymond, L. J. 1852; *Tasker* v. *Shepherd*, 30 L. J. Ex. 207; Chitty on Apprenticeship, 83; *King* v. *St. Martin's*, 2 Ad. & E. 655.

McMichael, contra, referred to *Ellen* v. *Topp*, 6 Ex. 424; *Popham* v. *Jones*, 13 Com. B. 225.

DRAPER, C. J.—The indenture declared on is not set out by either party. The plaintiffs have declared on it according to what they deem to be its legal effect, and the defendant adopts that representation of it. This would be consistent with the defendant's covenant, being in substance similar to that in *Popham* v. *Jones*, in which there was no reference to, or assertion of the plaintiffs being partners; and if, as is suggested by *Maule, J.*, a service of one might be a service of both, this plea would contain no answer to the declaration. I think there is no doubt a business may be carried on by two persons who are not co-partners. A capitalist may engage the service of a person skilled in a particular trade, and an apprentice might be bound to the two. It should appear, in order to make this plea an answer to the declaration that the covenant was so framed, that if the plaintiffs were partners, the dissolution of the co-partnership would, by rendering the service impossible, cancel the obligation to serve. Were this so, we should have to consider whether the principle of *Tasker* v. *Shepherd* (6 H. & N. 575) would govern.

As it is I think the plaintiff should have judgment on this demurrer.

Per cur.—Judgment for plaintiff.

CHANCERY.

(*Reported by* ALEXANDER GRANT, Esq., *Barrister-at-Law.*)

DRAKE v. THE BANK OF TORONTO.

Pleading—Usury—Bank directors and managers—Trustees. &c.

The rule of the court that a person seeking to impeach a security on the ground of usury, must offer to pay the amount actually advanced and interest, applies equally to the assignee of the debtor, although ignorant of the terms on which the security was affected.

The plaintiff in a bill to impeach a security held by an incorporated bank, stated that the notes held by the bank, and in respect of which the bank claimed a lien under their charter upon certain stock, had been "discounted for the said G., R. & H. upon an illegal and corrupt agreement, whereby and by reason whereof the said bank should and did receive from G., R. & H. upon the discount of the said promissory notes a much larger and greater rate of interest than at the rate of 7 per cent. per annum, and that it was only through and by reason of such discount upon such usurious consideration that the said bank became and now is holder of the said promissory notes." *Held*, a sufficient allegation of the usury between a stranger and a party to the transaction to let in the evidence of the usury.

Semble.—The directors and managers of incorporated banks are *quasi* trustees for the general body of stockholders, and if any loss should accrue to the bank by their infringing the statute against usury, they would be liable individually to make good the loss to the bank.

The bill in this case was filed by Elijah Drake and William Henry Bull, against the Bank of Toronto, William B Phipps, Frederick W. Jarvis, sheriff of York and Peel, and Henry A. Joseph, setting forth that about the 17th of November, 1860, Bull, acting on behalf of his co-plaintiff, received for a valuable consideration from the co-partnership firm of Gillyatt, Robinson, & Hall carrying on business in Toronto, their promissory note for $1500, payable at 27 days after date, to Drake, or order; and that by way of securing this as well as other notes, the firm deposited with Bull a certificate of stock or scrip of the Bank of Toronto, for twenty shares of the capital thereof, of $2000 value, and which stock had been fully paid up, accompanied by a memorandum in the words following:

"We have this day deposited with Elijah Drake the annexed Bank of Toronto scrip, for twenty shares of the capital stock of said Bank of Toronto. amounting to $2000, as security for the payment of our note this day given, for $1500, 27 days after date, with full authority to sell said shares of said stock at public or private sale, on the non-payment at maturity of our aforesaid note, and in case said shares of said stock shall not bring sufficient to pay said note, we agree to pay whatever sum may be remaining due after said sale, and we have this day appointed H. R. Forbes our attorney, to transfer said shares of said stock. Said Elijah Drake is further authorised to hold said shares of said stock as security for any notes, obligations, or indebtedness of ours either as makers or endorsers, given to or held by him, or to W. H. Bull, or to W. H. Bull & Co., and in case of non-payment thereof to sell and transfer at his option said shares of said stock."

And at that time the firm delivered to Bull the power of attorney to Forbes therein referred to; that Bull on the 20th of November became the holder of another note of the firm for $800, payable in 12 days after date; which not being paid at maturity, Bull requested Forbes to transfer the stock to Drake or Bull, in order to perfecting their security, but that the bank, acting through their cashier or manager, refused to allow such transfer to be affected, alleging as grounds for such refusal, that the power of attorney to Forbes was executed by Gillyatt, Robinson & Hall in their partnership name, and not by the partners individually, although such stock stood in their partnerships name and style of Gillyatt, Robinson & Hall. Also, that the firm were liable to the bank as endorsers of promissory notes endersed by, and by the bank discounted for the firm, which were then current, and in respect of which the bank under its charter claimed to hold a lien or security on such stock.

The bill further alleged that the plaintiffs had been informed that the promissory notes so held by the bank, and in respect of which they set up such lien on the stock had been discounted by the bank upon an usurious consideration, and in contravention of the statute in that behalf, The bill then enumerated five notes so held by the bank, amounting in all to $2391.91, all payable to the order of the firm, and endorsed by them, which said notes the plaintiffs alleged were by the "The Bank of Toronto discounted for the said Gillyatt, Robinson, & Hall, upon an illegal and corrupt agreement, whereby and by means whereof the said bank should and did receive from Gallyatt, Robinson, & Hall, upon the discount of the said promissory notes, a much higher and greater rate of interest than at the rate of 7 per cent. per annum, and that it was only through and by reason of such discount upon such illegal and usurious consideration that the said bank became and now is the holder of the said promissory notes;" and charged that the notes in the hands of the bank were utterly void, and that in respect thereof the bank had no lien or claim upon the stock.

It appeared that Gillyatt, Robinson & Hall had made an assignment in trust for the bebefit of creditors, to the defendant Joseph, and that Phipps had recovered judgment against the firm, and sued out execution thereon, which he had placed in the hands of the defendant Jarvis as such sheriff, and under which it was alleged he was about to proceed to sell the stock in question.

The bill, amongst other things, prayed, that under the circumstances, the plaintiffs might be declared entitled to the stock in preference to the bank; that the bank might be ordered to suffer a transfer thereof to be made, or that a sale thereof might be made, and the proceeds applied in payment of plaintiffs, in preference to the bank.

The bank answered the bill denying all knowledge of the transactions in question, and that the notes were discounted on usurious consideration, and submitted "that the pretended usury is so vaguely, generally, and indifferently pleaded and alleged in the bill that the plaintiffs are not entitled to give any evidence thereof."

The cause having been put at issue, was set down for the examination of witnesses before the court. In the course of the examination of the witness Robinson, a question was put for the purpose of obtaining an answer establishing the usury alleged in the bill, when it was objected by

Strong, for the Bank of Toronto.—That under the statements in the bill the plaintiffs were not at liberty to prove the fact of usury, it not having been alleged with sufficient certainty as to time, the amount of money lent and foreborne, and the amount of the excess of interest charged. The rule he contended, being,

that these facts must be alleged and proven with as much distinctness in this court is in a court of law. The allegation, as it stands, is a mere general allegation of usury, this, as in the case of a general charge of fraud, is insufficient, as the defendants are in reality ignorant of the case to be made, and are unprepared to meet it.

A Crooks, for the plaintiffs.—The statements in the bill follow substantially the words of the act, (22 Vic., ch. 58.); which is sufficient; the particularity insisted on by the other side, is only required where the parties to the transaction are themselves the litigants, not where the objection is taken by strangers.

Willes on Pleading, page 175; *Bond* v. *Bell*, 4 Drew. 157; *Mansfield* v. *Ogle*, 7 D. M. & G. 181. *Thibault q. t.* v. *Gibson*, 12 M. & W. 88; *James* v. *Rice*, 1 Kay, 231. were amongst other cases referred to.

[Esten, V. C.—I think as between a stranger and a party to the transaction the usury is stated with sufficient particularity, and that the evidence ought to be received.]

Afterwards the evidence was proceeded with, the principal witnesses being Robinson, and the manager of the bank. Robinson in his evidence, after enumerating several notes discounted by his firm at the bank, and the amount of discount charged on each, stated that the bank still held one of these notes, that the funds of this note were placed to his credit by the bank, the rest having been retired; that the proceeds were placed to his credit by the bank. With a portion of them he purchased a draft on New York for $1000, from the bank, at 1 per cent. premium; that he had no occasion to purchase the draft—did not desire to remit funds to New York—that he believed Mr. Cameron, the cashier, was aware of this fact. Mr. Cameron always told him that it did not pay them to discount at 7 per cent; that they would not do so. It was thoroughly understood between Mr. Cameron and him that he should take drafts on New York, or Montreal, on the discount of bills or notes, and the draft in question was taken in persuance of the general understanding. "When I presented bills for discount at the bank Mr. Cameron frequently told me that it did not pay them to discount at 7 per cent." Mr. Cameron stated this frequently, but that it came to be understood between them that the firm should take drafts on discounts; it was commonly done, Mr. Cameron always reminding witness that he must take drafts on his applying for discounts. Mr. Cameron instructed the book keeper what premium to charge; had no voice in fixing the rate of exchange. When the discount in question took place the understanding had been thoroughly established, and the draft was taken in pursuance of the general course of dealing Sometimes these drafts were redeposited at par, sometimes he sold them on the street. The witness further stated that on the 17th of October, 1860, the firm obtained a discount from the bank, the proceeds of which, $1483.40, were placed to their credit, with which proceeds they purchased a draft on Montreal for $1500, for which they paid three-forth per cent, premium, viz, $11.85, the ordinary rate of exchange on Montreal about that time at the bank being one-forth per cent. as witness knew, from having purchased drafts for cash about the same time. That on the 31st of October, 1860, they obtained a discount from the bank, and with the proceeds purchased a draft on Montreal for $1600, at three-forths per cent., which witness believed he re-deposited at par on the same day, on which day there was a large amount at the credit of the witness; about the same time the witness believed he purchased drafts from the bank at one-fourth per cent. premium. This witness stated other transactions much to the same effect, and during all this time the firm had purchased drafts from the bank on New York and Montreal, as they needed them for cash at one-half per cent. on New York, and one-forth per cent. on Montreal.

The manager of the bank, in his evidence, swore that one of the directors stated to him and the president of the bank that Gillyatt, Robinson & Hall had large transactions in the States, and would require, in the course of their business, a large amount of New York funds, and on this representation agreed to take their account and paper that would be satisfactory; that Robinson confirmed this statement afterwards, and stated to witness that they would require a large amount of New York funds to pay for their purchases in Boston; that this was the inducement to taking their account. He denied any arrangement with Robinson or his firm that they should take drafts on New York or Montreal, on discounts, otherwise than that the bank understood they would require drafts on New York and Montreal in the conduct of their business; that the rate of exchange on those cities is regulated by the supply and demand; that there is no fixed rate—it varies sometimes daily. The banks charge different rates constantly in the same day; that Robinson was generally charged three-fourths per cent. for drafts on Montreal, although all the customers of the bank were not charged that rate—the rate charged each individual depending entirely upon the nature and state of his account; that the bank had different rates for different parties; a stranger buying would be charged the rate marked on the counter, which is so marked for the day—sometimes for the hour. A customer requiring heavy discounts might be charged a higher or lower rate than marked on the counter, according to the state of his account. The other evidence materially bearing on the case is stated in the judgment.

At the hearing of the case,

A. Crooks and *Blake* for the plaintiffs.

The error into which the other side has fallen, is in treating this suit as one for redemption: this it clearly is not, but simply one to compel the perfecting of the title of the plaintiffs to the bank stock held by them as security. The rule that a mortgagor, in coming to impeach a mortgage for usury, is bound to tender the principal sum advanced and legal interest, does not apply when the same relief is sought by a second mortgagee. *Belcher* v. *Vardon* (2 Coll. 162); *Fitch* v. *Rockport* (1 McN. & G. 184); *Cole* v. *Savage* (10 Page, 583).

As to the fact of the usury having been committed, it is not necessary to prove a direct contract or agreement; that, in many instances, could never be proved. When parties contemplate entering into such an agreement some devise or cloke is invariably resorted to, and the question for the court to decide is, whether a jury, looking at all the circumstances of the case, would or would not say that usury was intended. By the statute the bank cannot take a higher rate of premium for its drafts when a discount is required to purchase than when cash is paid; this would clearly be in violation of their charter, and the act is equally violated by their requiring a draft to be taken when not wanted by the party, as when a draft is wanted by their demanding a rate higher than that usually asked. When goods were furnished in whole or part the onus of proving that the goods were sold at the market value was upon the lender: here drafts were taken by the firm which they did not require at an increased premium; in other words, goods were sold to them above their market value. *Harris* v. *Boston* (2 Camp. 348); *Lowe* v. *Waller* (2 Doug. 736); *Pratt* v. *Wiley* (1 Esp. 40); *Harrison* v. *Hannel* (5 Taunt. 780).

Mowat, Q.C., and *Strong*.—The rule with respect to the necessity for a party seeking to impeach a security on the grounds of usury tendering the amount of principal and legal interest, is greatly strengthened by the recent alteration of the law regarding usury, for if that rule prevailed at a time when usury was viewed with so much disfavour, still more will such a rule be upheld and allowed to prevail now that the law has been so much relaxed; and here it is contended that the bank has a lien, and it is immaterial how that lien is created, whether by law or act of the parties, the same rules will apply. The *Upper Canada Building Society* v. *Rowell* (19 U. C. Q. B. 124), *Commercial Bank* v. *Cameron* (9 U. C. C. P. 378), shew that the courts will take into account the fact of the relaxation of the usury laws, although in strictness it might be thought that the particular transaction might have been an evasion of the law.

The evidence in the case does not establish that when the particular discounts now impeached were made the firm should take drafts for the proceeds of such discounts; it was never made a condition of their obtaining a discount that drafts should be purchased by them, nor was any agreement made that they should pay more than the current rate of premium, nor that a draft should be taken when not required by the parties. The evidence shews that the drafts purchased were not for the same amounts as the discounts, and not purchased on the same day.

It was also objected that this court had not the power to compel the bank to allow the transfer to be made; the proper proceeding being by mandamus.

ESTEN, V. C.—The facts of this case are, that a mercantile firm of Gillyatt, Robinson and Hall, being indebted to the plaintiffs on a promissory note for $1500, deposited with them scrip for twenty shares of the capital stock of the Bank of Toronto, belonging to them, as collateral security for that note, and any other note or debt which they might owe to the plaintiff Drake, or to Henry Bull, or Henry Bull and Company, and delivered to the plaintiff a power of attorney to one Forbes, signed with the partnership name, authorising him to transfer the stock in the books of the bank into the name of the plaintiff so soon as default should be made in payment of any of the debts for which it was to be held as security. Henry Bull afterwards became possessed of a note for $800, on which Gillyatt, Robinson & Hall were liable, and default being made in payment of this note, and afterwards of the note for $1500, the defendants, the Bank of Toronto, which is a corporate body, established for the purpose of conducting the business of bankers, were required to permit a transfer to be made of the stock in question in their books into the name of the plaintiff, which they refused, on the ground, first, that the power of attorney was null and void, being signed only with the partnership name; and second, that Gillyatt, Robinson and Hall were indebted to them on several promissory notes of third parties, endorsed by the firm, and discounted for them by the defendants, and that the defendants had a lien on the stock in question for this indebtedness by virtue of the 21st clause of the act by which the bank was established. Meanwhile Gillyatt, Robinson and Hall had made an assignment of all their property to the defendant H. A. Joseph, upon the several trusts, for the benefit of their creditors; after which, however, the creditors accepted a composition, and released their debts, the composition being secured or guaranteed by Mr. Joseph, who thereupon became entitled to the estate for his own benefit, and Gillyatt, Robinson, and Hall have no longer any interest in it. Pending these proceedings Mr. Joseph applied to the bank to renew in part a note of one Vandell, being one of the notes upon which Gillyatt, Robinson and Hall were endorsers, as before mentioned, telling them that if that course was not adopted Vandell would fail, and his note would become a loss, and offering, if the bank would comply with his proposal, to guarantee the payment of the rest of the paper, held by the bank, of Gillyatt, Robinson and Hall; which offer the bank declined, declaring that they relied on their lien on the stock, and were indifferent as to the payment of the notes. The plaintiffs, upon learning the claim advanced by the bank, applied through their attorney, Mr. Boyd, to pay to the bank what was due upon the notes, upon having the notes delivered to him, and the stock transferred into their name, but the bank refused to accept this offer; and thereupon the present suit was instituted, in which, in addition to the facts before stated, the plaintiff insists that the notes held by the bank, and for which they claim a lien on the stock, were discounted by them upon an usurious contract; that consequently no indebtedness existed to them on the part of Gillyatt, Robinson and Hall, and they had no lien on the stock in question, which it was their duty to allow to be transferred as requested, and praying that he might be declared entitled to the stock in preference to the bank, and that the bank might be ordered to permit a transfer of it to be made into the name of the plaintiff; or that a sale might be made of it, and the plaintiffs paid their debt in preference to the bank; or in case of any loss, that the bank should make it good; or that the plaintiffs might be allowed to redeem the stock and the notes, or that they should be marshalled; or that, if any loss should have happened on the notes, by reason of the refusal of the bank to deliver them to the plaintiffs, that the bank should make it good.

It should be mentioned, that the bill contains a sort of minor case against another defendant of the name of Phipps, who had obtained judgment against Gillyatt, Robinson and Hall, and had threatened to proceed to a sale of the stock under execution, and the bill prays that he may be restrained from so acting. The defendants, the Bank of Toronto, answered the bill, denying the alleged usury, but insisting that the plaintiffs must, at all events, pay what was really advanced, with legal interest, and relying upon their lien on the stock. The bill was taken *pro confesso* against Phipps.

The sheriff of York and Peel is also a party to the bill, and H. A. Joseph, the assignee of Gillyatt, Robinson and Hall, as interested in the equity of redemption of the stock and notes. Evidence was entered into on both sides, and the case was argued fully with much ability. The first point discussed was whether, supposing the transaction to be usurious, the plaintiffs were bound, as a condition of obtaining relief from this court, to tender the principal sum advanced and legal interest. It was contended that the bank had no lien on shares of stock for any debt due to it from the holder of them, under any circumstances; that when the debt or liability claimed by it against such holder was tainted with usury and void, the bank could not prevent a transfer of the shares; that the equitable doctrine respecting the payment of the sum really advanced, and legal interest, did not extend to a subsequent incumbrancer or purchaser from the mortgagor; and that the bill did not, in the first place, pray redemption, but sought to compel the performance of a duty incumbent on the bank. The 21st clause of the act was certainly intended to give to the bank a sort of security on the shares of its stock held by its debtors for the amount of their debts. No transfer can be made until all debts are paid. This must be intended as a security. The mere retention of the stock until payment operated as security; and I apprehend that the dividends accruing in the meantime can be applied by way of set-off in satisfaction of the debt. On the final arrangement of the affairs of the bank all debts would be deducted from the stock before its avails would be paid to the holder. If, in addition to these rights, the stock is to be considered as the property of the debtor, so that the bank could proceed to a sale under execution upon a judgment obtained against him, in preference to all intermediate sales and dispositions either by the owner or under legal process, the security is greatly augmented. But, under any circumstances, it is a security of considerable importance, and whether it is created by the act of the party or the operation of law can be of no importance to the application of the equitable doctrine which has been mentioned. It is said, however, that where there is no legal debt there is no security. But the same remark is applicable to an usurious mortgage. If the mortgage were tainted with usury it was a nullity. No estate passed to the mortgagee: the mortgage-deed was a mere piece of paper—no debt existed. The court, however, would not lend its aid to destroy it but upon terms which it considered equitable. So, in the present case, to compel a transfer of the stock would be to annihilate the security, and if the aid of the court be wanted for that purpose, it must, as appears to me, be on the same terms. Such would be my judgment if the relief were sought by Gillyatt, Robinson and Hall; but it can make no difference that the party seeking relief is not the mortgagor, but an incumbrancer claiming under him. How can he stand in a better position than the person under whom he claims—at all events, as a plaintiff seeking relief?

I have examined all the cases cited by Mr. Crooks, and they all appear to me to recognise the doctrine in question, and no distinction is made between the mortgagor and a purchaser or incumbrancer claiming under him. Even the case of *Belcher* v. *Vardon* recognises the doctrine; if it had not, relief would have been given without even proving the debt under the fiat. The case in 10 Paige (*Cole* v. *Savage*) recognises the doctrine expressly, and the case in 1 Johnston (*Rogers* v. *Rathbun*, 1 J. C. C. 367) in effect; the case of Lord *Mansfield* v. *Ogle* is distinguishable, and so are the cases in bankruptcy. My opinion, therefore, is, that if the aid of this court is required to destroy this security, whatever it may be, and however imperfect it may be, it must be upon the terms of paying to the bank what they would have been entitled to receive upon a legitimate discount of the notes in question, supposing the actual transaction which occurred to have deviated from that standard.

This consideration introduces the second question, whether the transaction in question was not in fact usurious; which, however, in consequence of my determination on the first point, becomes of little practical importance. My sole concern is with the four transactions which form the subject of this suit; and which occurred respectively on the 26th of September, the 17th of Octo-

ber, the 31st of October, and the 16th of November, 1860. The three first transactions involved purchases of drafts on New York and Montreal respectively, and the usury imputed to them consists in an alleged charge of one-half per cent. for these drafts respectively over and above the market price prevailing at the times of the respective purchases; three-fourths per cent. being charged for the drafts on Montreal, the market price being one-fourth per cent.; and one per cent. being charged for the drafts on New York, the market price being one-half per cent. I have no doubt that if upon a discount of bills or notes the borrower should be paid wholly or in part with a draft charged at a rate beyond the market price for cash at the time, it would be usury.

The cases reported in 2 Campbell, 348 and 375, and other cases of that class place this beyond doubt. A bank choosing to discount paper receives the rate of interest allowed by law, which must be deemed a sufficient remuneration, and exercises care in securing responsible endorsers, so as to guard against all risk, and must pay cash, or what is equivalent to cash, to the borrower. It may pay wholly or in part in a draft, but it must be at the market price of the day, for cash, and any departure from this rule would be usury. If the market price only were charged, it would not seem to render the transaction objectionable that the borrower did not require a draft, and that it was in a measure forced on him, provided the sale were upon such terms that he could realize what he paid upon a re-sale. The question is, whether upon the three transactons I have mentioned the purchase of drafts was upon terms exceeding the market price for cash prevailing on the days on which they occurred respectively. The evidence on the subject is that of Messrs. Cassels, Robinson, and Cameron. Mr. Cassels proves that during a period embracing the times of these purchases, the rates of exchange on Montreal and New York respectively were one-half and one-quarter per cent. He says, however, that no agreement existed amongst the banks on the subject, but that for the most part the larger banks adopted the same rate. He shews, however, that at one time when the bank of which he is manager was charging one per cent. for drafts on New York, the bank of Upper Canada was charging one-half per cent., adding, that he believed a particular reason existed for it. Robinson states in his evidence that it was an understood thing between him and Mr. Cameron, that upon every discount obtained by his firm from the bank, a draft should be purchased on New York or Montreal; that Mr. Cameron fixed the rates without consulting him, or allowing him a voice in the matter; and that the rates charged upon discounts were three-fourths per cent. for drafts on Montreal, and one per cent. for drafts on New York; that during the six months ending on the 31st of October, 1860, his firm obtained discounts to the amount of $22,000 and upwards, and purchased drafts on Montreal and New York to the amount of over $23,000 at the respective rates of three-fourths and one per cent., while during the same period they purchased drafts to a large amount, for cash, on the same places, at the respective rates of one-quarter and one-half per cent.; that Mr. Cameron frequently said to him that it did not remunerate them to discount at 7 per cent.; that it came to be understood that whenever he obtained a discount he must purchase a draft; that this understanding was thoroughly established at the time of the transactions in question; that he purchased a draft on New York at one per cent. in connexion with the discount which occurred on the 26th of September, and re-sold it on the street at par; that this was in pursuance of the understanding in question; that he purchased drafts on the 17th and 31st of October, at the rate of three-fourths per cent. on Montreal, and one per cent. on New York out of the proceeds of discounts which occurred on those days respectively. Mr. Cameron in his evidence stated that there was no fixed rate of exchange on Montreal or New York; that it varied from day to day, and from hour to hour; that it was regulated by circumstances, amongst which he instanced the state of their funds at the places on which they drew at the time; the state of the account of the party with whom they were dealing; the nature of the funds in which they were paid; that a party purchasing a draft on a discount would be charged a higher rate than a party paying cash and maintaining a good balance in the bank. That a rate was always exhibited on the counter for the day, and sometimes for the hour; and that a stranger purchasing exchange for cash would be charged according to this rate.

Mr. Cameron heard Robinson's evidence given, and did not contradict many particulars stated by Robinson in his evidence. Upon this whole evidence I should hesitate, if I were on a jury, to affix to these transactions the character of usury, whatever suspicion I might entertain. It is possible, consistently with this evidence, that on the days on which these transactions occurred, the defendants, the Bank of Toronto, might have charged the same rates for cash as were charged to this firm on these discounts. There is nothing in the evidence to shew that this was not the case. Robinson purchased no drafts for cash on those days, nor does he prove any transaction of this nature between the bank and any other person on those days, nor what the current rates on those days respectively were. It is true that during the six months ending on 31st of October, he purchased in connexion with discounts at the above mentioned rates drafts to a greater amount than he obtained discounts. This fact, however, would not prove that the discounts in question in this cause involved the purchase of drafts at all; much less would it shew that drafts were purchased at more than the current rates; in short it is not shown that in these transactions drafts were purchased by this firm at more than the current rates for cash, or that they were forced upon them against their will. I dare say some such understanding existed as Robinson mentions; but it might exist legally. I dare say also, that Robinson purchased the drafts in question in pursuance of this understanding, and perhaps without requiring them; but it may have been done voluntarily, and without the bank being aware that he did not require them, and without their charging him more than the current rates. What I mean is, that the understanding may have been nothing more than this, namely, that the bank preferred those customers who required exchange; that they would not continue the accounts of those who did not require exchange, although they would not force a draft upon any one, or charge more than the current rates; and it is possible that the knowledge of this fact may have induced Robinson sometimes to purchase drafts when he did not require them but of his own accord, and without being required so to do by the bank. It is possible, consistently with this evidence, that the transactions in question may have been legally conducted, and I should not, therefore, if I were on a jury, ascribe the character of usury to them, and I think I must arrive at the same conclusion acting as a judge of the law and fact.

The third point discussed was as to the right of the plaintiff to have these securities marshalled, so that if the bank exhausted the stock they might stand in its place *quoad* the promissory notes. I should think the doctrine would apply to such a case, and that relief of this sort would be given; but it appears to be of no practical importance under the circumstances of the case, as the plaintiffs must pay the bank what is due to it, and will then be entitled to a transfer of the stock, and a delivery of the securities. The bank cannot be compelled *a priori* to take its satisfaction out of one fund more than out of the other, although if the funds should be realized, it would be thrown upon that which was not common to both parties. This is what I understand by the doctrine of marshalling.

The fourth point argued, was, whether the bank should be charged with the amount of Vandell's note, lost, as is alleged, through their refusal to accept Mr. Joseph's offer; but the answer to this claim is, that the bank was not bound to accept that offer, and Joseph, if he desired to preserve Vandell's note, should have paid the amount due to the bank, and dealt with the note as he should think fit. As to Phipps, there is no doubt that he must be enjoined from selling the stock. He can stand in no better position than the judgment debtor; and a decree may be pronounced against him with costs of this part of the suit. The sheriff seems to me an unnecessary party, and must have his costs. As the main subject of the suit, the usual decree must be pronounced for redemption and foreclosure or sale.

I may add, that I have been unable to trace the supposed defect in the fourth discount, occurring on the 16th of November. With regard to the offer made through Mr. Boyd, if the amount due to the bank had been actually tendered, and they had refused to received or deliver the securities or transfer the stock, and

thereby rendered a suit necessary, they might have been charged with the costs of it; but it does not appear that the money was actually offered to the bank, and it cannot be doubted that if any such offer had been made it would have been accepted.

The plaintiffs being dissatisfied with this decision of his Honor, brought the cause to be re-heard before the full court. On the re-hearing

A. Crooks and *Blake* again appeared as counsel for the plaintiffs.

Strong, for the defendants.

VANKOUGHNET, C.—Although a perusal of the whole evidence in this cause connot fail to impress one with a strong feeling that in the dealings of this bank with the firm of Gillyatt, Robinson & Hall, an attempt has been made to elude the provisions of the recent statute of this province, prohibiting the taking by any bank of more than seven per cent. per annum for the loan and forbearance of money, I do not think the evidence here is of that clear and conclusive character to warrant relief being granted to the plaintiffs on that ground. When the legislature was repealing the laws restricting the amount of interest to be taken by private persons for the use of money, it saw fit to retain those restrictions in their full force, so far as the banking institutions of the country are concerned; feeling no doubt, that as there are conceded to those bodies vast and important privileges and advantages in the conduct of their business, they ought to be restricted in the amount of interest they should be permitted to charge; and there can be no doubt as regards them the laws against usury remain in force, and in a proper case will be applied with the utmost regour. And while at this point, it may be well to direct attention to the position which gentlemen having the control and management of the monied institutions of the country occupy; for I have no doubt that should at any time a serious loss be sustained by a bank in consequence of the managers or directors attempting to envade the usury laws, those gentlemen may be held personally bound as trustees for the general body of the stockholder to make good such loss.

In the present case, if the plaintiffs had succeeded in clearly establishing the alleged usury, relief could have been granted to them only on condition of submitting to pay the sum actually advanced, together with legal interest. I think the decree pronounced by my brother *Esten* must be affirmed, and the present re-hearing dismissed with costs, to be taxed by the master.

ESTEN, and SPRAGGE, V. CC., concurred.

DANIELS V. DAVIDSON.

Mortgage with power of Sale—Demurrer for want of equity, and for want of parties.

A person conveyed one acre of certain lands, part of 200 acres, in fee to one D., and afterwards mortgaged the 200 acres, including the one acre, to one S., which mortgage contained a power of sale. The conveyance to D. of the one acre was not registered till after the mortgage, but before the power was exercised. *Held*, that under a mortgage with a power of sale duly registered, any sale made under the power will cut out any deed intermediately made by the mortgagor and registered—and if the power of sale in such a conveyance can, under the registry laws, give to a deed executed by virtue of its priority over a deed made subsequently to such a conveyance, but made and registered prior to the exercise of the power, the same effect must be given to it in relation to a deed executed before the conveyance containing the power, but not registered until after that conveyance—Effect of Stat. 9 Vic., ch. 34, s. 6, with reference to a power of sale contained in a mortgage.

The bill in this case, which was filed by Alexander Daniels, set forth, that on the 25th day of April, 1846, one George P. Goulding, being seized in fee of all and singular that certain parcel of land, being lot number 19, in the 5th concession of the Township of Mariposa, in the county of Victoria, containing 200 acres, did, by indenture bearing date the 25th day of April, 1846, convey and assure for valuable consideration by a good and sufficient deed in fee simple unto the plaintiff, one acre of the south half of the said lot, and described therein as village lots numbers 1, 2, and 5, on the north side, and 5 on the south side in said lot number 19; that plaintiff did not cause his deed to be registered until the 12th day of August, 1847; that on the 18th day of June, 1846, the said George P. Goulding and Lewis S. Church, who was interested in the said lands by an indenture by way of mortgage, conveyed the whole of the said lot number 19, containing 200 acres, and including the said one acre so conveyed to plaintiff as aforesaid, in fee simple, for the sum of $4,135, to one Abraham Cutler, who, on the 20th day of June, 1846, caused the same to be registered previous to the registration of the deed to plaintiff before mentioned; that on the 14th day of December, 1846, the said Abraham Cutler assigned the said mortgage to the defendant Thomas Clark Street; that in the month of June, 1848, the said Thomas Clark Street, with full notice of the said deed to the plaintiff, under and by virtue of a power of sale contained in the said mortgage, sold and conveyed, or pretended to sell and convey, the said lot of land, containing 200 acres, including the said one acre so conveyed to the plaintiff as aforesaid to the defendant Samuel Davidson; that plaintiff never received any notice whatsoever from the said Thomas Clark Street, or from any person or persons on his behalf, of the said sale of the said 200 acres, nor was plaintiff aware of the said sale, or that the defendant Samuel Davidson claimed title to the said land thereby, until recently, but was led to believe that the said Samuel Davidson was the assignee of a mortgage made by the said George P. Goulding and Lewis S. Church to one William L. Perrin.

Plaintiff submitted, that his said deed being duly registered nearly twelve months before the pretended sale by the said defendant Thomas C. Street, under the power in the said mortgage, the said Thomas C. Street sold and the several other defendants purchased, with full notice of plaintiffs title to the said land, and that by reason of the want of notice to plaintiff of the said sale, under the power contained in the said mortgage, the said sale and conveyance by the said Thomas C. Street to the said Samuel Davidson, and the subsequent purchases by the other defendants, were wholly void, and the said defendants took no title thereby, or if any, only subject to the right of plaintiff to redeem.

The defendant, Thomas Clark Street, demurred to this bill—generally, for want of equity as against him, and for want of parties, alleging that George P. Goulding and Lewis S. Church (as mortgagors) were necessary parties.

J. H. Cameron, Q.C., for the plaintiff.

S. Brough, Q.C., for the defendant Street.

THE CHANCELLOR.—This bill in effect alleges that the plaintiff, having acquired a title in fee to one acre, one of two hundred acres of land, from one George P. Goulding, by deed bearing date the 25th April, 1846, the said Goulding, and one Church, who had an interest in the said land, subsequently mortgaged the whole two hundred acres to one Cutler, to secure the repayment of $4,186, and that this mortgage was registered on the 20th June, 1847, prior to the registration by the plaintiff of his deed, which took place on the 12th August, 1847; that on the 14th December, 1846, Cutler assigned this mortgage to the defendant Thos. Clarke Street; that in June, 1848, the assignee, acting under a power of sale contained in the mortgage, but with full notice of the plaintiff's deed, sold, without notice to the plaintiff, the said land to the defendant Davidson, who has made sales of portions thereof to the other defendants.

The bill, while admitting and submitting that by reason of the prior registration of the mortgage, the plaintiff's deed of the one acre became in respect thereof a subsequent incumbrance, insists that inasmuch as the plaintiff's deed was registered prior to the sale to Davidson, the latter and all claiming under him bought with full notice of that deed; and that by reason thereof, and of the want of notice to the plaintiff of the intended sale under the power, the same is as against him inoperative, and he claims the right to redeem.

To this bill the defendant has demurred for want of equity, and on the ground that the mortgagors ought to be a party to the bill.

On the argument, Mr. Cameron, Q. C., very properly abandoned the position assumed by the bill, that notice to the plaintiff of the sale, if it could be made at all under the mortgage, was requisite, as it does not appear that there was any stipulation for notice in the power of sale; but he strenuously and ably urged—and I was much impressed with the argument—that the deed to the plaintiff having been executed before the creation by the mortgage of the power of sale, and having been registered before the execution of the power, the sale under the latter could not have priority over

the plaintiff's deed; that the registry laws did not provide in such a case, for the registration of a power, but merely for the registration of a deed, which in itself operated by way of consequence; and that the plaintiff's deed, having priority of registration over the deed executed under the power, took precedence of it. There is great room for argument in support of this position; but on reflection, I think it cannot be sustained under the law as it has been administered and understood to exist. In the first place, it is said that the registration of a mere power, though coupled with an interest, would be ineffectual against a subsequent conveyance of the estate, registered or unregistered, as the registry law—at all events as it stood in 1846—did not provide for the position of such a document, or the right given by it. Is this so clear? In the first place, it is urged, on the other side, that a power coupled with an interest—as for instance a mere power of sale over an estate to repay a loan—cannot be revoked, unless it be by force of the registry laws. Cannot it then be secured from such revocation by force of the same laws? We must look at their intent and object to consider this. The statute 9 Vic. cap. 34, sec. 2, gives the effect therein prescribed to all deeds and conveyances, "whereby any lands, &c., may be in any wise affected in law or equity." A deed is not necessarily a conveyance. It is an instrument under seal, and when executed *inter partes* is called an indenture. Suppose an indenture, whereby A. acknowledges the receipt from B. of a sum of money, covenants to repay it, and in default gives to B. power to sell the land, such a deed certainly affects the land in equity, and would be executed by this court if necessary.

I am not, however, driven to decide upon this more naked position. In the present case the mortgage which contains the power of sale is a consequence, and the bill admits that the plaintiff's deed must be postponed to it so far as it is a mortgage; but he argues, as already stated, that the power of sale is inoperative as against him. It was, I believe, conceded—and at all events it has been too long admitted law for me to venture to question it—that if a mortgage with a power of sale be registered, any sale made and deed executed legally under that power will cut out any deed intermedially made by the mortgagor and registered. If this be so, it must dispose of the whole question, because it can only be by force of the registry laws that the exercise of the power of sale could have any such effect. If it is only the conveying part of the deed that by the registry laws can gain priority or effect, and not the power of sale, then it would follow that a deed made and registered subsequently to such a conveyance would cut out a deed executed afterwards under the power, and yet by universal practice and consent such has not been its effect. If the power of sale in such a conveyance can therefore, under the registry laws, give to a deed executed by virtue of it priority over a deed made subsequently to such a conveyance, but made and executed prior to the exercise of the power, the same effect, in my opinion, must be given to it in relation to a deed executed as here before the conveyance containing the power, but not registered till after that conveyance. Demurrer allowed.

Bank of Montreal v. Woodcock.

Judgment creditor—Registration.

Where a bill has been filed prior to the 18th of May, 1861, *all* judgment creditors who had their judgments duly registered, are entitled to be treated as parties to the cause, though not actually named in the bill, and not added as such in the master's office until after that date, without having placed *fi. fas.* against lands in the hands of the sheriff.

This was an appeal from the report of the master of this court at Woodstock, upon the ground that he had refused to allow the claim of a judgment creditor.

Burton for the apellant.

Leys, for subsequent incumbrancers, contended that the apellant had no right to prove, he having omitted to sue out a *fi. fa.* against lands, as had been done by the other judgment creditors.

Barrett for the plaintiffs.

Esten, V. C.—This is an appeal by a judgment creditor, whose claim has been disallowed by the master under these circumstances: the suit, which is for foreclosure or sale, was pending on the 18th of May, 1861, the judgment in question was registered in December, 1858. The appellant was added as a party in the master's office, and proved his claim in October, 1861, but it was rejected by the master, and excluded from his report, on the ground that at th date of it more than three years had elapsed since the registration of the judgment, and that it had not been re-registered. The appeal is on the ground that the claim ought to have been allowed, and I am of that opinion. It has been decided in this court that the effect of the 11th section of 24 Vic., ch. 41, is to preserve the charge created by a judgment registered before the 18th of May, 1861, the owner of which would be a proper party to a suit pending on that day. The charge created by this judgment was therefore preserved; and it could not be re-registered, because the 64th section of the 22nd Vic., ch. 89, which provides for the re-registration of judgments was repealed by the 24th Vic., ch. 41. The charge of the judgment in question was created by its previous registration, this charge is preserved generally; the provision that it should cease at the expiration of three years without re-registration was repealed. The legislature could not have meant that the rights which it had saved should expire for want of an act which it had rendered impossible. It was ingeniously and plausibly argued, that the only effect of the 11th section of 24 Vic., ch. 41, was to leave the rights of judgment creditors, parties to suits pending on the 18th of May, 1861, in precisely the same state in which they would have been if that act had not passed, and as in that case the charge created by such judgment creditor's judgment would have expired upon the expiration of *three* years without re-registration, the same result must follow under the 11th section of 24th Victoria, ch. 41. If this view is correct it must equally follow that this section also provided for the re-registration of judgments, but as this cannot be seriously, and was not in fact, contended, I think the proposed construction of this section incorrect. I rather think the intention of the legislature was to dispense with re-registration in regard to the comparatively few judgments which were saved as a charge upon lands by the 11th section of the 24th Vic., ch. 41, and which would diminish in number every day, and shortly become altogether extinct. The inconvenience intended to be obviated by re-registration would in regard to these judgments be so slight that the legislature did not think it probably worth while to re-enact with respect to them the 64th section of 22 Vic., ch. 89.

It was also argued that the judgment creditor should have issued his writ of execution, and delivered it to the sheriff, and thereby preserved the lien of his judgment. This proceeding would not have preserved the existing lien, but created a new one. I do not perceive the bearing of this argument on the question. The right arising from a writ against lands delivered to the sheriff for execution, was very different from the lien or charge preserved by the 11th section of 24 Vic., ch. 41. That enabled the judgment creditor to pray a sale of the estate in equity; the other merely enabled the judgment creditor to redeem the estate if in mortgage. If a judgment creditor had filed a bill for a sale before the 18th of May, 1861, and the three years had expired before he had prosecuted his suit to a conclusion, he could not have continued it, although he might have delivered a writ against lands to the sheriff before the 1st of September. The 12th section of 24 Vic., ch. 41, was only intended to regulate priority amongst judgment creditors.

I think the exception should be allowed without costs.

Boddy v. Finley.

Duress—Costs.

A party, having been arrested on a charge of obtaining money under false pretences, agreed, in presence of the magistrate who had issued the warrant, to execute a mortgage on his farm to secure the amount; whereupon he was discharged, and he, together with the complainant who had sued out the warrant, went to a conveyancer and gave instructions for the conveyances which he subsequently executed. Afterwards a bill was filed by the mortgagor to set the instrument aside as having been obtained by duress and oppression. The court, under the circumstances, refused the relief sought, but as the conduct of the defendant had been harsh and oppressive, dismissed the bill without costs

The facts are stated in the judgment.

Fitzgerald for plaintiff. *Roaf* for defendant.

Spragge, V. C.—The conveyance impeached in this suit was executed under the following circumstances: the plaintiff was the owner of the west half of lot number one, in the second concession of the township of Malahide, subject to a mortgage to one Wilson for $700. He sold the west half of this parcel of land to the defendant for $400. The defendant in his answer says that he

knew of Wilson's mortgage covering the whole half lot, but that the plaintiff represented it to be only for $242. This is not at all sustained by evidence, which establishes, I think, that the mortgage was for $700, and that this was known to the defendant. The plaintiff's avowed object in selling to the defendant was to raise money in order to its being applied on Wilson's mortgage. The sale was in October, 1857.

Early in 1859, the defendant seems to have been informed that the plaintiff was selling off some farm stock, and was about to leave the province, and he took a course which does appear to me to have been a very unwarrantable one under the circumstances. He caused the plaintiff to be arrested under a criminal charge of obtaining money under false pretences; the foundation for the charge being the dealing between the parties upon the purchase of the land to which I have referred. The arrest itself was made in a violent and offensive manner. The defendant and the constable went together to the house of the plaintiff, each armed with a pistol—the defendant's loaded, but, as he says, not exhibited; the constable's loaded, as he says, only with powder. It was a five-barrel revolver, and was produced at the arrest, and the plaintiff threatened with it. The plaintiff was handcuffed at first, but the handcuffs were afterwards removed; and the three, the plaintiff, the defendant, and the constable, proceeded together to the house of the magistrate by whom the warrant was issued. On the way the plaintiff agreed that he would convey to the defendant the east half of the parcel of land which he owned, by way of securing him against the Wilson mortgage; and this agreement was repeated in the presence of the magistrate, who said that if the defendant was satisfied that the plaintiff would do as he had promised, he would discharge the warrant. It was suggested by the defendant that the magistrate should himself draw the necessary papers, but he observed that he might make some mistake, and advised them to go to a conveyancer. The plaintiff was not discharged until he had promised to give the security.

I observe here that there was nothing unreasonable in the defendant being indemnified against the Wilson mortgage, or in its being done by such instruments as were executed, though it would have been better if it had been done in one instrument.

After the plaintiff had been discharged from his arrest, he, and the defendant went together to a Mr. Meneray, who lived in the village of Warwick, at a distance of about two miles from the magistrate, they together gave instructions to Mr. Meneray for the drawing of the papers: the plaintiff then, without the defendant, went alone into the village to see a relation as he said; the defendant remained, and mentioned to Meneray that the plaintiff had been arrested. When plaintiff returned he executed the papers, without, as Meneray says, so far as he could judge, any compulsion. The defendant left first, and the plaintiff then said to Meneray that he, the plaintiff, from some misinformation that he had received, had been inclined to do a very rash act for which he might be sorry hereafter.

If these instruments had been given before the discharge of the plaintiff, as was the case in the cause reported in Aleyn, (Page 92) I am of opinion that they could not stand. But the plaintiff was not under duress when he executed them, and if at that time he was a free agent, I am not prepared to hold that the previous oppressive conduct of the defendant is sufficient to invalidate the deeds. The question seems to be, as put by Lord *Eldon*, (Note *a* to *Countess of Strathmore* v. *Burns*, 2 B., C.C., 351) whether or not the mind was so subdued, that though the execution was the free act of the party, it was the act speaking the mind, not of that person but another.

I have examined the several cases cited and some others, and it seems to me the test is that put by Lord *Eldon*, and trying the case by that test, I cannot but think that the plaintiff, in executing these instruments, was his own master in mind and body. He probably executed them because he had promised to do so when under arrest, but I see no reason to suppose that he apprehended a re-arrest or any further violence if he did not fulfil his promise.

I think the bill must be dismissed. but without costs. The conduct of the defendant was not only harsh and oppressive, but, as appears by the evidence, quite unjustifiable in the transaction, and I think I ought not to give him his costs.

CHANCERY CHAMBERS.

(*Reported by* A. GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*)

DICKENSON v. DUFFILL.

Practice—Security for costs—Government officer.

The mere fact of a plaintiff being in the servi e of the Crown, and absent from the jurisdiction of the court, is not sufficient to exempt him from giving security for costs; to do so, it must be shewn that he is absent from his domicile in the service of the Crown.

The plaintiff in this case was acting Deputy-Inspector-General of Canada, and, as such, resident at Quebec, out of the jurisdiction of the court. The defendant Hawkins, before answering the bill, had obtained upon præcipe the usual order for security for costs, which the plaintiff moved to discharge, on the ground that, under the circumstances, he was entitled to be exempted from giving such security.

Hodgins, in support of the application.

Hawkins, in person, *contra*.

The cases cited appear in the judgment.

SPRAGGE, V. C.—The plaintiff seeks to take himself out of the general rule, that a plaintiff residing out of the jurisdiction of the court must give security for costs. The plaintiff's residence is in Quebec, in Lower Canada, and he stands upon the same footing as to the courts of Upper Canada as a British subject residing in Scotland or Ireland does to the English courts.

His ground of exemption is, that he is in the service of the Crown, being Acting Deputy-Inspector-General, and is in the active discharge of his duties in that capacity, at the seat of Government, Quebec.

If the being in the service of the Crown were itself a ground of exemption, it may be that the plaintiff has established it—though I am not clear that the public duties in which the plaintiff is employed are of such a nature as to be a ground of exemption—but I think being in the service of the Crown is not of itself sufficient. The case of *Chappell* v. *Watt* (2 L. T. N. S. 283) establishes this. The plaintiff seeking exemption must be absent from his domicile in the service of the Crown; not merely in the service of the Crown, and absent from the jurisdiction of the court in which he is suing. The plaintiff there was an officer serving with his regiment in Ireland, but inasmuch as it appeared that his domicile was in Ireland, he was held not exempt. The court held that the true ground of excuse was not, that an officer could not come over to conduct his own suit, but that by the command of a superior authority he is obliged to go out of the jurisdiction; and Mr. Justice Crompton states the rule thus: "The real rule is, is the plaintiff kept away from his English domicile by the order of the Crown?"

In the case of *Evelyn* v. *Chippendale* (9 Sim. 497), relied upon by the plaintiff in this case, the plaintiff, a half-pay lieutenant in the royal navy, held the offices of harbour-master and captain of the port, in Barbadoes, where he had resided sixteen years; the former of these offices was in the gift of the House of Assembly, the latter in the gift of the Governor. And it was because he held the latter office, an office under her Majesty, as the Vice-Chancellor put it, that he was held not compelable to give security for costs.

In a suit evidently between the same parties, though reported as *Evering* v. *Chiffenden* (7 Dowl. 586), a similar application in the Court of Queen's Bench was refused; Patterson, J., observing, "*Prima facie* when it is said that he is a resident abroad in the service of the Crown, it must be supposed that he is an Englishman. If then he is so, he is a resident abroad for a temporary purpose in the service of her Majesty; and I do not see the difference between this case and that of Lord *Nugent* v. *Harcourt*. This is not the case of voluntary absence from the country, but the plaintiff is fulfilling a duty which I take is always performed by a naval officer." It was thus placed upon the ordinary footing of a plaintiff absent from his English domicile by the order of the Crown. The opinion of the Vice-Chancellor in 9 Simons is more brief; but I apprehend, from what he did say, that he went upon the same principle.

In Lord *Nugent* v. *Harcourt* (2 Dowl. 578) the principle is very clearly expressed: "In the case of an officer in the army, the

absence is certainly involuntary. But I think if an Englishman is not permanently abroad, but is absent for temporary purposes in the service of his Majesty, he stands in the same situation as if he were compulsorily abroad, and therefore ought not to be compelled to find security for costs. If he had gone abroad for his own convenience merely, it would have been different."

The principle established by all these cases is, that to entitle a plaintiff to exemption from the ordinary rule, his domicile must be within the jurisdiction of the court in which he is bringing suit, and his absence from it must be occasioned (unless in the case of mere temporary absence, as for travelling) by his being engaged in the service of the Crown; it being assumed in the case of an Englishman that his domicile is in England, and his absence being looked upon as temporary.

The plaintiff here does not show that his domicile is within the jurisdiction of the court in which he is suing; and I cannot agree with his counsel that there is any presumption that it is so. His name, it is urged, is English. The presumption upon that would be that his domicile is in England; assuming that he is not a foreigner, which, I suppose, should be assumed, as he is in the service of the Crown. There can be no legal presumption that his domicile is in Upper Canada, any more than in Nova Scotia or New Brunswick: all that can be said is, that it is more probable that it is either in Upper or Lower Canada than in any other colony, or in England, from the nature of his appointment.

I desire to add, that I very much doubt whether such an appointment as the one in question, though in the name of the Crown, is of a nature that ought to exempt a plaintiff from giving security for costs. Suppose this plaintiff an Englishman, and suing in one of the courts in England, would his position be such that he could be regarded as having his domicile in England, but temporarily absent in the service of the Crown? An Englishman residing in India, in the civil service of the East India Company, has been held to be domiciled in India. This appears from the case of *Arnold* v. *Arnold* (2 M. & C. 256), and other cases referred to in the *Attorney-General* v. *Napier* (6 Ex. 217), where the question of domicile was a good deal discussed. In the latter case the language of Mr. Baron Parke is, "If a natural born subject, domiciled in England, enters into her Majesty's service, and goes abroad, at the Queen's command, into foreign service, it is quite clear that his original domicile has not been parted with by him. He goes for a temporary purpose, and is supposed to be there for a time only, but not for the purpose of fixing his permanent abode abroad." This language appears to me wholly inapplicable to a person holding such an office as the plaintiff holds, and suing in an English court; even more inapplicable than to the case of an Englishman who holds an appointment in the civil service of the East India Company; at least in this, that a permanent abode would be much less probable in India than in Canada. There is, of course, the difference, that the appointment of the plaintiff is under the Crown, but the force of that is only that it indicates temporary absence from England—a presumption that his original domicile there has not been parted with—a presumption that, I think, could scarcely be held good in the case of the plaintiff holding an appointment in Canada substantially under the Colonial Government. The case of an appointment in the civil service of the East India Company is, in fact, though not in name, upon much the same footing.

But the plaintiff is not (as in the case supposed) bringing suit in England, but in Upper Canada, where, as I have said, there is, I think, no presumption in favour of his domicile.

[After the matter was first argued, it was mentioned again, and and a further affidavit from the plaintiff produced.]

Spragge, V. C.—I do not think this affidavit is receivable, and did not mean to give leave to file it for use upon this application, a course which would be wholly irregular. I was asked not to give judgment until a further affidavit could be procured, and said I would abstain from giving judgment for the present, leaving it to the plaintiff to take his own course.

The question has, however, been further argued upon this new affidavit, subject to the objection to its reception. I do not think that it strengthens the plaintiff's case. He styles himself formerly a resident of Upper Canada. He says, "I resided in Upper Canada several years, say from the year 1833 until the removal of the seat of government to Lower Canada; that if I were not in the civil service of this province I would at this time, to the best of my belief, be residing permanently in Upper Canada." And he then mentions certain property which he owns in Upper Canada, but upon none of which does he appear to have resided.

I understand from this affidavit that Upper Canada was not the plaintiff's domicile of origin, but at most his acquired domicile; that he resided at Kingston from 1833 until the removal of the seat of government to Lower Canada. This first took place in 1843, I think. He does not inform us where he has been since; but, I take it, his affidavit means that he removed to Lower Canada with the government, in whose service he now is. If so, then for the last eighteen years or thereabouts his residence has been wherever the seat of government might from time to time be. He intimates no intention of making Upper Canada again his domicile, and all that we can say about Upper Canada is, that at a certain period it was his acquired domicile, and would, as he believes, have continued so if he were not in the civil service. But being as he is in the civil service, Upper Canada has ceased to be, so far as his affidavit shows, his acquired domicile.

In proceeding upon the facts stated in the affidavit, I do not mean to say that it is admissible—it is clearly not so upon this application, filed as it is after argument; but the case of *Lillie* v. *Lillie* (2 M. & K. 404) would lead me to doubt whether the plaintiff is not bound by the description of residence in his bill, and cannot amend it by affidavit, for in that case the description in the affidavit was clearly sufficient to exempt the plaintiff from giving security for costs, but he was compelled to give security, because the description in the bill was not sufficient to exempt him.

The additional case to which I have been referred, *Clark* v. *Fergusson* (5 Jur. N. S. 1155), does not seem to throw any light upon the point. The plaintiff described himself as of Longborough, near Galashiels, in Scotland, a lieutenant in her Majesty's ship *Gladiator*, now on service, and Sir John Stuart said, "The bill stated, though not perhaps with as much precision as might be wished, that the plaintiff was 'an officer in her Majesty's ship *Gladiator*, now on service,' and that averment was substantially sufficient to exempt him from giving security for costs." I cannot suppose that Sir John Stuart meant to say that an officer of a ship, not in service with his ship, was entitled to exemption—that would be at variance with the well settled rule. His reading of the allegation evidently was, that the plaintiff was on active service with his ship, and this is evident from his remarks as to want of precision in his allegation in the bill; in any other view it was precise enough. It is immaterial whether Sir John Stuart was right in his reading of the allegation—that was a mere matter of construction; but he certainly did not mean to controvert the rule, that the plaintiff must be absent on active service, or to question the case of *Lillie* v. *Lillie*, which was cited to him.

Upon the allegations in the bill, and upon the plaintiff's first affidavit, he proceeded upon the presumption that his domicile was in Upper Canada, a presumption for which I see no ground. The affidavit last filed does not proceed upon such presumption, but upon the fact of a former residence in Upper Canada, as a country of acquired domicile, and the continued ownership of property therein; but in either view there is an absence of that which forms in England the true ground of exemption, a temporary residence abroad from his domicile in the service of the Crown. The plaintiff does not establish, either by presumption or evidence of fact, that his domicile is now in Upper Canada.

I think it would be pushing the rule of exemption beyond its legitimate bounds to hold a person exempt from giving security for costs under the circumstances disclosed in this case, and would operate unfairly to defendants. I think the application should be refused with costs.

The plaintiff subsequently dismissed his bill and filed a new one, stating certain facts to exempt him from being called upon to give security, whereupon

Brough, for the defendants, moved upon notice for an order that the plaintiff should pay the costs of the former suit, and give security for costs in the second cause, before they could be called upon to answer the bill, referring to *Spires* v. *Sewell* (5 Sim. 193), *Budge* v. *Budge* (12 Beav. 385).

Scott, contra.

SPRAGGE, V. C.—The defendants have not obtained an order for leave to read the affidavits used upon a like application in a former suit between the same parties, and I think that without such order they are not entitled to read them. I must, therefore, dispose of this application upon the affidavits filed in support of, and in opposition to it; together with the affidavit of the plaintiff filed in the former suit, which is read by the plaintiff, under an order obtained by him for that purpose.

The affidavit of defendant Hawkins in support of the application, states shortly "that the above-named plaintiff, to the best of my knowledge and belief, resides at the city of Quebec, in Lower Canada." The plaintiff seeks to exempt himself from the ordinary rule, that a plaintiff residing out of the jurisdiction of the court must give security for costs, by stating his position by affidavit as follows: "That I hold the office of Deputy-Inspector-General of the province of Canada, under and by virtue of an order of his Excellency the Governor-General in Council, dated the 7th day of April, A. D. 1855.

"That by virtue of the instructions of her Majesty's provincial government I am required at present to reside at the city of Quebec, in this province, such city being at present the seat of the executive government.

"That I am now, and have been since my appointment as aforesaid, in active service as such Acting Deputy-Inspector-General, in the civil service of the Crown, in this province."

It is to be observed that the plaintiff's affidavit is wholly silent upon the subject of domicile, original or acquired.

He rests his right to exemption simply upon the ground that he holds a public appointment in the service of the crown; that he is in the active discharge of its duties, and that he is at present required to reside at Quebec, the seat of the executive government. I have no hesitation in saying that in my judgment this forms no ground for exemption. In disposing of the application in the former suit, I stated my view of the principle upon which exemption is allowed, to be, that the plaintiff seeking exemption must be absent from his domicile in the service of the crown, not merely in the service of the crown and absent from the jurisdiction of the court in which he is living. It is the latter position only that the plaintiff shows here. The authorities to which I referred in my former judgment convince me that this is not enough. I must therefore grant the defendant's application.

HODGSON V. BANK OF UPPER CANADA.

Notice of motion to dismiss—Evidence.

Held, that it is not necessary, in a notice of motion to dismiss, to specify the evidence to be read on the hearing of the motion.

This was a motion on behalf of some of the defendants to dismiss the plaintiff's bill for want of prosecution. The notice of motion merely set out that "application would be made to a judge in Chambers for an order dismissing the plaintiff's bill for want of prosecution," without stating that any evidence would be read or referred to.

The motion was objected to on the ground that no evidence, either of filing the answer or service of the answer, could be brought before the court under the notice of motion.

SPRAGGE, V. C.—I think the notice of motion sufficient. The plaintiff had not to be informed that a registrar's certificate would be used; and besides, the object of specifying in the notice the evidence to be used is, that the party receiving it may examine the evidence, and perhaps answer it. The certificate is not prepared until the day when the motion is made. The order may go on the usual terms.

WATERS V. PETERS.

Married woman—Next friend—Insolvency of next friend—Solicitor—Costs of application—Dismissal of bill.

(Oct. 25, 1862.)

On the 22nd August last, a solicitor of the Court of Chancery filed a bill on behalf of Mrs. Waters, a married woman, by one Ramsay, her next friend, who was procured by the solicitor to act as next friend, without the privity and consent of the married woman, and at the time being insolvent, and no security for costs given, and no written authority of the next friend being filed with the bill.

Browne, pursuant to notice, moved, on behalf of Peters, one of the defendants, for an order to take the plaintiff's bill off of the files, with costs of this application to be paid by the solicitor who filed the bill. In support of the notice it was contended, first, that a defendant had a right to make a motion of this kind (*Hall* v. *Bennett*, 2 S. & S. 78); second, that a bill cannot be filed on behalf of a married woman, without first obtaining her consent (Dani. Ch. Prac. 8 ed. 106; *Andrews* v. *Cradock*, Prac. Ch. 376; *Cook* v. *Fryer*, 4 Beav. 13; Mit. Plead. 28); third, that before the name of any person can be instituted as next friend of any married woman, such person shall sign a written authority to the solicitor, which must be filed with the bill (Ayeh. cap. 12); fourth, that the next friend was insolvent, and had given no security for costs, therefore he was not a proper party to act as next friend (Dani. Ch. Prac. 8 n. 106, Amer. 1 n. 144; *Pennington* v. *Aline*, 1 S. & S. 264; *Hind* v. *Whitmore*, 2 K. & P. 458); fifth, that the solicitor is liable for costs, if he file the bill without first obtaining his client's proper authority (*Allan* v. *Bone*, 4 Beav. 493; *Malens* v. *Greenway*, 10 Beav. 564; *Hall* v. *Bennett*, 2 S. & S. 78; *Hood* v. *Phillips*, 6 Beav. 176).

Foster, contra, contended that a defendant had no right to make an application to have a bill dismissed, and referred to *Cook* v. *Fryer* (above cited) to show that the judge must be satisfied that the married woman wishes the bill dismissed, and that she is the proper person to make the application; that solicitor not liable to costs (*Jerdian* v. *Bright*, 6 L. T. N. S. 279)—in this case a motion was made to take a bill off the file, on the ground that the plaintiff had not authorized the solicitor to file it; the bill was taken off of the file, and the court did not order the solicitor to pay the costs; that as to filing the consent of the next friend with the bill, it is only necessary by an English statute, 15 & 16 Vic. cap. 86, sec. 11, consequently does not apply to this country.

VANKOUGHNET, C.—Unless the plaintiff's bill be amended by substituting for Ramsay a proper person, with the consent of the plaintiff, as her next friend, within one month from the date of the service on the plaintiff of the order to be taken out herein, the bill in this cause must be taken off of the files; and the solicitor who filed the said bill must pay to the defendant Peters his costs of this application, and all necessary costs incurred thereunder.

THE BANK OF UPPER CANADA V. POTTROFF.

Staying proceedings in the Court below, pending appeal.

The Consolidated Statutes, cap. 13, sec. 16, sub-sec. 4, as to giving additional security pending appeal, does not apply to mortgage cases.

(Nov. 15, 1862.)

The defendant, William Freeman, applied for an order to stay proceedings in the Master's office, pending an appeal from the decree made in the cause, having filed the ordinary bond under the orders of the Court of Appeal, conditioned for the effectual prosecution of the appeal by him the said defendant William Freeman.

It was contended on the part of the plaintiffs that in addition to the ordinary bond, the defendant appealing should be compelled (before obtaining any order to stay proceedings in the court below) to give security to the satisfaction of the court for the payment of the debt and costs ordered by the decree to be paid.

SPRAGGE, V. C.—The defendant Freeman, the appellant, is assignee of a mortgage. The plaintiffs are judgment creditors of the mortgagor. The question was one of priority, and was decided in favour of the plaintiffs. From this decision Freeman appeals. I am satisfied this does not come within the exceptions of the act, and that the ordinary bond is all that the applicant is required to give. No exception is taken to the bond filed.

Order to go, staying proceedings in the Master's office, pending the appeal.

COMMON LAW CHAMBERS.

(*Reported by* Christopher Robinson, Esq., *Barrister-at-Law.*)

McKenzie et al. v. McNaughton et al.

Application to set aside judgment—Delay—Misnomer—Amendment.

A summons was served on the 19th February, 1859, and final judgment signed for want of appearance on the 24th December, 1860, and execution issued. Defendants, on the 21st January, 1861, moved to set aside the judgment on the ground that it had been signed more than a year after the summons was returnable, and without giving a term's notice. *Held*, that the application was too late.

One of the defendants, *Edmund* M. correctly styled in the summons, was by mistake named in the judgment roll and executions *Edward* M. *Held*, amendable.

This was a summons to shew cause why the final judgment in this cause should not be set aside with costs.

1st. Because the defendants were served with process (summons) on the 19th of February, 1859, and no proceedings taken till the 24th December, 1860, when final judgment was entered against all the defendants (one of the defendants, *Edmund* McNaughton, being deing designated therein as *Edward* McNaughton) for want of appearance, for £809 0s. 9d. and costs.

2nd. Because there was a variance between the judgment roll and execution and the writ of summons, the style of the cause in the summons being the same as in this summons, while the style of the cause in the roll and executions called defendant *Edmund* McNaughton *Edward*.

3rd. Because the plaintiffs did not give a term's notice, although more than a year had elapsed since the last proceeding.

In answer to the summons the plaintiff's attorney made an affidavit to the effect that the delay in entering judgment was agreed upon between him and the defendants: that the defendants undertook not to enter appearance, as they had no defence, and had engaged to pay off the debt within eighteen months, and had made small payments from time to time, but little more than sufficient to keep down the interest; and that in December last, finding that other people were pressing, he entered up the judgment. He swore also that he believed the application to set aside the judgment was made, not at the instance of the defendants, but of a creditor of theirs who took out an execution against them for a large debt, and placed it in the sheriff's hands a few minutes only after the execution in this case was delivered to him. In this affidavit it was alleged that the agreement with the plaintiff's attorney for delay was made between him and Andrew McNaughton, one of the defendants.

On the part of the defendants, Andrew McNaughton made an affidavit that after his first interview with the plaintiffs' attorney about this suit he always believed that the suit had been withdrawn: that this application was not made on behalf of any other of their creditors, but with the idea that if he could succeed in getting the judgment set aside he could then make arrangements to pay all the creditors equally: that he had often applied to the plaintiffs' attorney for an account of their debt, but had never received one.

It was not denied that the name of *Edward* was by mistake given as the christian name of one of the defendants in the judgment roll instead of *Edmund*, the name properly given in the summons.

Robinson, C. J.—By the Common Law Procedure Act, section 81, it is enacted that a plaintiff shall be deemed out of court unless he declare within one year after the writ of summons is returnable.

The judgment being entered on the 24th December, 1860, the defendants move against it for irregularity in being signed too late, that is, more than a year after the summons was returnable; but they come, as appears, not before the 21st of January, 1861, which is too late, according to the practice, and I think this is a case in which the application should not be favoured.

The same objection, of being too late in moving, applies to the other ground of not giving a term's notice, if indeed such an objection could be taken when the defendants have not appeared.

As to the mistake in the christian name of one of the defendants, Edward for Edmund, that can be cured by amendment, as the summons gives the true name.

I think that the name of the defendant, Edmund McNaughton, should be amended in the judgment roll and the writ or writs of execution that have issued under it, by making it conform with the name in the summons, and that this summons should be discharged, but not with costs.

Cochrane v. Scott et al. and Cochrane v. Cross et al.

Reference to arbitration—Costs.

Two actions for false imprisonment were referred to arbitration at the assizes, *no verdict being taken*, costs to abide the event. In one the arbitrator found £20, in the other £10. The plaintiff having proceeded by attachment on the award, *held*, that he was entitled to full costs without a certificate.

Such a case is not within the 156th rule of court, for the plaintiff cannot be considered as proceeding upon a final judgment.

Quære, whether under C. L. P. A., section 331, a judge's order is not necessary to have taxation revised by the principal clerk.

The plaintiff in this case applied to revise taxation, on grounds which sufficiently appear in the judgment.

Burns, J.—Both of these cases were actions against the defendants for false imprisonment, in consequence of the writs to hold to bail being set aside for irregularity. When they came down for trial at the assizes at Stratford, in the spring of 1858, by consent of parties the causes were referred to an arbitrator, no verdicts being taken. The costs of the cause in each and the costs of the reference were ordered to abide the event. The arbitrator made his awards, and in the first case awarded £20 to the plaintiff, and in the second case £10. The plaintiff proceeded then to tax costs, and the deputy clerk of the Crown for the county of Perth taxed to the plaintiff full costs in each case. The plaintiff after that proceeded to demand the sums awarded and costs, and upon non-payment applied to the court to enforce the awards by attachment. The defendants resisted these applications, and the matter came on to be heard in Trinity Term last, before me in the Practice Court. The rules were made absolute for the attachment, but ordered to lie in the office a certain length of time, to afford an opportunity to have the costs taxed correctly and upon a proper scale, as a question was raised with respect to the costs as taxed by the deputy clerk of the Crown.

The order then made was special, directing an application to be made to a judge in Chambers, at least that was what I contemplated at the time. I had overlooked the provisions of the 331st section of the Common Law Procedure Act. Upon looking at that section now, I see I have made a note in the margin to that section in my copy, that some of the profession say, and have acted upon it, that they may as a matter of course have the costs re-taxed by the principal clerk: I doubt that being the true construction: the revision I think should be by a judge's order for the purpose. Be that as it may, however, the defendants in these cases avail themselves of the construction put upon the clause by the profession, and carried the taxation before the principal clerk. The plaintiff declined to attend this taxation, because he considered it a violation of the order made when directing the attachment to lie in the office till a taxation procured in accordance with it. The master in the first place taxed the plaintiff's costs on the scale of the county court, and then allowed the defendants their costs, that is, the difference of costs between the two courts to be deducted from those; and in the second case he allowed the plaintiff only division court costs, and taxed to the defendants their full costs.

The application now before me is made by the plaintiff, that the master shall review his taxation, and the question is simply this, whether he has taken a correct view of the matter. At the time of the argument I was under the impression that this very point had been before me in some shape sometime since, and I find it was in *Jones* v. *Reid* (1 U. C. P. R. 247). In some measure the same question was before Mr. Justice Richards in *Morse* v. *Tretzel* (Ib. 375). In this last case an order was made for full costs, but that case differs from *Jones* v. *Reid* and from this case, for no verdict was taken in either of them, and it is through the verdict the court deals with the question of costs, and under the rule of court by means of the final judgment.

I still adhere to my opinion expressed in *Jones* v. *Reid*, that where the parties refer a case to arbitration without taking any verdict, the different provisions of the statutes referred to do not apply. The provision in the rule of reference that costs shall abide the event, are not equivalent to saying that the plaintiff shall not have costs without a certificate, for the judge who tries

the cause may grant the certificate, notwithstanding the verdict be within the jurisdiction of the inferior court. A judge cannot certify, in my opinion, when there is no verdict which enables him to say the court has possession of the couse; that is, I mean cannot certify under the different statutes.

Then as to the rule of court. The case of *Jones* v. *Reid* was decided before the new rules, but I apprehend there has been no difference in that respect. The 155th rule is that costs shall be taxed on the scale of the inferior courts, if there be no special order of a judge, in any action of the proper competence of the county court *in which final judgment shall be attained without a trial.* If the plaintiff had gone to the master with an award upon which he could have obtained a final judgment, and was entering up that judgment, then the master would have been right. This is not such a case. The plaintiff proceeds upon the award and not upon any judgment, and therefore the question is just this, whether, when an award is made in a case where no verdict has been taken, but the parties are proceeding upon the award, it is to be considered as a final judgment within the meaning of the 155th rule. I think it is not, and therefore the master was wrong in thinking he had jurisdiction to deal with costs on the smaller scale.

The case of *Jones* v. *Reid* was decided in the Practice Court, from which there could be no appeal, but this case being in Chambers the defendants have a right to apply to the court to rescind my order if my view of the law be incorrect.

The summons for revision must be absolute, but it will be without costs.

BALFOUR V. ELLISON ET AL., EXECUTORS OF ÆNEAS SAGE KENNEDY.

Judgment—Right of subsequent creditors to move against.

A judgment will be set aside on the motion of a subsequent judgment creditor only when it has been procured by fraud, and the process of the court thus abused. If a nullity upon any other ground, a stranger cannot be predjudiced by it; and if irregular only, he has no right to complain.

J. B. Read, on behalf of a subsequent judgment creditor, moved to set aside the judgment issued in this cause, and the *fi. fa.* issued thereon. Several grounds of objection were taken, and among others, that if such judgment is intended to be a judgment by default of defendant's appearance to the action, the said judgment is not justified by the writ of summons filed, as the judgment contains no copy of the special endosement on said writ, as required by the statute in that behalf: that the said judgment is fraudulent and void as against creditors of the said Æneas Sage Kennedy, deceased, on account of the plaintiff having caused the same to be entered without sufficient authority from the defendants so to do; or on the ground that, if such authority was given, it was by the plaintiff's collusion, or that of his attorney or agent, and for a much greater sum than ought to be recovered by the plaintiff against the estate of the said Æneas Sage Kennedy: that there is no judgment to warrant the *fieri facias* issued, the judgment signed in this cause not being against the estate of the said Æneas Sage Kennedy, or even against the defendants as his executors, but against the defendants personally.

BURNS, J.—The question raised by the affidavits of Bown, a subsequent judgment creditor, that the plaintiff's judgment was a collusive one, and fraudulent, is met by the plaintiff, and I think anything like fraud or collusion is sufficiently answered and repelled, and therefore I can neither set aside the judgment nor grant an issue to try the validity of it upon that ground.

All the other objections resolve themselves into regularity of the plaintiff's proceedings, and certainly there seems no want of points of irregularity as the papers stand at present, but perhaps they may be amended and set right upon an application for the purpose. The plaintiff's judgment was not obtained upon a specially endorsed writ, as would appear by the judgment, though the writ of summons was specially endorsed. The affidavit of Mr. Read, attorney in this suit for the defendants shews that an appearance was entered by him, and after service of the declaration he suffered judgment by default as the least expense to the estate.

The writ of *fi. fa.* in the sheriff's hands does not appear to be supported by the judgment, certainly, for the judgment is not entered against the defendants as executors. If Bown can obtain a priority over the plaintiff by reason of there being no judgment to warrant the execution, then he can do so by notifying the sheriff of it, and to proceed upon his execution, but I know of no authority which authorises a stranger to the action asking the court to interfere with the proceedings of another party, whether those proceedings amount to an irregularity or to a nullity. If the proceedings are void the stranger cannot be predjudiced, and if irregular only, he cannot complain. I know of no other ground of interference than when it is complained that the power and process of the court is used for a fraudulent purpose. See *Perrin* v. *Bowes*, (5 U. C. L. J. 188.)

Rule discharged, with costs.

UNITED STATES REPORTS.

IN THE QUARTER SESSIONS OF SCHUYLKILL COUNTY.

THE COMMONWEALTH V. HELLER.

The separation of the jury after a sealed verdict had been agreed upon in a case of misdemeanor, is not good cause for a new trial.

PARRY, P. J.—After the jury had retired to deliberate upon their verdict, the court adjourned until the afternoon; but before the judges had left the bench, the constable in charge of the jury informed the judges that the jury had agreed upon their verdict, and were ready to deliver it. The president judge (one of the associates being present and concurring) directed the constable to tell the jury they might seal up their verdict and bring it into court when the court met that afternoon. Neither the defendant nor his counsel were present when this direction was given. In giving this direction the president judge followed the practice of his predecessor on the bench, and in accordance with his own impression of the practice in similar cases. At the opening of the court in the afternoon, the jury delivered a sealed verdict to the court, finding the defendant guilty. The verdict was recorded by the clerk, and acknowledged by the jury as their verdict, in the usual form.

These are the facts on which the reason assigned for a new trial is founded, and presents for decision the question, "Whether the separation of the jury by permission of the president judge, after the sealing of their verdict, and before its rendition in court, is a valid ground for a new trial."

Lord Coke says (Co. Lit. 227, b.) "By the law of England, the jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed. After they be agreed, they may in causes between party and party, give a verdict, and if the court be risen, give a *privy* verdict before any of the judges of the court, and then they may eat and drink, and the next morning in open court, they may either affirm or alter their *privy* verdict, and that which is given in court shall *stand*. But in *criminal cases of life or member*, the jury can give no privy verdict, but they must give it openly in court. And hereby appeareth another division of verdicts, viz., a *publick* verdict, given openly in court, and a *privy* verdict given out of court before any of the judges as aforesaid." "After the verdict is recorded, the jury cannot vary from it, but before it be recorded, they may vary from the first offer of their verdict; and that verdict which is recorded shall stand; also, they may vary from a *privy* verdict."

In Jacobs' Law Dictionary, under the word "Verdict," it is stated, a privy verdict is "given out of court, before one of the judges thereof; and is called *privy*, being to be kept secret from the parties until it is affirmed in court;" (1 Inst. 227.) But a privy verdict is, in strictness, no verdict; for it is only a favor which is allowed by the court to the jury for their ease; the jury may vary from it, and when they come into court may give a contrary verdict, but this must be before the privy verdict is recorded; (5 Mod. 351.) No privy verdict can be given in criminal matters which concern *life*, as felony, &c.; but it must be openly in court;

because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present. But in criminal causes, where the defendant is not to be personally present at the time of the verdict, and in informations, a *privy* verdict may be given (Raym. 191; 1 Vent. 97).

In Trials per Pais (vol. 1, 260), a case is cited from 1 Vent, 124, in which the court was moved to set aside a verdict in ejectment for the plaintiff, on the ground that the jury, after they had given their privy verdict in favour of the plaintiff, they were treated at a tavern by the plaintiff's solicitor, before the affirmance of the verdict in court. Counsel was heard on both sides, and the court delivered their opinion seriatim, that the verdict should stand.

In the case of *The King* v. *Wolfe et al.*, 1 Chitty, 401, an indictment for a conspiracy, it was decided, after an argument before the Court of Queen's Bench, that the dispersion of the jury with the permission of the judge, during the interval of the adjournment, in case of a *misdemeanor*, does not vitiate their verdict, and that the separation of the jury is a matter of discretion with the judge. The judges delivered their opinions seriatim. Chief Justice Abbott, in his opinion, said, "If we entertained any doubt upon a question of this kind, which is of importance by reason that the subject matter relates to the trial by jury, we should pronounce a very deliberate opinion; but as as none of us entertain any doubt, it is unnecessary to take any further time for consideration." He further said, "I am of opinion that in case of a *misdemeanor*, their dispersion does not vitiate the verdict; and I found my opinion upon the admitted fact that there are many instances of late years, in which juries upon trials for misdemeanors have dispersed and gone to their abodes during the night for which the adjournment took place; and I consider every instance in which it has been done, to be proof that it may be lawfully done. It is said that in some of these instances the adjournment and dispersion of the jury have taken place with the consent of the defendant. I am of opinion that that can make no difference." "I am also of opinion that the consent of the judge would not make, in such a case, that lawful which was unlawful in itself; for if the law requires that the jury shall at all events be kept together until the close of a trial for misdemeanor, it does not appear to me that the judge would have any power to dispense with it. The only difference that can exist between the fact of the jury separating with or without the approbation of the judges, as it seems to me, is this, that if it be done without the consent or or approbation of the judges, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas if he gives his consent, there will be no such consequence of a separation." "It seems to me that the law has vested in the judge the discretion of saying whether or not, in any particular case, it may be allowed to the jury to go to their own homes during a necessary adjournment throughout the night."

Holroyd, J., said: "I am entirely of the same opinion, that the separation does not render the verdict invalid. I do not find any authority in law which says that the separation of the jury in a case between party and party, or in the case of a misdemeanor, that does avoid the verdict."

Bailey, J., said: "The case is put on the plain, simple, dry ground, whether, because the jury separated, and the defendant gave no consent to that separation, and did not know until after the verdict was given that that separation had taken place, he is as a matter of right entitled to call upon the court to vacate the verdict and grant a new trial. Now, upon that naked point it seems to me that he has no right to make that application."

Best, J., said: "I am of the same opinion. It appears to me that no mischief can result from allowing jurors to separate, a discretion being always vested in the judge as to the propriety or impropriety of keeping them together in each particular case."

This decision of the court seems to have settled the question in England; for, after a careful search through the digests of the English reports, no case has been found in which it has been again raised.

In New York it has been held in several cases that the separation of the jury before the rendition of the verdict in court, does not avoid the verdict. In *The People* v. *Douglas*, 4 Cow. 32, Woodward, J., in delivering the opinion of the court, said: "On looking into books, we do not find the mere separation of the jury has ever been held a sufficient cause for setting aside a verdict, either in a civil or criminal cause, if we except the case of *Commonwealth* v. *McCaul*, Virg. Cases, 271 (this was a capital case). "The question has been learnedly examined in several cases, and especially in that of *The King* v. *Wolfe et al*, 11 Chitt. 401, which appears to be a case which excited very general interest, and led to the utmost research of counsel and the Court of King's Bench." In reference to this decision in *The King* v. *Wolfe et al*, Justice Woodward further said: "What the King's Bench would have said of a capital case, it is true, does not directly appear, because the cause under consideration was one of a misdemeanor, but the reasoning of the judges is applicable to both cases; and we think that the mere fact of the separation, unaccompanied with abuse, should not avoid the verdict even in a capital case."

In *Smith* v. *Thompson*, 1 Cow. 221, after the jury had retired, and before they had agreed upon their verdict, two of the jurors eluded the care of the constable. One of them went to a tavern, and the other to his own house, and the next morning returned to the jury-room, and afterwards agreed upon the verdict, and rendered it in court. The court held this to be no ground to set aside the verdict.

In *Horton* v. *Horton*, 2 Cow. 589, after the jury had agreed upon their verdict, and while the court were at dinner, without the knowledge of either party, the jury separated, but the court held this no cause for a new trial.

The same principle was decided in *Douglas* v. *Toucy*, 2 Wend. 352; *Burn* v. *Hoyt*, 3 J. R. 255.

In Kentucky it has been held that the separation of the jury after agreeing upon their verdict, but before its rendition in court, will not vitiate the verdict (1 Bill. 265).

In Ohio it has been expressly decided that where juries separate after agreeing upon the verdict, without leave of the court, it is not a ground for a new trial (3 Ham. 52).

In South Carolina it has been decided that a separation of the jury in a *capital case*, and before rendering a verdict, is no cause for a new trial (1 Dev. & Bat. 500). And in the same State, it has also been held that the separation of the jury in all cases is within the discretion of the president judge (2 Baily, 565).

In Connecticut and New Jersey it has also been held that mere separation of the jury before the rendition of the verdict in court, although irregular if done without permission, does not vitiate the verdict. (See the cases cited in *People* v. *Douglas*, 4 Cow. 32, and the cases collected in a note to *Smith* v. *Thompson*, 1 Cow. 221.)

The law upon this point, as settled by the decisions in England and in this country, cannot be better stated than in the words of Justice Woodward, part of whose opinion is above quoted, "that though the jury separate, if there be no further abuse, this shall not vitiate the verdict, though it would be a contempt of the court if contrary to their instructions, and would be punishable as such."

The very question raised by the facts, and the reason for a new trial in this case, appears to have been decided in *The State* v. *Eagle*, 13 Ohio, 490; the syllabus of which is thus stated in 2 U. S. Dig. sup. 417: "The court may instruct a jury to seal up their verdict in a criminal case, and separate, should they agree while the court was not in session; and such instructions given instantly, on the announcement of the adjournment, is the act of the court, and sufficient."

But independently of direct authority in favor of the validity of a verdict, where a jury has separated by permission of the judge, after having agreed upon it and sealed it up, no reason can be adduced against it that would not operate with greater force against a separation during the progress of the trial, and before the charge was delivered. The juror is under no greater obligation by his oath not to separate after, than before the rendition of the rendition of the verdict. The oath of the constable is, "That he will not suffer any person to speak to them, nor speak to them himself, *until they have agreed, unless it be to ask them if they have agreed.*" When they have agreed upon their verdict, the obligation of the oath is at an end. And the practice of receiving a *privy* verdict by the judge in England shows the construction placed by the courts upon the extent of the obligation of the oath. The practice of sealing the verdict in this country, seems to have been substituted for the privy verdict in England, for both must be rendered in court to be of any effect; and as it is clear, from the authorities cited, that a privy verdict could always have been

rendered in England in cases of *misdemeanor*, there seems to be no reason why a judge should not direct a jury to seal up their verdict during the temporary adjournment of the court. The court have it in their power to correct any abuse or misconduct on the part of the jurors either before or after the rendition of the verdict, and no injury to any one is likely to result from a continuance of the practice; and as none has been alleged in this case, no reason has been shown for a new trial.

The motion is denied, and a new trial refused.

SUPREME COURT OF PENNSYLVANIA IN AND FOR THE WESTERN DISTRICT.

EWING V. THOMPSON.

U. S. appointments—How revoked—Certiorari.

Where, in the United States, an office is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled.

The effect of a writ of *certiorari*, directed to an inferior tribunal, is to suspend the powers of the superior court. The judicial proceeding can progress no further in the court below, but it is not clear that collateral proceedings are affected by it.

The opinion of the court was delivered by Strong, J.

Three prominent questions are raised by this motion. They are:—Has the complainant a legal right to the office of Sheriff of the city and county of Philadelphia? Does the defendant unlawfully invade or threaten to invade that right? If he does, is the invasion of such a character as to call for the exercise by this court of its preventive power?

On the 27th day of November, 1861, the Governor of the commonwealth issued a commission to the complainant, reciting that by the election returns of the October election of that year, it appeared that he had been chosen sheriff of the city and county of Philadelphia, and authorizing him to perform the duties and enjoy the privileges of said office for the term of three years from the second Tuesday of October, 1861, if he should so long behave himself well, and until his successor shall be duly qualified. Under this commission he entered upon the duties of the office, and he has, in fact, acted hitherto as sheriff. If this commission is still in force, beyond controversy he has a legal right, not only to the office, but to its undisturbed enjoyment. This we do not understand to be controverted. The next stage in the inquiry, therefore, is whether anything appears which invalidates the commission. The defendant produces a commission from the Governor to himself, dated October 21, 1862, reciting that it appeared from the returns of the same election, held in October, 1861, that he has been chosen sheriff of the said city and county, and authorizing him to hold, exercise and enjoy the said office of sheriff, with all its rights, fees, perquisites, emoluments and advantages, and to perform all its duties for the term of three years, to be computed from the second Tuesday of October, 1861, if he should so long behave himself well, and until his successor should be duly qualified. The two commissions are for the same office, for the same term, and both recite the same election returns. The second does not profess to be founded upon any amended return. It makes no allusion to any contest of the election, and it does not in terms revoke, annul or supersede the commission previously issued to the complainant. What, then, is its legal effect?

Had there been no contest of the election of sheriff or of the election returns, it could not be maintained that the commission issued in October, 1862, annulled, vacated or superseded the commission given to the complainant in November, 1861. The power of the Governor to revoke a commission once issued to an officer not removeable at the pleasure of the Governor, may well be denied. Even where he has the power of appointment of such an officer, an appointment once made is irrevocable. Much more would it seem is a commission issued by him incapable of being recalled or invalidated by himself, when the appointing power is located elsewhere, and when his act in issuing the commission is not discretionary with him, but is only the performance of a ministerial duty. Under the Constitution, the Governor does not appoint a sheriff, and he has no choice as to whom he will commission. The appointment is made by the electors, and it is the duty of the Chief Executive to commission the person whom they have designated according to the forms of law, and a vested right is consummated in the person commissioned, a right which nothing but a judicial decision can take away, or authorize him to recall. The observations of the supreme court of the United States in *Marbury* v. *Madison*, 1 Cranch 137, bear forcibly upon this subject. That was an application for a mandamus to compel the delivery of a commission for an office to which the applicant had been appointed by the President of the United States, and for which a commission had been made out but not delivered. The office was one which the law created, and of which it fixed the duration of tenure by the officer, but under the Constitution the President had the appointing power. Chief Justice Marshall, in delivering the unanimous opinion of the court, made the following observations:

"Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable, and the commission may be arrested if still in the office. But when an officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But, having once made the appointment, his power over the office is terminated in all cases where, by the law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it."

In this case it seems to have been held that neither the appointment nor the commission can be withdrawn. The executive may undoubtedly be authorized by law to revoke a commission or supersede it for cause, though he has not the power of appointment, and though the duration of the tenure may be determined by the Legislature. Whether he could when the tenure as well as the mode of appointment is defined by the Constitution, is perhaps not so clear, unless the commission has issued to one who was not elected or appointed. But the law has made the return the only evidence of an election, in the first instance, and conclusive until it has been corrected or shown to be false by a judicial determination. The defendant cannot stand, therefore, on his commission alone. He is compelled to show that the executive was authorized to issue it, before he can contend successfully that it has superseded that previously granted to the complainant.

This brings us to inquire whether the proceedings which have taken place in the court of quarter sessions empowered the Governor to grant the commission and thereby supersede that which was issued upon the original return. These proceedings are not referred to in the second commission, but if they conferred a power, the commission must be held to have issued under it, rather than be void. Prior to the date of his commission a contest of the complainant's election and the return thereof had been initiated in the court of quarter sessions, under the provisions of the Act of Assembly of July 2nd, 1839, and in that contest a decree was entered on the 18th day of October, 1862, that the complainant was not elected, but that the defendant had received a majority of the votes given, and that he was duly elected. On the same day a *certiorari* was sued out of this court by the complainant to remove the record of the contest in the court of quarter sessions, and it was served. The object of that writ was to stay further proceedings in the court below, and to remove the record of the case into this court. That such is the effect of a *certiorari*, except in cases where the Legislature has made a different rule, is the doctrine of all the cases. It is not itself a writ of *supersedeas*, but it operates as one by implication. Originally in fact, and now always in theory, at least, it takes the record out of the custody of the inferior court, and leaves nothing there to be prosecuted or enforced by execution.

Very many of the English as well as the American authorities are collected in *Patchin* v. *The Mayor of Brooklyn*, 13 Wendell 664. There are very many others, all holding that a common law writ of *certiorari*, whether issued before or after judgment, to be, in effect, a *supersedeas*. There are none to the contrary. In some of them it is ruled that action by the inferior court after service of the writ is erroneous; in others, it is said to be void and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is

suspended by it; that the judicial proceeding can progress no further in the lower court. It is not so clear, either in reason or authority, that collateral action is erroneous or void. If an execution has been issued upon a judgment before the service of a *certiorari*, the power of the sheriff to go on under the execution is not suspended. It requires a formal *supersedeas* to suspend it. The court may even issue a *vend. ex.* to enable its completion. An execution issued after *certiorari* served is erroneous, and perhaps void, because its issue is the act of the court to which the superior writ has been sent, and of the party whose further proceeding has been stayed.

An election contest is in some respects peculiar. True it is a judicial proceeding, but so far as the court in which it is conducted is concerned, it terminates with the judgment or decree. No execution of the decree is entrusted to the court, or is under its control. When the truth of the return is contested, the duty of the court is to ascertain what should have been the true return, and declare it. Then its duty has been done. The regularity of its proceeding may be revised in the superior court, and, no doubt, a *certiorari* removes the record in such a case. It cannot, however, operate upon the inferior court as a supersedeas, for, after a decree, there is no possible action of that court to be stayed. If it stays anything it can only be the action of the Executive in issuing a new commission in view of it, rather than upon it, or action under the new commission when issued, by the substantial party to the decree in whose favor it has been made. But the issue of a commission by the executive, after the service of a *certiorari*, is not disobedience to the writ, for that goes only to the judges. It is not, therefore, a contempt, as action by the judges and the parties would be. He is no party to the contest, either in form or in substance. In reason, therefore, there is an obvious difference between the effect of a *certiorari* upon the court to which it is sent, or the parties to the judicicial proceeding removed, and the executive who has no connection with the record. Nor do the authorities show that a *certiorari* operates upon any other than the court and the parties.

We are, therefore, not prepared to hold that on the 21st day of October, 1862, after the decree declaring what was the true result of the election had been made in the court of quarter sessions, the executive had not authority to issue a commission to the defendant. Especially are we not prepared so to rule upon this motion, which is an appeal to our judicial discretion, while we are sitting only at Nisi Prius. The commission of the defendant is not necessarily invalid, because the election contest is still pending in the sense in which a cause adjudicated in an inferior court is said to be pending after its removal, by *certiorari* or writ of error, to a court which is superior. Had it issued one day before the service of the *certiorari*, but after the decree of the court of quarter sessions, and had the officer commenced his duties, no one will contend that it would have been avoided or interrupted by the mere subsequent service of the writ, any more than an execution partly executed is stayed by the service of a *certiorari* on the court which had awarded it. And yet, had the *certiorari* sued out by the complainant been four days later than it was, the election contest would be a pending proceeding just as truly as it now is. A *certiorari*, after a judgment, like a writ of error, is, in fact, a new suit. It enables him who obtained it to aver errors in the record removed, not to re-try the facts in this court. A judgment in it may, indeed, be followed by a new trial in the lower court, but there is no re-trial here. It is not on this account, not because the action may in this sense be said to be pending, that proceedings are stayed in the court where the trial was held, but it is because in contemplation of law its record is removed to another tribunal.

But while we do not hold that the *certiorari* served on the court took away from the executive the power to issue the commission to the defendant after the decree correcting the election return, a power which the decree unimpeached gave him, we do hold that the service of the writ affects the defendant. He was a party to the contest in the quarter sessions, not in name, but in substantial truth. It was his right which was in controversy, and his were the fruits of the decree. Upon him, therefore, the *certiorari* may operate. When it was served and the record was removed, he had not begun to execute the duties of the office, or to act under the decree and his commission. His position is like that of a party who has an execution in his hands not delivered to the officer, when the writ comes and stays his further proceeding. His title to his commission is not taken away, but his right to proceed under it is suspended until the final decision under the revisory writ. It may be that the decision of the supreme court on the hearing of the *certiorari* will result in setting aside the decree of the court of quarter sessions, and thus leave the original return and the commission of the complainant in full force. On the other hand, if the decree be affirmed, the right of the defendant to his commission, and to the emoluments of the office from the 21st day of October last will be established. His title will then have commenced at the date of his commission. It does not, however, give him a present right to assume the office, or interfere with its duties.

The second question is easily answered in the affirmative. The bill and affidavits show that there has been and still is a disturbance of the rights of the complainant, made by the defendant, no doubt under the belief of right, but still unlawful.

The remaining inquiry is whether the case is such an one as gives the court, in the exercise of its equity, power to grant an injunction. It is a bill preferred by an individual asserting a personal right invaded. Yet it is not to be overlooked that it affects public interests. The office of sheriff is a most important one, and the question which of two persons claiming it may lawfully perform its duties is one in which the whole community is interested. We ought not to leave the matter in doubt. Though we cannot now determine finally who has the right, wo can and ought to determine who is the sheriff in fact, and prevent a conflict, until there should be an adjudication that shall terminate finally the election contest. We therefore feel constrained to award an injunction.

A speedy, final decision of the contested election is imperatively demanded by public considerations. In the light of these, individual interests and personal convenience are of minor importance, though they are by no means to be disregarded. We have no power to compel a hearing on the *certiorari* before the return day of the writ, but we have power to dissolve the injunction now raised, and we have power to impose terms upon the allowance of a common law writ of *certiorari* after judgment. It is not a writ of right, and will never be allowed for merely technical errors which do not affect the merits. Bac ab. *certiorari* A. We will use some of these powers unless the parties agree in writing to a hearing on the writ of *certiorari* before the supreme court in banc at Pittsburgh, on the 15th day of November, 1862. We cannot treat the writ as not allowed, but we can revise the allocatur and quash the writ if there do not appear to be sufficient grounds for it.

And now to wit: Nov. 1st, 1862, this motion came on for hearing befooe the supreme court, at nisi prius, and was argued by counset, whereupon, after due consideration, it is ordered, adjudged and decreed that, on the complainant's giving security, according to the Act of Assembly in the sum of five thousand dollars, the said John Thompson, his agents and servants, be enjoined from interfering or intermeddling with the office of sheriff of the city and county of Philadelphia, or from disturbing or molesting the complainant in the peaceable possession and enjoyment thereof until final hearing of a certain writ of *certiorari* sued out by the supreme court to remove the record of a contested election between the complainant and defendant, or until further order.

And it is further ordered that the defendant have leave to move the court, on the 15ih day of November, 1862, to quash the *certiorari* for having been issued without special cause previously shown, unless the plaintiff shall then show sufficient cause, on giving five days' notice.

GENERAL CORRESPONDENCE.

Notaries Public—Fees.

To the Editors of the Law Journal.

Gentlemen,—You are aware that many persons, not of the legal profession, are appointed in Upper Canada to be Notaries Public. Especially is this the case in localities where there is no resident Lawyer.

The commission they receive reads: "To have, use, and exercise the power of drawing, passing, keeping, and issuing all deeds, contracts, charter parties, and other mercantile transactions; and also to attest all commercial instruments that may be brought before them for public protestation; giving and granting unto them all the rights, profits and emoluments appertaining and rightfully belonging to the said calling of Public Notary."

By Con. Stat. U. C., cap. 42, sec. 22, I find 50 cents given as fee for protest, and 25 cents for each notarial letter; and Con. Stats. Canada, cap. 57, sec. 1, repeats these fees; but I have been unable elsewhere to discover what "emoluments appertain" and "rightfully belong" to Notaries Public, for the "deeds, contracts, charter parties, mercantile transactions," &c., which they are empowered to "draw, pass, keep, and issue."

In the rural districts, where there are no Lawyers, the great bulk of the local conveyancing of Upper Canada finds its way into the hands of the Notaries Public; and being, with but few exceptions, men of intelligence, I have no doubt the instruments they prepare are satisfactory to their patrons. But can it be possible that no provision has been made for their fees? I have conversed with many of them—all as ignorant in relation to the "rightful emoluments" to which they are entitled, as I am myself. As their numbers are fast becoming formidable, can you throw light upon their "profits?"

Then again, nearly the whole of the Notaries Public are Commissioners for taking affidavits, &c., in B. R.; but in vain do they turn for information as to fees to the Con. Stats., for beyond providing for the payment of 20 cents for bare administration of affidavit, there appears to be nothing said; while they are empowered to receive "recognizance or recognizances of bail," &c., from parties for whom they must necessarily in many instances prepare the documents.

Some information on the matters spoken of above would greatly oblige a numerous class of readers.

Yours, &c.,

Merrickville, Oct. 24, 1862. JOHN MUIR.

[1. In Upper Canada, conveyancing is open to all the world. Any man who deems himself possessed of sufficient intelligence may prepare "deeds, contracts, charter parties," &c. The price is not regulated by any statute or rule of court. It fluctuates like the prices of the country tavern keeper or the village blacksmith. It may be less or more, according to the bargain entered into between the contracting parties.

2. A Commissioner for taking affidavits, recognizances, &c., is an officer of the courts. His fees are regulated by the rules of court. In the tariff made by the Judges of the Queen's Bench and Common Pleas we find the following:

COMMISSIONER.

For taking every affidavit	£0	1	0
For taking every recognizance of bail	0	2	6

These are the only fees which the Commissioner is by law entitled to receive. These are the only duties which properly appertain to his office. His duty is to *take* affidavits, recognizances, &c., not to *draw* affidavits, recognizances, &c. If he do the latter he does more than is expected of him, and he must get his pay as best he can.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. BUCKMASTER ET AL. v. RUSSELL.

Statute of Limitations—Acknowledgment of debt—New promise.

The following contained in a letter: "I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of £40 9s. 6d. I have no wish to have any thing to do with the lawyers, much less do I wish to deny a just debt. I cannot however get rid of the notion that my account with you was settled when I left the army in 1851. But as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly."

Held, not a sufficient acknowledgment to take the debt out of the Statute of Limitations by which it was previously barred.

Quære whether, if the offer in the letter had been accepted, an action would have lain for the annual instalments?

EX. WHITE v. BRETON.

Condition precedent—Part performance of agreement.

The plaintiff by an agreement, in consideration of a sum of money to be paid him by the defendant for certain shares held by plaintiff in a loan and discount society, promised that all the property of the said society and all the interest and emoluments arising therefrom should vest in and exclusively belong to defendant. The plaintiff transferred his shares to defendant, who received and accepted them; but A. & B. refused to deliver the shares in their hands respectively.

In an action by the plaintiff for payment—*Held*, that the transfer of the shares of A. & B. was not a condition precedent to plaintiff's right to recover; and that even if it were so, the defendant had made himself liable by accepting part of the consideration.

M. R. POOLE v. MIDDLETON.

Vendor and purchaser—Specific performance—Contract to sell shares in a joint stock company—Powers of directors jus disponendi.

Specific performance was decreed of a contract by a shareholder to sell shares in a joint stock company, although the directors of the company objected to the transfer of the shares being made to the person with whom the contract was entered into.

A clause in the deed of settlement of a joint stock company that no shareholder shall transfer his shares except in such manner as the directors should approve, does not authorise the directors to prohibit a shareholder from contracting to sell his shares.

Shares in a joint stock company are in the nature of property, and are subject to the *jus disponendi* incident to property.

L. J. PICKLES v. PICKLES.

Power—Appointment—Fraud.

P. being tenant for life, with an exclusive power of appointment among his children, grants to G. a lease of certain property, and at the same time executes a will appointing the daughter who concurs with her father in a bond to uphold G's title; and P. having died, one of his sons filed a bill against his sister to upset the appointment, on the ground that it was made in consequence of a corrupt bargain.

Held on the evidence, that the appointment was not made on any previous bargain, but that it was the result of instructions long before given; and bill dismissed with costs.

EX. DICKENSON v. JACOBS.

Attorney and Client—Negligence—Attorney paying costs of setting aside proceedings.

The court will not, on a summary application, order an attorney to pay the costs of setting aside proceedings for irregularity, even where he has admitted that it was owing to his error, and has promised to pay, unless there is clear evidence of the nature of the negligence, and that it was gross.

EX. BROMLEY v. JOHNSON.

Contract—Parol—Reduction into writing—Evidence.

When, after a parol contract, before the parties separate, one asks that he may have a note of it, and the other writes out a note or memorandum of it, which purports to contain, and does contain all the essential elements of it, the latter must be taken to contain the terms of the contract, and the previous parol contract cannot be referred to.

C. P. THE G. S. NAVIGATION CO. v. SLIPPER.

Ship—Charter party—Loading cargo—Bar of harbor—Liability for freight.

Where, by charter party, a vessel is to go to a certain port, or so near thereto as she may safely get, and there load a cargo and bring it home, and the vessel goes to the port in question and loads the cargo inside the harbor, for which cargo the master signs bills of lading, but finds that with such cargo on board the vessel cannot pass the bar of the harbor—here the charterer having done all that was required of him—may refuse to put the cargo on board a second time (outside the bar), and the vessel sailing away without the cargo, the charterer is not liable for the freight stipulated for by the charter party.

B. C. CHADWICK v. STRICKMELL.

Order of judge at Chambers—Enforcing—Attorney—Attachment—Rule of Court.

An order of a judge made at Chambers before it can be enforced by attachment must be made a rule of court.

EX. THE DANUBE AND BLACK SEA RAILWAY AND KUSTENDJIE HARBOR CO. v. XENOS.

Contract—Refusal to perform—Breach.

A contracted with B to do a certain act on a day fixed. Before this day A deemed that he had made the contract. B, in a letter to A, said that "he was ready to perform his part of the agreement, and that if A persisted in his refusal to perform the same on his part he should hold A responsible for all loss that might ensue; and that unless B received by the next day a withdrawal of A's denial, he would conclude that A intended to persist in refusing to perform the agreement, and would forthwith proceed to make other arrangements."

No withdrawal took place, and B made other arrangements. Subsequently, before the day fixed, A consented to perform the contract.

Held, affirming the judgment of the Court of Common Pleas, that the breach of contract was complete on the non-withdrawal by A of his denial of the contract.

EX. BIFFIN v. BIGWELL.

Husband and wife—Agreement to live apart—Husband's liability for necessaries.

The husband is not liable for necessaries supplied to the wife, on her orders, while she is living apart with an allowance, under an agreement between them, unless her assent was caused by threats such as might act on a reasonable mind; and the mere fact that there was a threat of confinement in a lunatic asylum is not shown to have operated on her mind, is not necessarily enough to make the agreement invalid, and render him liable for necessaries supplied to her without his privity.

EX. CRONSHAW v. CHAPMAN.

Execution—Taking goods of wrong party—Liability of execution creditor.

Where, under process of execution from a county court, some goods of a stranger had been taken, the mere fact that the execution creditor told the bailiff that goods would be claimed by a third party, but that such claim was not to be regarded.

Held not to amount to a direction to take all the goods or any which were not liable to be seized, so as to make the execution creditor personally liable.

EX. POPHAM v. PICKBURN.

Libel—Privileged publication—Newspaper—Medical reports.

The defendant having published in his newspaper a report read at a vestry meeting containing a statement to the effect that certain returns of the plaintiff, a medical man, to the registrar under the statute, were wilfully false (such report not having been published by the vestry).

Held, that the publication of it was not privileged.

C. P. LAWRENCE v. WALMSLEY.

Equitable plea—Promissory note—Surety.

To a declaration on a promissory note the defendant pleaded as an equitable plea that he made the note jointly with E, for the accommodation of E, and as his surety; that at the time of making the note the plaintiff, having notice of the premises, agreed, in consideration of the defendant's making the said note as surety, to call in and demand payment of the said note from E within three years; that a memorandum of the agreement was to be endorsed upon the note, which, by mistake, was not done; that the plaintiff did not demand payment of E within three years, whereby he lost the means of obtaining payment from E, who has since become insolvent.

Held, on demurrer, that the plea was good, on the ground that the plaintiff had not performed the condition, in consideration of which the defendant became surety.

B. C. FAWKES v. LAMB.

Principal and agent—Broker—Contract—Evidence—Sale note.

Where a written contract for the sale of goods was silent as to the time for which warehouse-room was allowed by the seller to the buyer, it is competent for either party to show, by parol evidence, what time is allowed in such a transaction by general custom, but not to show that the parties themselves had agreed by word of mouth, that a certain definite time had been allowed.

Plaintiff, a broker, having goods of T in his possession for sale, contracted with defendant by a sale note, delivered by the plaintiff to the defendant, to the following effect:—"I have this day bought, in my own name, on your account, of T," certain goods, and signed by plaintiff, "A. Fawkes, Broker."

Held, in action on a contract supported by this evidence, that T, and not the plaintiff, was the person entitled to sue.

CHANCERY.

V. C. W. RE PHŒNIX LIFE ASSURANCE CO., HATTON'S CASE.

Winding up—Contributory—Invalid transfer.

A, a shareholder in a joint stock company, to avoid his liability for a call, of which he had received notice, transferred his shares to B, a man without means, who was procured by A's solicitor with a promise of indemnity, and paid for executing the transfer, but not informed of the pending call. The directors refused to accept the transfer, and A's name remained upon the register, without any steps taken by him to obtain its removal.

Held, that the attempted transfer was invalid, as a mere device to avoid payment of the call, and that A remained liable as a contributory.

REVIEW.

A MANUAL OF COMMON LAW AND BANKRUPTCY, FOUNDED ON VARIOUS TEXT-BOOKS AND RECENT STATUTES. By Josiah W. Smith, B.C.L. London: V. & R. Stevens, Sons & Haynes, 26 Bell Yard, Lincoln's Inn, 1862.

This book, though small in size, is large in contents. It is an epitome of about sixty standard text books, designed by the learned author to be a companion to his well known and much prized Manual of Equity. "Multum in parvo" should be inscribed on its title-page.

To the student the work will be a treasure; and to the practising attorney or barrister it will be a key to the several works on which it is founded, and in their absence, in some degree, a substitute. Though, as the author observes, it is in its nature, and the purposes for which it is adapted, different from the works on which it is founded, and from all other works on common law, and therefore cannot be regarded as competing with any of them. But, as the author also very properly observes, none of them will serve as a substitute for it.

The work bears on its face the impress of originality, and on its every page the handiwork of an experienced and able law writer. It is both clearly and concisely written. Probably no man at the bar, other than the author, would have conceived, much less executed, so novel and so useful a work.

We bespeak for it a ready sale. No student should be without it. It is an apt introduction to the wide field of legal literature afforded by the numerous text works in general use. No practitioner should be without it. It in the office will be a ready reference library, and on circuit will be a small but compendious companion.

The price is moderate (11s. 6d. sterling), considering that it is printed and bound in a manner worthy of the eminent law publishers, V. & R. Stevens, Sons & Haynes. Their agents in Toronto are Messrs. Rollo & Adams. We recommend such of our readers as feel disposed to buy the work to pay them a visit.

The work is divided into four parts, and each part is divided into three or more titles, which in their turn are subdivided into three or more chapters.

The first part treats of rights and wrongs concerning the person, character or reputation. The second, concerning the subjects of property as cognizable at common law. The third, concerning certain relations of life as cognizable at common law. The fourth, as to the enforcement of private rights and the redress of and protection from private wrongs or civil injuries.

The condensation is really wonderful. The whole range of legal literature is embraced in less than 450 pages. Brevity and perspicuity are well combined. The book is so readable as to be perfectly intelligible to lay as well as professional men.

THE LUZERNE LEGAL OBSERVER. Scranton, Pensylvania.—We welcome our contemporary in his new garb. There is now a strong family likeness between us and our contemporary. We are flattered to know that he has made us his model. At all times we have been glad to receive our contemporary. In future we shall watch his progress with increased interest.

THE MONTHLY LAW REPORTER. Boston, Massachusetts.—We observe an increase of matter in the numbers of the current volume of the *Reporter* without a corresponding increase of price. Considering the great rise in the price of paper in the United States, this speaks volumes for our contemporary. The Reporter is an admirable periodical. It appears to be well supported and so far as we can judge richly deserves support.

THE LONDON QUARTERLY REVIEW, Leonord, Scott and Co., New York.—The quarterly number for October is received. Its contents as usual are both of interest and of value. The first article is a criticism on *Les Miserables* the last work of Victor Hugo. The criticise is by no means harsh. Though blemishes are pointed out good parts are not concealed. The work is said to bear undoubted traces of having been the produce of much honest toil and many noble aspirations. The second article, the *Platonic dialogues* is written by a man having a just conception of the greatness of the great Philosopher, Plato. The pure love of truth which pervades the works of Plato is an example to all philosophers. Considering the time at which he lived his writings are wonderful. The light of Christianity serve only to exhibit in greater splendor the magnificence of his intellect. The third article *Political Memoirs*, points out the difficulty of making a proper estimate of Statesmen from mere journals or diaries. The fourth article *Belgium*, is an interesting sketch of this interesting little kingdom and its people. The remaining articles four in number, are of more or less interest. Of these the last—*The Confederate struggle and Recognition*—is one that at the present time will command much attention. The writer eloquently argues for the recognition of the South. He prophesies that the North never can and never will succeed. He supports his conclusions by an able review of the struggle and its causes.

GODEY'S LADY'S BOOK. We must not forget to say a word in praise of this favorite magazine, now that it is beginning a New Year. The number for January 1863 is before us. It is a holiday number. Well may it be so called. The embellishments are all that one can desire. It opens with an emblematical title page containing a likeness of Washington taken from Stuart's great picture. There are between seventy and eighty engravings embracing almost every article that a lady can work with her needle. The publisher announces his intention to commence the year with a determination to surpass anything he has before done. The number before us is a real earnest of that intention. Godey, in war or in peace is always the same; regular in his visits, and at all times a welcome visitor. The following are the terms to subscribers in the British Provinces:—

One copy per year $3, Two copies per year $5, Three copies per year $6, Five copies per year $11 25.

No American postage to pay.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

WILLIAM A. HOWELL, of Jarvis, Esquire, M.D., to be an Associate Coroner for the County of Haldimand.—(Gazetted November 8, 1862.)

WILLIAM TEMPEST, of Oshawa, Esquire, M.D., to be an Associate Coroner for the County of Ontario.—(Gazetted November 15, 1862.)

NOTARIES PUBLIC.

WALTER D. DICKENSON, of Prescott, Esquire, to be a Notary Public for Upper Canada.—(Gazetted November 8, 1862.)

GEORGE A. DREW, of the Village of Elora, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

JAMES F. SMITH, the younger, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

H. H. STOVEL, of Mount Forest, Esquire, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

JAMES GEDDES, of the Town of Mount Forest, Esquire, to be a Notary Public for Upper Canada.—(Gazetted November 15, 1862.)

REGISTRARS.

ISAAC CLEMENS, of the Township of South Waterloo, Esquire, to be Registrar of the South Riding of Waterloo, in the place and stead of Ward Hamilton Bowlby removed.—(Gazetted November 8, 1862.)

TO CORRESPONDENTS.

"JOHN MUIR"—Under "General Correspondence."

LAW STUDENT.—Younger sons of Peers are not so numerous in Canada as to make your question of general interest to our readers. Therefore not answered in our columns.

THE

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AND

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DIARY FOR JANUARY.

1. Thursday..... Taxes to be computed from this day.
4. SUNDAY..... *2nd Sunday after Christmas.*
6. Monday ..... County Court Term begins. Surr. Court Term begins. H'ir &
6. Tuesday..... *Epiphany.* [Devisee Sittings com. Municipal Elections,
7. Wednesday... Election of School Trustees.
8. Thursday..... York and Peel Winter Assizes commence.
10. Saturday..... County Court and Surrogate Court Term ends.
11. SUNDAY..... *1st Sunday after Epiphany.*
12. Monday..... Election of Police Trustees in Police Villages. [Board of Audit.
15. Thursday..... Treasurer or Chamberlain of Municipalities to make returns to
17. Saturday..... Articles, &c, to be left with Secretary of Law Society.
18. SUNDAY..... *2nd Sunday after Epiphany.* [hold 1st meeting.
19. Monday ..... Mem. of Mun. Coun. (except Co's) and Tr. of Police Villages to
20. Tuesday ..... Heir and Devisee Sittings end. Last day for Notice Chan. Ex.
25. SUNDAY..... *3rd Sunday after Epiphany.* [Toronto.
27. Tuesday..... Members of County Council to hold 1st meeting.
31. Saturday..... Last day for Cities and Counties to make return to Governm't.
[Grammar School Trustees to retire.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would notbe unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

JANUARY, 1863.

TO SUBSCRIBERS.

The attention of each Subscriber in arrear is directed to the wrapper of his copy of the Law Journal. There he will find a statement of the amount due us. The transmission of that amount will oblige us. The amount due us in the aggregate is very large. We must make an effort to collect it. Subscribers therefore will please take warning and govern themselves accordingly. Those long in arrear cannot expect much more indulgence. Those in arrear for a short time only have not much to fear. Those not in arrear had better transmit the $4 payment in advance for the current volume, and so save discount of $1 on their annual subscription.

NOTICE.

Subscribers will with this number receive the Law Journal Calendar for 1863. *Index to Vol.* 8 *will be issued with our next number.*

MARRIAGE WITH SISTER OF DECEASED WIFE.

The law of England is said to be founded on the laws of God. The law regulating marriage, which is a sacred as well as a civil contract, should be especially rested on the Divine law. The branch of it to which we are about to refer is supposed to be so.

Strange to say, the law which prohibits the marriage of a man with the sister of his deceased wife rests chiefly, if not wholly, on the legislation of Henry the Eighth, a monarch whose power was only equalled by his lust.

On 3rd June, 1509, he married Catharine of Aragon, the widow of his brother Arthur. She was his first wife. During 1528, he desired to marry Anne Boleyn, and, in order to be divorced from Catharine, professed scruples as to the legality of a marriage contracted with his brother's widow. He endeavored to get Catharine to consent to a divorce. This she steadily refused. Notwithstanding, the king cohabited with Anne Boleyn, and, in the early part of the year 1533, when she was pregnant, privately married her. She thereupon became his second wife. On 23rd May, 1533, a convocation of clergy declared his marriage with Catharine to have been contrary to God's law, and, in the following year, in order to confirm this declaration of the clergy and ratify his marriage with Anne Boleyn, the 25 Hen. 8, c. 22, was passed: it is the first English statute to which it is necessary for us to refer.

It was entitled "An Act concerning the successors," and recited that many inconveniences had fallen, as well within the realm as in others, by reason of marrying within degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the stepmother, the brother the sister, the father his son's daughter or his daughter's daughter, or the son to marry the daughter of the father procreate and born by his stepmother, or the son to marry his aunt being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or *the brother to marry his brother's wife*, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or *his wife's sister*, which marriages, albeit they be plainly prohibited and detested by the law of God, yet nevertheless at some times they have proceeded under colours of dispensations by man's power, which is but usurped, and of right ought not to be granted, admitted, nor allowed; for no man of what estate, degree, or condition soever he be, hath power to dispense with God's laws, as all the clergy of the realm in the convocation, and most part of all the famous universities of christendom and parliament do affirm and think.

It therefore enacted that no person or persons, subjects or residents of the realm, or in any of the king's dominions, of what estate, degree or dignity, soever they be, shall from henceforth marry within the said degrees afore rehearsed, what pretence soever shall be to the contrary thereof; and in case any person or persons, of what estate, dignity, degree or condition, soever they be, hath been heretofore married within this realm, or in any of the king's dominions, within any of the degrees above expressed, and by any the archbishops or ministers of the church of England, be separate from the bonds of such unlawful marriage, that then every such separation shall be good, lawful, firm and permanent, forever, and not by any power, authority or

means, to be revoked or undone hereafter; and that the children proceeding and procreate under such unlawful marriage shall not be lawful or legitimate, any foreign laws, licenses, dispensations, or other thing or things, to the contrary thereof notwithstanding.

The effect of this *expost facto* statute was not only to render void the marriage of the king with Catharine of Aragon, but as a consequence to bastardize her child, the Princess Mary.

In 1536, the king, desiring to marry Jane Seymour, affected to be jealous of Anne Boleyn, had her tried for high treason, condemned, and executed. She was executed on 19th May, 1535, and on the next morning the king was married to Jane Seymour. She thus became his third wife. In order to legalize the marriage with Jane Seymour, and bastardize the Princess Elizabeth, the issue of his marriage with Anne Boleyn, the king, in the year following, procured the 28 Hen. 8, c. 7, to be passed. It is entitled "An Act for the establishment of the successors of the imperial crown of the realm." It repealed the former act 25 Hen. 8, c. 22. So much however of that act as respected marriages within the degrees therein prohibited was re-enacted, with slight modifications. It was also enacted, that if any man carnally know any woman, all persons in any degree of consanguinity or affinity of the parties so offending shall be adjudged to be within the said prohibition, in like manner as if the persons so carnally knowing one another had been married. The king, though married to Anne Boleyn, had been too intimate with her sister. This is here made the pretence for avoiding the marriage with that sister, and bastardizing her child Elizabeth. The remainder of the act contained a limitation of the crown to the issue of the Lady Jane Grey by the king, and in default to the heirs of the body of the king lawfully begotten, with a general power to the king to name his successors, either by letters patent or by his last will.

The crown was subsequently limited by the king in succession to his son Edward by Lady Jane Seymour, his daughter Mary by Catharine of Aragon, and his daughter Elizabeth by Anne Boleyn, and this limitation was afterwards confirmed by act of parliament.

In the same year that the last mentioned succession act (28 Hen. 8, c. 7) was passed, the 28 Hen. 8, c. 16, was also passed. It was entitled "An Act for dispensing with rules and licenses from the Pope." It enacted that all marriages had and solemnized before 3rd November, 1535, should be valid, whereof there was no divorce or separation had by the ecclesiastical laws of the realm, and which marriages were not prohibited by God's law, limited and declared in the act made in that present parliament for the establishment of the king's succession, should be good, and they were thereby confirmed. The previous act therefore as to the marriages prohibited "by God's law" was thereby confirmed.

Lady Jane Seymour, on 12th October, 1537, was brought to bed of Prince Edward. She died two days after her delivery, and was buried on the 15th day of October, 1537.

On 6th January, 1540, the king, by proxy, married Anne, sister of the Duke of Cleves, but, not liking her when she came to live with him, refused to have her as his wife. She, however, was in law his fourth wife. Shortly afterwards he fell in love with Catharine Howard, cousin germain of Anne Boleyn, and, in 1540, in order to destroy the effect of his pre-contract with Anne, sister of the Duke of Cleves, so as to enable him to marry Catharine Howard, caused the 32 Hen. 8, c. 38, to be passed. It enacted, in substance, that from 1st July then next (1540), all marriages solemnized in the face of the Church, consummate with bodily knowledge, between persons not prohibited by God's law to marry, should be valid, notwithstanding precontract; and that no reservation or prohibition, God's law except, should trouble or impeach any marriage without the Levitical degrees. This was the first act that recognized the Levitical degrees as being in any manner a part of the law of England.

On 8th August, 1540, the king, having removed the obstacles in the way of his marriage to Catharine Howard, married her, and she thus became his fifth wife.

In 1542, Catharine Howard was accused of incontinence, and executed. The king in the year following married Catharine Parr, widow of Lord Latimer. She was his sixth wife, and continued his wife till the time of his death, on 28th January, 1547, in the 56th year of his age, and 38th year of his reign.

His son, Edward 5, succeeded, reigned seven years, and was succeeded by Mary. Her first act was to have a statute passed declaring the legality of her birth. It was entitled, "An Act declaring the queen's highness to have been born in a most just and lawful matrimony.' It for the second time repealed the whole of 25 Hen. 8, cap. 22, and so much of 28 Hen. 8, c. 7, as had a tendency to bastardize her or to pronounce the marriage between her father and Catharine illegal, which marriage was declared "to stand with God's law" and to be valid to all intents and purposes. So much of the act 25 Hen. 8, c. 7, as contained the prohibited degrees, was left untouched until the ensuing session, when, by 1 & 2 Phi. & Mary, c. 18, s. 17, so much of the 28 Hen. 8, c. 7, as concerned the prohibition to marry within the degrees specified, together

with the whole of the 28 Hen. 8, c. 16, and 32 Hen. 8, c. 28, were repealed.

Elizabeth succeeded Mary. Her purpose was to undo what had been done by her sister, and in carrying her purpose into effect she in great part revived the marriage acts of her father. It was enacted by 1 Eliz. c. 1, s. 2, that the 1 & 2 Phil. & Mary, and all and every the branches, clauses and articles, therein contained (with a few exceptions) should be repealed and thenceforth utterly void and of no effect. The act then expressly revived most of the statutes repealed by 1 & 2 Phil. & Mary, omitting 28 Hen. 8, c. 7, but terminating with 28 Hen. 8, c. 16, which was expressly included. The section (10) reviving it concluded as follows: "and all and every branches, words and sentences, in the said several acts and statutes contained, are revived and shall stand and be in full force and strength *to all intents, constructions and purposes.*"

The 28 Hen. 8, c. 7, which contained "the prohibited degrees," was omitted because its effect was to bastardize Elizabeth; but the prohibited degrees were referred to in and confirmed by 28 Hen. 8, c. 16. It has therefore been held that "the prohibited degrees," though mentioned in the repealed act, are still within the intent, construction and purpose, of 28 Hen. 8, c. 16, and so revived, or rather that the 28 Hen. 8, c. 7, to the extent of the prohibited degrees, is revived. (*Harrison* v. *Burwell*, Vaughan, 325; *Hill* v. *Good*, Vaughan, 302.)

In 1563, "A Table of Kindred and Affinity, wherein whosoever are related are forbidden in Scripture and our laws to marry together," was published by the authority of the queen. It contained the prohibitions, prescribed by the statutes of Henry the Eighth.

In 1603, it was provided by the 99th Canon of the Church, that "no persons shall marry within the degrees prohibited by the laws of God and expressed in a table se forth by authority, A.D. 1563, and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall be by course of law separated, &c."

In 1835, the 5 & 6 Wm. 4, cap. 54, was passed. It recites, that marriages between persons within "the prohibited degrees" were voidable only by sentence of the Ecclesiastical Court, pronounced during the life time of both the parties thereto, and it was unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled for so long a period, and it was fitting that all marriages which might thereafter be celebrated by persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable. It therefore enacts, that all marriages before the passing of the act between persons within the prohibited degrees of affinity should not thereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit depending at the time of the passing of the act. It also enacts, that all marriages after the passing of the act celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever. It is expressly declared that the act shall not be construed to extend to Scotland. It is not declared on the face of the act whether or not it shall be taken to extend to the Colonies. It certainly does not bind all British subjects in all parts of the world. It does not, for example, affect the law of marriage in any conquered colony in which a different law at the time of its passing prevailed. Whatever effect it may have in any other colony remains to be decided (per Lords Campbell, Cranworth and Wensleydale, in *Brook* v. *Brook*, 4 L. T. N.S. 93).

The law of England therefore, be it right or wrong, now makes void the marriage of a man with the sister of his deceased wife (*Regina* v. *Chadwick*, 11 Q. B. 205; *Coulson* v. *Allison*, 3 L. T. N.S. 763). That law of course extends only to subjects of her Majesty, whose domicile at the time of the marriage is within the portion of the dominions affected by the act to which we have referred (*Fenton* v. *Livingstone*, 5 Jur. N.S. 1183; *Brooke* v. *Brooke*, 30 L. T. Rep. 184; 31 L. T. Rep. 91; 4 L. T. N.S. 93). It applies as much to a naturalized as to a British born subject (*Mette* v. *Mette*, 28 L. J. Prob. 117.) The disability of either party to the marriage invalidates the marriage *in toto* (*Ib.*)

We do not at present propose to discuss the question whether or not the marriage of a man to the sister of his deceased wife is in truth opposed to divine law, or whether the law which prohibits such a marriage is in fact a reasonable or proper law. On a future occasion perhaps we shall do so. So long, however, as the law remains unaltered, it ought, like other laws, to be observed. Its history is certainly not much in its favor, but the fact that it is unrepealed, and, if any thing, strengthened by modern legislation, is sufficient to require obedience on the part of all concerned.

There have been many eulogies on trial by jury; but this spoken of by Sir James Mackintosh in his defence of Jean Peltier, charged with a libel on Buonaparte, First Consul, is probably unsurpassed in beauty:—"He now comes before you, perfectly satisfied that an English jury is the most refreshing prospect that the eye of accused innocence ever met in a human tribunal."—*Legal Notes and Anecdotes.*

JUDGMENTS.

QUEEN'S BENCH.

Present: McLEAN, C. J.; HAGARTY, J.

December 15, 1862.

Ash v. *Somers.* — Trespass. Judgment for plaintiff on special case.

In re Clerk of Peace of York and Peel and Clerk of the Recorder's Court in and for the City of Toronto.—Rule *nisi* for *mandamus* discharged. Clerk of the City Council held to be Clerk of the Peace in and for the City of Toronto for jury purposes.

Lynch v. *Wilson et al.*—No judgment on second plea. Court divided in opinion. Judgment for defendants on third plea.

Corporation of London and Corporation of Middlesex.—Postea to plaintiffs.

Reid v. *Trayner.*—Judgment for plaintiff on demurrer.

Ex parte Roblin and United Counties of Frontenac, Lennox and Addington.—Rule discharged.

VanBrocklin v. *Town of Brantford.*—Rule discharged without costs.

Adams v. *Nelson.*—Nonsuit to be entered.

Sexton and Port Whitby Road Co.—Rule discharged.

Strange v. *Dillon.*—Appeal dismissed.

Bell v. *Oliver.*—Appeal dismissed.

McCollum v. *McKinnon.*—Rule absolute.

Crooks v. *Bowes.*—Judgment for plaintiff on demurrer.

Ex parte School Trustees of Escott.—Rule absolute for *mandamus*.

Moore v. *Gurney.*—Rule discharged.

Mills v. *Wigle.*—Rule absolute for new trial on payment of costs.

In re Knowles.—Order for sale. Proceeds to be paid into court.

Ward v. *Fenton.*—Rule absolute for new trial upon payment of costs, unless plaintiff elect to reduce verdict.

Pearman v. *Hyland.*—Rule absolute for new trial on payment of costs.

Present: McLEAN, C. J.; HAGARTY, J.

December 20, 1862.

Woodruff v. *Corporation of Peterborough.*—Judgment for defendants. Postea to them. Leave to appeal.

Commercial Bank v. *G. W. R. Co.*—Action to recover $1,500,000 Plea, never indebted. Rule *nisi* discharged.

Muma v. *Niagara District Mutual Fire Insurance Company.*—Rule *nisi* to set aside nonsuit discharged.

Goodwin v. *Ottawa and Prescott Railway Co.*—Rule absolute to enter nonsuit.

Bergin v. *O'Neill.*—Postea to defendant.

Shaver v. *Linton.*—Rule absolute for new trial without costs.

Regina v. *Jerrett.*—Rule *nisi* granted.

Mann v. *Chamberlain.*—Rule *nisi* refused.

Colgan v. *Heyden.*—Rule *nisi* granted.

COMMON PLEAS.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

December 15, 1862.

Hooker v. *Gamble et al.*—Rule absolute without costs.

Cameron v. *Boulton.*—Rule discharged.

Carruthers v. *Reynolds.*—Rule absolute to enter nonsuit. (Leave was reserved to move to enter a verdict for defendant in this cause, but upon the suggestion of counsel for plaintiff, the court, considering it had power to award the rule, ordered a nonsuit to be entered.)

Fisher v. *Jamieson.*—Postea to demandant. *C. S. Paterson* applies for leave to appeal. Granted.

Hodgins v. *Hodgins.*—The court desire to have the case re-argued.

Wright v. *Ashton.*—Appeal allowed. Rule to be made absolute to enter nonsuit.

Cook v. *Christie et al.*—Rule discharged.

Roberts v. *King.*—Appeal dismissed with costs.

Niblock v. *McGregor.*—Plea held bad, and rule *nisi* for new trial refused.

Lynes v. *Sifton.*—Appeal dismissed with costs.

Edwards v. *Kerr.*—Appeal dismissed with costs.

Macaulay v. *Ashton.*—Appeal allowed. Rule absolute for new trial. Costs to abide the event.

Hamilton et al v. *Holcomb.*—Rule absolute to enter verdict for plaintiffs.

Young v. *Laidlaw.*—Rule discharged.

Armstrong v. *Bowes.*—Notice of action not sufficient. Plaintiff recommended to enter *stet processus*, else new trial.

Merrill v. *Ellis.*—Rule absolute. Verdict entered for defendant on 2nd and 3rd issues set aside on payment of costs by plaintiff, and repleader granted.

Smart v. *McBeth.*—Judgment for plaintiff on demurrer. New trial not necessary.

Westbrooke v. *Callaghan.*—Judgment for plaintiff on demurrer.

Clark v. *McKellar.*—Rule discharged.

McLellan q. t. v. *Brown.*—Rule discharged.

McLellan q. t. v. *McIntyre.*—Rule disharged.

Anderson v. *Romney.*—Rule absolute for new trial, unless plaintiff consent to the entry of *stet processus.*

Titus v. *Durkee.*—Rule *nisi* granted.

Building Society v. *McCurrey.*—Rule absolute to enter verdict for plaintiffs.

Town of Clifton v. *Hubbard.*—Rule disharged.

Gaviller v. *Beaton.*—Rule absolute to set aside verdict for plaintiff and to enter verdict for defendant.

Smart v. *Henry.*—Rule absolute to enter a nonsuit.

Grimshaw v. *White.*—Plaintiff's proceeding irregular. Rule absolute.

Gartshore v. *Williams.*—Rule refused.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

December 20, 1862.

School Trustees of Elgin v. *Township of Elgin.* — Rule discharged with costs.

Moodie v. *Dougall.*—Action against defendant for damage sustained by sheriff, by defendant directing sheriff to seize goods. Declaration held good. 2nd plea held bad. Replication to 4th plea held bad. No connection shewn between the wrong doer and plaintiff, and plaintiff not shewn to be damnified. Judgment on the whole record for defendant,

Carveth v. *Fortune.*—Rule discharged. This was a rule *nisi* for nonsuit. The rule was discharged and award to stand.

Gibb v. *Davidson.*—Appeal allowed setting aside nonsuit, and new trial ordered. Costs to abide the event.

McFarlane v. *Buchannan.*—Action for use and occupation. Rule absolute to reduce verdict to seven pounds and four shillings.

Haldan v. *Kerr.*—Interpleader issue. Defendants, execution creditors of three persons, who, as executors carried on business together under power in will. The judgment was obtained against them in their individual capacity. They then made an assignment for benefit of creditors of estate of testator, and also individual assignments to plaintiffs, for benefit of their individual creditors. *Held*, that goods passed to plaintiffs. Postea to plaintiff.

Bishop of Toronto v. *Cantwell.*—Action of ejectment. Verdict for defendant. Rule *nisi* for a new trial discharged.

Fraser v. *Hickman.*—Rule disharged.

PRACTICE COURT.

Present: MORRISON, J.

December 15, 1862.

Lyall v. *Forgie.*—Rule *nisi* discharged.

Gwynne v. *G. T. R. Co.*—Reference to master.

Charlesworth v. *Crooks.*—Rule discharged with costs.

In re VanNorman.—Rule absolute, with costs to be paid in ten days.

Titus v. *Cardie.*—Rule absolute.

Miller v. *Norman.*—Rule absolute to refer back award, upon payment of costs of this application. Costs of award to abide the event.

Forsyth v. *Greenwood.*—Rule absolute without costs.

Moffatt v. *White.*—Rule discharged upon payment of certain costs specified.

William v. *Belyea.* Rule absolute upon payment of nisi prius costs, but not costs of application.

Smart v. *Colfage.*—Rule absolute with costs—$14 witness fees to be deducted.

Coombs v. *Cuddey.*—Rule absolute without costs.

Bartlett v. *Benson.*—Rule absolute if costs not paid on or before first day of next term.

Macaulay v. *Ewing.*—Rule absolute without costs.

McKellar v. *Douglass.*—Rule absolute for procedendo, but without costs.

SELECTIONS.

LEGAL LONDON.

There is a legal district of London as unmistakably as there is a Jew's quarter in Frankfort; for the *Juden-gasse* of the German free town is hardly more distinct from the Zeil, than Chancery Lane and its environs from the City or West End of our metropolis.

And as there are several foreign colonies scattered throughout the British capitol—as Hatton Garden and its purlieus, swarming with glass-blowers and organ-grinders, is the metropolitan Italia; the neighbourhood of Leicester Square, with its congregation of beards and soft hats, the cockney Gallia Ulterior; and the parish of St. Giles, where the courts and cellars teem with hod-men and market-women, the London Hibernia; so there is a peculiar race of people grouped around the courts of law and inns of court—Westminster and Lincoln's Inn being the two great legal provinces of London even as York and Canterbury are the two great ecclesiastical provinces of England.

A reference to the map will show that legal London is composed not only of lawyers' residences and chambers, but of inns of court and law courts—civil as well as criminal, "superior" as well as petty—and county courts, and police courts, and prisons; and that whilst the criminal, the county, and police courts, as well as the prisons, are dotted, at intervals, all over the metropolis, the superior law courts are focussed at Westminster and Guildhall; the inns of court being grouped round Chancery Lane, and the legal residences, or rather "chambers" (for lawyers, like merchants, now-a-days, live mostly away from their place of business) concentrated into a dense mass about the same classic spot, but thinning gradually off towards Guildhall and Westminster, as if they were the connecting links between the legal courts and the legal inns.

The inns of court are themselves sufficiently peculiar to give a strong distinctive mark to the locality in which they exist; for here are seen broad open squares like huge court-yards, paved and treeless, and flanked with grubby mansions—as big and cheerless—looking as barracks—every one of them being destitute of doors, and having a string of names painted in stripes upon the door-posts, that reminds one of the lists displayed at an estate-agent's office, and there is generally a chapel-like edifice called the "hall," that is devoted to feeding rather than praying, and where the lawyerlings "qualify" for the bar by eating so many dinners, and become at length—gastronomically—"learned in the law." Then how peculiar are the tidy legal gardens attached to the principal inns, with their close-shaven grass-plots looking as sleek and bright as so much green plush, and the clean-swept gravel walks thronged with children, and nurse-maids, and law-students. How odd, too, are the desolate-looking legal alleys or courts adjoining these inns, with nothing but a pump or a cane-bearing street-keeper to be seen in the midst of them, and occasionally at one corner, beside a crypt-like passage, a stray dark and dingy barber's shop, with its seedy display of powdered horsehair wigs of the same dirty-white hue as London snow. Who, moreover, has not noted the windows of the legal fruiterers and law stationers hereabouts, stuck over with small announcements of clerkships wanted, each penned in the well-known formidable straight-up-and-down three-and-fourpenny hand, and beginning with a "THIS-INDENTURE"-like flourish of German Text, "THE WRITER HEREOF," &c. Who, too, while threading his way through the monastic-like byways of such places, has not been startled to find himself suddenly light upon a small enclosure, comprising a tree or two, and a little circular pool, hardly bigger than a lawyer's inkstand, with a so-called fountain in the centre, squirting up the water in one long, thick thread, as if it were the nozzle of a fire-engine.

But such are the features only of the more important inns of court, as Lincoln's, and Gray's, and the Temple; but, in addition to these, there exists a large series of legal blind alleys, or yards, which are entitled "Inns of Chancery," and among which may be classed the lugubrious localities of Lyon's Inn and Barnard's ditto, and Clement's and Clifford's, and Sergeant's, and Staple, and the like. In some of these, one solitary, lanky-looking lamp-post is the only ornament in the centre of the back-yard like square, and the grass is seen struggling up between the interstices of the pavement, as if each paving-stone were trimmed with green *chenille.* In another you find the statue of a kneeling negro, holding a platter-like sun-dial over his head, and seeming, while doomed to tell the time, to be continually inquiring of the surrounding gentlemen in black, whether he is not "a man and a brother?" In another you observe crowds of lawyers' clerks, with their hands full of red-tape-tied papers, assembled outside the doors of new club-house-like buildings. Moreover, to nearly every one of these legal nooks and corners the entrance is through some archway or iron gate that has a high bar left standing in the middle, so as to obstruct the passage of any porter's load into the chancery sanctuary; and there is generally a little porter's lodge, not unlike a French *conciergerie,* adjoining the gate, about which loiter liveried street-keepers to the awe of little boys, who would otherwise be sure to dedicate the tranquil spots to the more innocent persuit of marbles or leap-frog.

The various classes of law courts too have, one and all, some picturesque characteristics about them. For example, is not the atmosphere of Westminster Hall essentially distinct from that of the Old Bailey? During term time the Hall at Westminster (which is not unlike an empty railway terminus, with the exception that the rib-like rafters are of carved oak rather than iron,) is thronged with suitors and witnesses waiting for their cases to be heard, and pacing the Hall pavement the while, in rows of three or four, and with barristers here and

there walking up and down in close communion with attorneys; and there are sprucely-dressed strangers from the country, either bobbing in and out of the various courts, or else standing still, with their necks bent back, and their mouths open as they stare at the wooden angels at the corners of the oaken timbers overhead.

The courts here are, as it were, a series of ante-chambers ranged along one side of the spacious Hall; and as you enter some of them, you have to bob your head beneath a heavy red cloth curtain. The judge, or judges, are seated on a long, soft-looking, crimson-covered bench, and costumed in wigs that fall on either side their face, like enormous spaniel's ears and with periwigged barristers piled up in rows before them, as if they were so many mediæval medical students attending the lectures at some antiquated hospital. Then there is the legal fruit-stall, in one of the neighboring passages, for the distribution of "apples, oranges, biscuits, ginger-beer"—and sandwiches—to the famished attendants at court; and the quiet old-fashioned hotels, for the accommodation of witnesses from the country, ranged along the opposite side of Palace Yard.

How different is all this from the central criminal court at the Old Bailey! There we find a large boiled-beef establishment, with red steaming rounds in the window, side by side with the temple of justice, and a mob of greasy, petty larceny-like friends of the "prisoner at the bar," and prim-looking policemen, gathered round the court doors and beside the gateway leading to the sheriff's entrance at the back, waiting the issue of that day's trials. Then within the court, upon the bench there are the aldermen, reading the daily papers, or writing letters, attired in their purple silk gowns trimmed with fur, and with heavy gold S collars about their neck; and the under-sheriffs in their court-suits, with their lace frills and ruffles—the latter encircling the hand like the cut paper round bouquets—with their black rapiers at their side, and all on the same seat with the full-wigged judges; and the barristers below crowded round a huge loo-table, that is littered with bags and briefs; and the jury packed in their box at one side of the little court—which, by the by, seems hardly bigger than a back parlor—with a long "day-reflector" suspended over their heads, and throwing an unnatural light upon their faces; whilst in the capacious square dock, facing the bench, stands the prisoner at the bar awaiting his doom, with the Governor of Newgate seated at one corner of the compartment, and a turnkey at the other.

This again is all very different from the shabby-genteel crowd, with its melange of "tip-staffs" and sham attornies, gathered about the insolvent court, and the neighboring public houses, in Portugal Street; that, too, utterly unlike the quaint, old-fashioned tribunals in Doctor's Commons; these, moreover, the very opposite to the petty county courts, that have little to distinguish them from private houses, except the crowd of excited debtors, and creditors, and pettifoggers grouped outside the doors; and those on the other hand, entirely distinct from the still more insignificant police courts, with their groups of policemen on the door-step, and where, at certain hours, may be seen the sombre-looking prison van, that is like a cross between a hearse and an omnibus, with the turnkey conductor seated in a kind of japan-leather basket beside the door at the end of the vehicle.

Farther, there are the several prisons scattered throughout the metropolis, and forming an essential part of the legal capital: the gloomy, yet handsome prison pile of Newgate, with its bunch of fetters over each doorway—the odd pologon-shaped and rampart like penitentiary, perched on the river bank by Vauxhall—the new prison at Pentonville, with its noble, portcullis-like gateway—the city prison at Holloway, half castle, half madhouse, with its tall central tower, reminding one of some ancient stronghold—besides the less picturesque and bare walled Coldbath Fields, and Tothill Fields, and Horsemonger Lane, and the House of Detention, and Whitecross Street, and the Queen's Bench—not forgetting the mastless hulks, with their grim-looking barred port-holes.

These, however, constitute rather the legal institutions of London than the legal localities; and that there are certain districts that are chiefly occupied by lawyers, and which have a peculiarly lugubrious legal air about them, a half-hour's stroll along the purlieus of the inns of court is sufficient to convince us.

Of this legal London, Chancery Lane may be considered the capitol; and here, as we have before said, everything smacks of the law. The brokers deal only in legal furniture, the publishers only in Fearne on Remainders and Impey's Practice, and such like dry legal books—and the stationers in skins of parchment and forms of wills, and law-lists and almanacs, and other legal appliances. Then the dining-rooms and "larders" so plentiful in this quarter, are adapted to the taste and pockets of lawyer's clerks; and there are fruiterers, and oyster-rooms, and "*café restaurants*," bakers, and "cocks," and "rainbows," for barristers and attorneys to lunch at; and "sponging-houses," barred like small lunatic asylums, and with an exercising yard at the back like a bird cage; and patent offices; and public-houses, frequented by bailiffs' followers and managing clerks; and quiet looking taverns, which serve occasionally as courts for commissions "*de lunatico*."

Now, the people inhabiting the legal localities of the metropolis are a distinct tribe, impressed with views of life and theories of human nature widely different from the more simple portion of humanity. With the legal gentry all is doubt and suspicion. No man is worthy of being trusted by word of mouth, and none fit to be believed but on his oath. Your true lawyer opines, with the arch-diplomatist Talleyrand, that speech was given to man not to express, but to conceal his thoughts; and we may add, it is the legal creed that the faculty of reason was conferred on us merely to enable human beings to "special plead," *i. e.*, to split logical hairs, and to demonstrate to dunderhead jurymen that black is white.

What beauty is to a Quaker, and philantrophy to a political economist, honor is to your gentlemen of the long robe—a moral will-o'-the-wisp, that is almost sure to mislead those who trust to it. The only safe social guide, cries the legal philosopher, is to consider every one a rogue till you find him honest, and to take the blackest view of all men's natures in your dealings with your friends and associates; believing that there is no bright side, as has been well said, even to the new moon, until experience shows that it is not entirely dark. In legal eyes, the idea of any one's word being as good as his bond is stark folly; and though, say the lawyers, our chief aim in life should be to get others to reduce their thoughts to writing towards *us*, yet we should abstain from pen, ink and paper as long as possible, so as to avoid "committing ourselves" towards *them*. Or if, in the frank communion of friendship, we are ever incautious enough to be betrayed into professions that might hereafter interfere with our pecuniary interests, we should never fail, before concluding our letter, to have sufficient worldly prudence to change the subscription of "Yours sincerely," into "Yours, *without prejudice*."

That lawyers see many examples in life to afford grounds for such social opinions, all must admit; but as well might surgeons believe, because generally dealing with sores and ulcers, that *none* are healthy; and physicians advise us to abstain from all close communion with our fellows, so as to avoid the chance of contagion, because *some* are diseased. Nor would it be fair to assert that *every* lawyer adopts so unchristian and Hobbesian a creed. There are many gentlemen on the rolls, at the bar, and on the bench, who lean rather to the chivalrous and trusting than the cynic and skeptical view of life; and many who, though naturally inclining towards the Brutus philosophy, and preferring stoical justice

to Christian generosity, are still sufficiently poetic to see a glimpse of "good in all things."

Moreover, it is our duty and pride to add, that if among the body of legal gentry there are to be found such enormities as "sharp practitioners" and "pettifoggers"—scoundrels who seek to render law a matter of injustice, and who use that which was intended to prevent injury and robbery as the means of plunder and oppression—who regard it as their interest to retard, rather than advance justice, and who love equity and its long delays simply on account of the iniquity of its costs—if there be such miscreants as these included among the legal profession, there are, on the other hand, the most noble judges of the land comprised among its members; and granting we should estimate the true dignity of a vocation by those who are at once the most honorable and honored types of it, we must candidly admit that there is no office that sheds so pure and brilliant a glory upon our nation, as that filled by the righteous and reproachless band of English gentlemen who occupy the judgment seats of this country.

For whilst in every other kingdom the judge is but little better than a quibbling and one-sided advocate—a government hireling, trying his hardest to convict the prisoner—the British arbiter weighs, with an exquisitely even hand the conflicting testimony in favor of and against those who are arraigned at his tribunal, and with a gracious mercy casts into the trembling scale—in cases of indecision—the lingering doubt, so as to make the evidence on behalf of the accused outweigh that of his accusers. Nor can even the most skeptical believe that it is possible for governments or private individuals to tempt our judges to swerve from the strictest justice between man and man, by any bribe, however precious, or by any worldly honors, however dazzling. Indeed if there be one class in whose iron integrity every Englishman has the most steadfast faith—of whose Pilate-like righteousness he has the profoundest respect, and in the immaculateness of whose honor he feels a national pride—it is the class to whom the high privilege of dispensing justice among us has been intrusted, and who constitute at once the chiefs and the ornaments of the profession.—*Criminal Prisons of London.*

EXTRACTS FROM LORD BROUGHAM'S LETTER TO THE EARL OF RADNOR.

"Brougham, *October* 15*th*, 1862.

"But as to the last session in its legal and law-amending aspect, it really must be allowed to have done more than might have been expected, considering the degree in which all men's minds were absorbed by the cruel, unjust, and unnecessary civil war of the Americans, the distressed condition of Lancashire, the struggles of the Italian Kingdom, not to mention the distraction of our great international Exhibition. Some really useful amendments of the law were effected, of no great pretensions; for the less unassuming ones are far from being undeniable improvements."

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"But the Act of by far the greatest pretension, for facilitating the transfer of real estate, is by many experienced persons expected to prove a failure. Certainly, such a bill should have been subjected to the fullest discussion, both of professional men, through whose instrumentality it must be worked, and of the community at large, for whose dealings it is intended. There could have been no harm whatever in a year's delay, for letting the plan be considered during the long vacation, and no use in hurrying such a measure through Parliament at the end of the session. The great Incorporated Law Society urged strong objections to it, alleging that it was permissive, and no one with a good title would take advantage of it, and holding that it would be inoperative except in creating offices with large salaries. I am very far from concurring in all the objections made, and still less in the sarcasm which has been ventilated, that the bill was hurried through in order to provide a set-off to the Bankruptcy Act, which has proved a total failure. This failure is fully admitted, and by all; but I consider the attempt to improve our conveyancing as conscientiously made, and heartily wish it may succeed, though I have stated now, as I did at the Social Science Congress, the objections to its hasty enactment, and my preference for the plan repeatedly presented in the shape of bills, extending to estates of every kind the procedure with customary property, by which, as Mr. Fawcett has explained from his large experience in customary courts, the cost of conveyance of the largest estate does not exceed a few shillings and the dispute of a title is almost unknown.

"But all the defects in late measures, and the great occasion for legislation upon other matters, as well as for arrangements in our judicial procedure requiring no new law, though imperatively required, lead to the absolute necessity of a department for performing the duties of Minister of Justice. Such a department would have prevented the omissions and bad provisions in the recent Acts, and would secure the proposal of measures required, beside the inestimable benefit of presiding over the preparation of all bills, with the consent of the Government and of individual members. We are indebted to Mr. Napier, the able and excellent ex-Chancellor of Ireland, for his persevering efforts on this subject in different sessions as long as he continued in Parliament. In 1853 and 1855 he met with little support; but in 1856 he obtained the consent of the Commons to a modified resolution. The year after his triumph was complete. He carried, all but unanimously, an address for the establishment of a separate and responsible department of Public Justice, supported strongly by Lord Palmerston and Lord John Russell, who recommended the Queen to return an immediate answer that the "subject should receive that attentive consideration which its importance demands." I therefore naturally, before the end of the session, called for information as to what had been done in the five years since the "attentive consideration" had been promised; and a private communication from a leading member of the Government apprises me that nothing whatever has been concluded. It may, however, be hoped that this important step, so strongly recommended by the Commons and by the two chief Ministers, will at length be taken; and there is assuredly no lack of duties for the department. Nevertheless, even if the establishment of it should be delayed, some of these duties are so urgent that they must be discharged without such help."

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"You have lately seen a scandal in Scotland; the agitation over great part of the country on the subject of a conviction for murder. Petitions for pardon, numerously signed, are sent up, and a meeting was held at Glasgow, attended by thousands, to pass resolutions in favour of such an application nominally, but really against the learned judge and respectable jury who tried the indictment. The Home Secretary, in whose department the consideration of such a petition is, happens to be a lawyer; but this is a mere and a rare accident. His two predecessors were not; and I do not recollect an instance of a lawyer in practice holding that office. Ought not this and all such cases to be brought before the Department of Justice? But this case, and the scandal of the agitation upon it, in all probability never would have arisen had the attempt I so often made succeeded, to extend my Evidence Act to defendants in criminal cases, on their desiring to be examined, and of course subjected to the sifting of cross-examination. It is plain that the woman convicted would have desired to be examined, and her sifted testimony would either have led to an acquital or confirmed the verdict; in either case the public mind would have been satisfied. The only objection ever urged to this extension of the Evidence Act is, that any party declining to take the benefit of the law would be supposed to be guilty for that reason. But surely the judge

could explain to the jury how consistent such a refusal was with innocence, arising, as it oftentimes would from the party's want of confidence in his own presence of mind to stand a cross-examination. We must recollect, too, that the existing law allows the examination of defendants compulsorily and without any option in *quasi* criminal cases, as actions for assault of the worst character, or false imprisonment, or for libel. Lord Denman and Lord Campbell were so much struck with this inconsistency, that they inclined strongly to support my bill, if confined to cases of misdemeanour in which the opposite party was examined for the prosecution.

"The want of a Public Prosecutor has been often complained of, and in addition to all the instances of this defect given in my friend Mr. Phillimore's Committee, recent cases have put our inferiority to Scotland in this respect in a very remarkable light. A swindler, for example, having, beside obtaining money on false pretences, committed several forgeries, was not tried for the felony but only for the misdemeanour, which he confessed. His connections were in good circumstances, and it was urged for him that it was a first offence, and that he was only twenty-three years of age. No Public Prosecutor would have resorted to such a plea to excuse his breach of duty. Some years ago I recollect an anchorsmith of good property forging to a large amount, and he found means to pay the recognizances of the party bound over to prosecute, and so escaped.

"There are other things which we may very wisely borrow from Scotch procedure. Where the jurisprudence of two countries differs in fundamental principle there can be no mutual interchange. Thus the law regulating the title and conveyance of real estates in France, Scotland, and England, is so entirely different, that the one country cannot borrow from the other. But in procedure it is quite otherwise, and each might greatly profit by the imitation of the others. France, for example, in much that relates to criminal procedure might most advantageously borrow from us, as we might from their criminal appeal system. So Scotland has borrowed our trial by jury in civil cases with great advantage; and we have adopted, from the Scotch, the important principle of local jurisdiction, though as yet very imperfectly. The allowing trustees remuneration is another superiority of their procedure, and ought clearly to be adopted in England in all cases where the constitution of the trust does not expressly preclude it; but with the remuneration should be coupled more stringent obligations, such as the requiring yearly accounts. It is certain that the interests of parties under trust suffer much more constantly from the negligence and even inaction of trustees than from their dishonesty.

"I have mentioned the great subject of local judicature, and the vast improvement of our judicial system by the County Courts. It is with the most unqualified satisfaction that I observe their success. Last year there were nearly half a million of causes tried by those courts and only seventeen appeals; but the number of actions brought was nearly 900,000, for £2,220,000, so that half of them were settled without going to trial. It is difficult to over-estimate the benefits of such a system to the community, and especially to the working classes. That the jurisdiction of the courts ought to be considerably enlarged, seems evident. In Scotland the local judge has nearly unlimited jurisdiction; and one among other benefits derived from hence, is the facilities thus afforded for the choice of judges in the higher tribunals. It is well known how often a great advocate proves an indifferent judge. But if the option were given to parties to select the county court for trying their cause, a test of judicial capacity would manifestly be afforded by the comparative resort to the courts. All my attempts to extend the jurisdiction and to make the optional clause operative, failed. But my disappointment was far greater in the rejection of my proposal, often made, of introducing the process of Reconcilement, on which I have more than once addressed you. Can any one doubt the effect of both parties going before an experienced and impartial person, clothed with judicial dignity, and stating their several cases for his advice without the interposition of professional men? It must lead to the abandonment of most of the groundless claims and desperate defences, and the settlement of more than half the actions now brought. And such is the result of the plan wherever, as in Denmark, it has been fairly tried. The whole community, but most of all the humbler classes, have an immediate interest in this improvement, which will save them from being sacrificed to the profit, not of the more respectable branches, but the worst of the legal profession, the harpies who deform and defile it. As often as this has been propounded, it has been met by technical objections, but not one whit more strenuously than my original proposal of County Courts, or the great Evidence Act, the judges themselves joining in the opposition; and yet thirty years have sufficed to refute the one set of objectors, and a much shorter period to convince and convert the others; so that the learned judges have candidly confessed how great a help is afforded to the discovery of the truth by hearing the parties themselves as well as their counsel. Not one of the objections to Reconcilement is more strongly urged, or more plausible in itself, than those I had to encounter on County Courts and the Evidence of Parties.

"But now, my dear friend, we are dwelling upon the improvement of the law and the great benefits which the community derives from it. We have both of us, from the very beginning of the century, anxiously devoted ourselves to protect the rights of the people and promote their improvement, without the least regard to the combinations or the movements of party; and, Heaven be praised! we have had success enough to cheer us. Even at the present hour we are comforted by the spectacle of those who suffer the most severely, conducting themselves with exemplary patience, and perfect abstinence from all outbreaks, and even all discontents; so unlike the working classes of forty years ago under far less pressure. This is manifestly the result of their advance in knowledge, and better comprehension of the causes of the distress. But while our prospects at home are thus comfortable, abroad, in most quarters, the aspect of affairs is truly painful. Mischief is brewing in one part of Germany that may endanger its internal tranquility, and even shake the general peace; while priestly intrigue in France may have the same sad result, by the maltreatment of Italy. A gloom is thus cast over the prospect of the future in Europe; but in America the view of the present is as distressing as possible. Of the grievous civil war now raging for above twelve months, with the utter disregard of human life and of public credit, it is difficult to speak so as not to offend either, nay, perhaps both parties, of whom one seems bent upon an impossibility. But at least let us hope that the imputation is groundless which would represent the Northern States as prepared to inflict upon their adversaries, and upon humanity itself, the only aggravation whereof the deplorable contest is capable, by exciting an insurrection of the slaves. Such a calamity is more to be dreaded by the friends of that unhappy race than by those of their masters, for the chief sufferings would be theirs; and we might, on their behalf, have to address the more numerous and better armed body of the whites, and to exclaim,

> "Tuque prior, tu parce, genus qui ducis Olympo:
> Projice tela manu, sanguis meus!

Nor let it be imagined that when the war shall happily cease, its evils will be at an end, either for the Americans themselves or for others. Armed men in hundreds and thousands will remain inured to slaughter, incapable of subordination, impatient of peace—their own government will be less secure than ever, and our colonies will have a bad neighbour."—*Law Magazine.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from Vol. 8, page 264.*)

The security covenant and bond to the Crown being perfected, both instruments are to be deposited with the proper officers. As to the covenant, sec. 26 provides that before any clerk or bailiff enters on the duties of his office, the covenant, with the Judge's certificate of approval, shall be filed with the Clerk of the Peace of the county in which the court is situate, who is to grant a certificate of the same.

For the filing and certificate, the Clerk of the Peace will be entitled to receive one dollar from the officer.

A copy of the covenant, certified by the Clerk of the Peace, is to be received in all courts as sufficient evidence of the due execution and contents thereof, without further proof (sec. 28).

With respect to the bond to the Crown, the practice is for the County Judge to send it, with his approval endorsed, to the Minister of Finance. It seems that the act respecting the security to be given by public officers (cap. 12 Con. Stat. Can.), so far as applicable to subordinate officers, extends to Clerks and Bailiffs in the Division Courts, and therefore the provision of the section is given. It enacts that—

Every person appointed to any civil office or employment or commission in any public department within the Province, or to any such office or employment of public trust under the Crown,—or wherein he shall be concerned in the collection, receipt, disbursement, or expenditure of any public money,—and who, by reason thereof, is required to give security, with surety or sureties or otherwise,—shall within one month after notice of such appointment, if he is then within the Province, or within three months if he is then absent from the Province (unless he sooner arrives in the said Province, and then within one month after such arrival) give and enter into a bond or bonds or other security or securities, in such sum and with such sufficient surety or sureties as may be approved of by the Governor, or by the principal officer or person in the office or department to which he is appointed, for the due performance of the trust reposed in him, and for his duly accounting for all public moneys entrusted to him or placed under his control.

Every person who by reason of his appointment to any civil office or employment or commission, as aforesaid, or who by reason of being concerned in the collection, receipt, disbursement or expenditure of any public moneys, gives or enters into any bond or other security for the due performance of the trust reposed in him—or for the duly accounting for of public moneys entrusted to him—shall cause every such bond or security to be registered at full length in the office of the Registrar of this Province, in manner hereinafter mentioned, and shall forthwith, after such registration, deposit the original bond or security at the office of the Minister of Finance.

And every such bond or security shall be recorded and deposited as aforesaid, within one month after being entered into or given, if the person on whose behalf it is entered into or given resides or is within this Province, and, if he is absent therefrom, then within three months after being entered into or given, unless such person arrives sooner within the Province, and then within one month after such arrival.

And by sec. 11 of the same act, every person required to give bond or security who fails to have it registered and deposited within the month, incurs a forfeiture of office.

The object of both these instruments, covenant and bond, is to afford adequate security to the public and the Crown for the full and faithful discharge of the officer's duty, and, that this security may be always maintained, provision is made for new sureties as occasion requires. If any surety in a covenant dies, becomes resident out of Upper Canada, or insolvent, the County Judge is required to notify the officer for whom such person became security of the fact, and he is required, within one month after being so notified, to give new security, and failing to do so incurs forfeiture of office (sec. 29). The insolvency of a surety, it is presumed, is not to be understood in the strict sense of being actually in the Insolvent Debtors' Court, but that any other tangible evidence of insolvency, as an assignment to creditors, a return of writs "no property," or the like, would evidence insolvency within the meaning of the section.

Section 30 enacts that the parties to a former covenant are not to be exonerated, by giving a new covenant, from their liability on account of any matter done or omitted before the renewal of the covenant.

By the act already referred to (cap. 12 Con. Stat. Can.) a more full provision is made in sec. 12, and regarding the purposes of the enactment there seems to be ground for holding that it would extend to the covenants as well as bonds required to be given by Clerks and Bailiffs. But any question on the point is practically obviated when the same persons enter into the covenant and bond as securities, as indeed is commonly the case. Sec. 12, no doubt, extends to the bonds; it enacts that—

Every such person as aforesaid who has given any bond or other security, with surety or sureties for the due execution of the trust reposed in him, or for duly accounting for public moneys coming to his hands,—shall give notice in writing to the Secretary of the Province, or to the principal officer or person of the department to which he belongs, of the death, bankruptcy, insolvency, or residence out of the Province, of any surety or person bound for or with him in any such security.

Such notice shall be given within one month after the fact comes to the knowledge of such person as aforesaid, if he then is or resides in this Province, or within three months if he be out of this Province (unless he sooner arrives in the Province, and then within one month after such arrival). And any person who neglects to give such notice within such period as aforesaid, shall forfeit to the use of her Majesty one fourth part of the sum for

which the surety so dead or bankrupt or insolvent or resident out of the Province, became security, to be recovered in any court of competent jurisdiction, by action of debt or information, at the suit of the Crown.

And the section further provides that, if new sureties are not put in, the officer is liable to forfeiture of his office.

The Judge is not limited by any of these enactments. He may, if the public interest require it, call on a Clerk or Bailiff to give a new security, and the Judge would seem to be justified in doing so where the increase of business in a court showed the existing securities to be insufficient in amount, or where he had reason to doubt the sufficiency of a surety, without being able to say that he was insolvent. Any officer declining to give new security when reasonably required to do so by the Judge, whether in terms of the statute or otherwise, might well be dismissed by the Judge at whose pleasure he holds office. And, moreover, an officer wilfully neglecting to communicate to the Judge any fact which would destroy or diminish the value of the security he is required by law to give and maintain, would be guilty of misbehaviour warranting his removal from office. No express provision appears to have been made for relieving the sureties in a security covenant from their responsibility for their principal, Clerk or Bailiff, but a new covenant entered into, approved and regularly filed, would doubtless operate to relieve them from further responsibility, from and after the time of such filing (see sec. 30).

Sec. 13 (same act) provides a mode of release. It is as follows:

When any person has become surety to the Crown for the due accounting for public moneys, or the proper performance of any public duty, such person, when no longer disposed to continue such responsibility, may give notice thereof to his principal, and also to the Secretary of the Province,—and all accruing responsibility on the part of such person as such surety shall cease, at the expiration of one month from the receipt of the last of such notices; and the principal shall within that period give the security of another surety, and register and deposit the bond of such new surety, or in default of so doing shall be liable to forfeit, and be deprived of the appointment, office, employment, or commission, in respect whereof such new security ought to have been given, in the manner and subject to the provisions hereinbefore set forth.

Thus it will be seen that very full provision has been made for securing the Crown and the public against damage or loss by the default, breach of duty, or misconduct of officers, by providing not only that ample security shall be given on the appointment of the officer, but also that the same shall be maintained and continued as a valuable and sufficient security; rendering it incumbent on the Clerk or Bailiff to notify the Judge without delay of any thing that would impair the value of the existing security, and on the Judge to cause new sureties to be given when any such fact is brought to his notice.

CORRESPONDENCE.

Division Court Law—Neglect of County Judge to require Security from Bailiff—Action.

TO THE EDITORS OF THE LAW JOURNAL.

Newcastle, December 14, 1862.

GENTLEMEN,—As you are at all times willing to give information on matters relating to division courts, your opinion on the following point is desired.

A B is appointed a division court bailiff, goes into his duties and acts as such for upwards of a year. During this time a writ of execution is put into his hands. The writ has never been returned. The defendant in the writ produces A B's receipt in full payment. The plaintiff in the case wants his money. He finds that A B is worthless, and also finds that *no sureties were taken from A B for the due performance of his office pursuant to the statute.* Query—to whom is the plaintiff to look for his money or redress?

I am, yours truly,

"MANVERS."

[A division court bailiff is in express terms prohibited from entering upon the duties of his office before the covenant of himself and sureties required by law, as a security to suitors, approved in the manner directed by the Division Court Act, is filed in the office of the clerk of the peace: (Con. Stat., U. C., cap. 19, sec. 26.) It is for the county judge to direct and approve of the security: (*Ib.*, sec. 25.) With him also rests not only the power to appoint, but the power to remove the bailiff: (*Ib.*, sec. 23.) It is the duty of the judge to see that proper security is given before the bailiff enters on the duty of his office. The neglect of this duty gives to the party injured by it a right of action against the county judge. (See *Parks* v. *Davis*, 10 U. C. C. P. 229.)]—EDS. L. J.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

SLOAN V. CREASOR, ATKINSON, AND MCKERNAN.

Division court bailiff—Misconduct—Action against his sureties—Prior judgment against the bailiff.

The plaintiff sued C., a division court bailiff, and his sureties, on their covenant that the bailiff would not misconduct himself in office, alleging a judgment recovered by himself against C., for selling his goods under execution contrary to the orders of the plaintiff in the suit, and a *fi. fa.* on such judgment returned *nulla bona* as to part, and claiming to recover the balance.

Held, (affirming the judgment of the county court,) that the declaration was bad, for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause of action.

Appeal from the county court of the county of Simcoe.

The declaration alleged that the defendants by their covenant, on the 1st day of January, 1858, covenanted and promised in the sums of money therein mentioned, that the defendant John Creasor as bailiff of the first division court of the county of Simcoe, should duly pay over to such person or persons entitled to the same all such moneys as he should receive by virtue of his said office of bailiff, and should and would well and faithfully perform the duties imposed upon him as such bailiff by law, and should not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; and the plaintiff averred that after the making of the said covenant, and whilst the said defendants John Atkinson and Daniel Kernan were so sureties for the said John Creasor as such bailiff, one John Ardagh recovered a judgment in the said first division court for the county of Simcoe against the plaintiff for a certain amount therein mentioned; and then it proceeded to set forth the issuing of a warrant of execution for the amount so recovered, together with the costs of suit, and

the delivery of such writ to the defendant John Creasor, as bailiff of the said court, for the purpose of levying the amount endorsed on such execution to be levied from the goods of the said plaintiff: that after the delivery of the writ to the said John Creasor the said John Ardagh countermanded the execution of the same, or the levying on the plaintiff's goods under the said writ, on the plaintiff paying to the said John Creasor all his costs by reason of the said writ being in his hands as such bailiff: that the plaintiff tendered to the said John Creasor all costs due on the said writ, but that Creasor refused to accept the same, and refused to stay proceedings on the said writ; and afterwards, while the said order of the said John Ardagh was in full force to stay the proceedings on the said *fi. fa.*, the said defendant John Creasor wrongfully, illegally, and contrary to his duty in that behalf, did, under pretence of the said warrant of execution, seize, take, and carry away certain goods and chattels of the plaintiff, to wit, a large quantity of wheat in sheaf, a large quantity of peas in the straw, and one hundred and fifty bushels of potatoes, and did afterwards wrongfully sell the same, the said order to stay proceedings and countermand not having been in any wise revoked cancelled, or annulled.

The declaration then averred that for such seizing and taking of the plaintiff's goods, and the wrongful conversion of the same, the plaintiff commenced an action of trespass in the county court against the said John Creasor, and that by the consent of the parties in the said action, their counsel and attorneys, and by an order of the said court, the said action and all matters in difference therein were referred to the award and arbitrament of John Strathy, Esquire, and that within the time appointed for making an award the said John Strathy did make an award in favour of the plaintiff for $78.25, for his damages by reason of such wrongful taking and conversion, and that the costs of the said action, reference, and award, were duly taxed to the said plaintiff at the sum of $97.88. The declaration then set forth a judgment obtained on the said award for the damages and costs, and that an execution issued thereon, and was delivered to the sheriff of the county of Simcoe, endorsed to levy the sum of £43 18s. 1d., being the amount ordered to be paid on the said award and costs, and the sum of £8 15s., being the costs taxed and ordered to be paid by the rule to enforce the payment of the said award, and the costs attending the proceedings for the said rule and the judgment entered thereon; and that the said sheriff afterwards returned the said writ of *fieri facias* with an endorsement that he had made thereon the sum of $87.80, and that the defendant John Creasor had no other goods or chattels within his bailiwick whereof he could cause to be made the residue of the said money. The declaration then concluded by alleging, "and so the plaintiff saith that the said defendant John Creasor did not well and faithfully do and perform the duties imposed upon him as such bailiff by law, and did misconduct himself in the said office of bailiff to the damege of the plaintiff, being a party in a legal proceeding, contrary to the said covenant, whereby the plaintiff hath sustained the said damagas; and the plaintiff claims fifty pounds."

The defendants demurred to this declaration, alleging, among other grounds of demurrer, that the plaintiff having recovered judgment against Creasor for the wrong, was precluded from suing on the covenant; and judgment having been given for the demurrer in the court below, the plaintiff appealed.

McCarthy, for the appellant, cited *McArthur* v. *Cool*, 19 U.C. Q. B. 476; *Thompson* v. *McLean*, 17 U. C. Q. B. 495; *Sanderson* v. *Hamilton*, 1 U.C. Q.B. 460; *McIntosh* v. *Jarvis*, 8 U.C. Q.B. 533; *Nelson* v. *Baby*, 14 U.C.Q.B. 235, 238; *Miller* v. *Tunis*, 10 U.C.C.P. 423; *Baker* v. *St. Quintin*, 12 M. & W. 441; *Hunt* v. *Hooper*, Ib. 664; *Drake* v. *Mitchell*, 3 East 257; *Bell* v. *Banks*, 3 M. & G. 258.

Osler, contra, cited Stephen on Pleading, 288; 1 Saund. 276; Bac. Abr. "Statute" L.; *Hoye* v. *Bush*, 2 Scott N. R. 86; *Peppercorn* v. *Hoffman*, 9 M. & W. 618, 628; *King* v. *Hoare*, 13 M. & W. 494; *Joule* v. *Taylor*, 7 Ex. 61.

McLean, C. J.—The plaintiff appears to have brought this action, not for the purpose of recovering again such damages as a jury may give him for the tort of the bailiff against him and his sureties, but rather for the purpose of recovering the balance due upon the execution in the suit against the bailiff alone. If that were not the case it is difficult to imagine why the plaintiff set out on the record any thing connected with the suit against the bailiff, and the reference of that suit to arbitration, and the issuing an execution and levying a specific amount of the moneys endorsed to be levied on that execution. Had it been intended to act independently of the judgment recovered against Creasor, and to proceed *de novo* for the same cause of action against Creasor and his sureties, there could have been no necessity to set forth any thing but the cause of action alleged in the county court suit—that is, the seizing and selling the plaintiff's goods after he had been directed not to do so by Ardagh—and then the allegation that in doing so he had misconducted himself and caused damage to the plaintiff, a party in the suit or legal proceeding at the suit of Ardagh, contrary to the terms of the said covenant, whereby an action had accrued to the plaintiff to recover from the said defendants the amount of the said damages, the matter would have been sufficiently plain; but if that was all that was intended the declaration certainly sets out a good deal of irrelevant matter, and the statement at the close "whereby the plaintiff has sustained *the said damages*" might have been confined to a specific amount arising from the tort of the bailiff.

On the argument, however, the plaintiff argued that notwithstanding the recovery against Creasor and the levying of a portion of the damages awarded against him, he had a right to bring a second action for the same cause, and recover damages a second time for precisely the same tort. It is quite plain that there is no covenant set out a breach of which would render the sureties or their principal liable to the plaintiff for payment of any damages recovered against the bailiff individually, for a tort committed in the discharge of his duty. Then taking the conclusion of the declaration to apply to the act of trespass, for which the plaintiff shews that he has already recovered, and that the intention is to endeavor again to recover against Creasor and his sureties, it becomes necessary to look at some of the grounds of demurrer urged by the defendants against the declaration.

The sixth objection is, that "the plaintiff having sued for the wrong in the county court elected his remedy, and cannot now sue Creasor, or he would be made twice liable for the same cause, contrary to the maxim, "*nemo debet bis vexari pro eadem causâ*," &., and the matter has become "*rem judicatam*;" and the seventh is, "that the plaintiff having referred his grievance against Creasor to arbitration, thereby discharged the sureties from liability, and as to Creasor the wrong has become a debt, and a matter adjudicated upon."

Either of these objections, I think, must be fatal to the plaintiff's recovery. The action is against the defendants jointly, and on a covenant said to have been made by them under their respective seals in the sums of money therein mentioned, and it is alleged that they covenanted and promised that the defendant John Creasor as bailiff of the first division court, should duly pay over to such person or persons entitled to the same all such moneys as he should receive by virtue of the said office of bailiff, and should not misconduct himself, &c.

The covenant being sued upon as a joint one, any matter which will discharge one of the defendants will equally discharge all, for there can be no recovery against two of the defendants, who are bound only with a third person jointly to do a particular act. In the case of *King and another* v. *Hoare*, (13 M. & W. 493,) and the numerous cases cited by Mr. Baron Parke in the judgment given by him in that case, the principle is clearly established, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party, and that in cases of joint contracts or joint torts there can be no distinction made when there is but one cause of action in each case. The party injured may sue all the tort-feasors or all the contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other, but for the purpose of the decision in that case they are upon the same footing: whether the action is brought against one or two, it is for the same cause of action. It is also said in the same case by the learned baron, that if there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the

suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result.

In the case of *Buckland* v. *Johnson*, (15 C. B. 145,) the same principle is also recognised, and at page 166 *Maule*, J., says: "Having his election to sue in trover for the value of the goods at the time of the sale, or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy, and he has obtained a verdict and judgment. He has therefore got what the law considers equivalent to payment namely, a judgment for the full value of the goods. * * * When the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury, * * * and having once recovered in respect to the same goods the plaintiff cannot again recover the same thing against somebody else. There is an end of the transaction. Having once recovered a judgment his remedy was altogether gone: his claim was satisfied as against all the world. He was in fact in the position of a person whose goods had never been converted at all."

In the case of *McArthur* v. *Cool et al.*, in our own court, (19 U. C. Q. B. 476,) it was held that the plaintiff had at one time a cause of action for the money sought to be recovered against Cool, a division court bailiff, and the other defendants his sureties, but that having elected to proceed in an action of trespass against Cool, the plaintiff could not afterwards sue on the covenant for money had and received by the bailiff for the same cattle for the taking of which the verdict in trespass had been recovered. That decision is binding until reversed by the judgment of a court of appeal, and upon the authority of that case, as well as the others cited, I think this appeal against the judgment of the learned judge of the county court on the several causes of demurrer must be discharged with costs.

HAGARTY, J.—The declaration in this case is framed apparently in conformity with that in *McArthur* v. *Cool*, (19 U. C. Q. B. 476.) There the covenant was stated jointly, not jointly and severally, and the statute not referred to. On objection taken the court say it can be supported as a joint covenant, although the sums for which each is respectively bound are different.

The statute is not here referred to, and the covenant is stated as joint, not joint and several. This creates a difficulty in my mind.

The three defendants, Creasor, Atkinson, and McKernan, covenant jointly that Creasor shall not do any act to the damage of the plaintiff. The declaration alleges an act so done, and a judgment in tort recovered against Creasor alone therefor, and part payment on such recovery. After that can this action be maintained against the three defendants on a joint contract?

The case of *King* v. *Hoare*, (13 M. & W. 504,) and *Buckland* v. *Johnson*, (15 C. B. 145,) seem strongly against the plaintiff's right.

Assuming the alleged wrong done here to be within the covenant, the plaintiff, when Creasor injured him, had two remedies,—one against him alone for the tort, the other against him and the other defendants on the joint contract that he should not commit any such tort.

Let us now see Parke, B.'s words: "If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment recovered in a court of record, the judgment is a bar to the original action, because it is thereby reduced to a certainty, and the object of the suit attained as far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, "*transit in rem judicatam*," the cause of action is changed into matter of record, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two. * * * Popham, C. J., states the true ground. He says: "If one hath judgment to recover against one, and damages are certain," (that is, converted into certainty by the judgment,) "although" he be not satisfied, yet he shall not have a new action for the trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two is, because there every one of these is chargeable and liable to the entire debt; and therefore a recovery against one is no bar against the other until satisfaction." And it is quite clear" (continues Parke B.,) "that the Chief Justice was referring to the case of a joint and *several* obligation. * * * We do not think that the case of a joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case." The judgment is lengthy, and thus concludes: "These considerations leads us, quite satisfactorily to our own minds, to the conclusion, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the *same debt or tort* against another party."

To succeed in this action the plaintiff must I think maintain that where a man covenants not to do an act in itself the subject of trespass, and having done the act he is sued and judgment recovered against him expressly for the trespass, he can again be sued on his covenant, the same act of trespass being laid as the breach. This I consider cannot be permitted by the law. If, therefore, here the defence as to Creasor is a good bar, it is difficult to see how it must not equally be so as to his co-defendants.

Considering that the plaintiff fails on this ground I have not considered several other points suggested.

BURNS, J., concurred.

Appeal dismissed.

IN THE MATTER OF RIDSDALE AND BRUSH, CLERK OF THE CORPORATION OF THE TOWN OF AMHERSTBURGH.

Roman Catholic separate schools—Claim of exemption by protestants as subscribers to—Misconduct of clerk—Mandamus.

A rate having been imposed for the purpose of building a new school house in the town of Amherstburgh, certain persons who were not catholics, but protestants, signed a notice to the clerk, he himself being one of them, that as subscribers to the Roman Catholic separate school they claimed to be exempted from all rates for common schools for the year 1861; and the clerk, thereupon in making up the collector's roll, omited this rate opposite to their names.

Held, that the clerk who had been notified before making up the roll that it would be illegal to exempt these persons, had done wrong, and might be punished under C. S. U. C., ch. 55. secs. 171, 173, but that the court could not in the following year interfere by mandamus to compel him to correct the roll.

[Trinity Term, 1862.]

In Hilary Term last *Robert A. Harrison* obtained a rule calling upon the clerk to shew cause why a writ of mandamus should not issue, commanding him either in the collector's roll of the town to set opposite the lots or parcels of land as therein described of Thomas F. Park and eleven others named, the amount for which each of them was chargeable for school rates during the year 1861 erroneously omitted therefrom, or to certify the error to the collector of the municipallity, or to the treasurer of the county, upon the ground that the persons were liable to taxation for common school purposes in the town.

This rule was obtained on affidavits, stating the following circumstances to be true in fact: that the appellant was a ratepayer of the town, as were also the twelve persons mentioned: that the common schools were managed under a board of school trusetes, and that they were also a separate school, a Roman Catholic school, managed by a separate board of Trustees: and the corporation of the town, at the request of the board of school trustees, passed a by-law to raise for common school purposes the sum of £450 for the year 1861, which sum was intended to be expended in the building of a new school house. The supporters of the Roman Catholic school had, on the 1st of February, 1861, given by the hands of one of the trustees thereof a notice to the clerk of the municipallity, in the following words:

"We, the undersigned, subscribers of the Roman Catholic separate school, town of Amherstburgh, claim to be exempted from all rates relating to common schools and common school libraries for the year 1861."

This notice was signed by all those who had formerly supported the separate school, and in addition thereto, for the year 1861, by the twelve persons mentioned. The clerk of the municipality was one of the twelve persons. It was said that none of these twelve persons were catholics, but, on the contrary, were protestants, and that the object in their subscribing the notice was to claim exemption from paying, and to avoid being assessed for any part of the money with which to build the school house.

The persons named it was said owned a great deal of property in the town, and were on the assessment roll assessed for the ordinary town taxes in other respects, but that the town clerk, Thomas H. Brush, in making up the roll for the collector, had omitted to carry out opposite to their names any rate whatevor in respect of the sum so directed by the by-law, upon the ground that those persons were to be considered as exempted from the rate by reason of their being supporters of the separate school.

It was sworn that in the early part of the year, and before the roll was made up, it was intended to exempt these persons from payment of the rate, and Brush, as the town clerk, was notified that it would be illegal to exempt these persons, for they were not Roman Catholics. The roll however, was delivered to the collector having no rate in respect of common schools to be paid by these persons set opposite their names or property. On the 3rd of February, 1862, a written notice was served upon Brush, requesting him to set opposite to the names of the persons mentioned in the roll the amount for which each person was chargeable for school rate for the year 1861, or to certify the same to the clerk of the municipality, or to certify the same to the county treasurer.

During last term *Prince* shewed cause, and filed affidavits in reply. In none of the affidavids was it denied that any of the persons mentioned were not Roman Catholics. Two of these persons said they had been supporters of the separate school before the year 1861, and had sent children to the separate school. The clerk stated that he had sent his children to the separate school before 1861, but he had never claimed exemption till 1861.

The collector's roll was delivered to the collector on the 21st of November, 1861, and he refused to allow any alterations while in his hands.

Consol. Stats. U. C., ch, 55, secs. 89, 104; ch. 64, sec. 27, sub-sec. 12; ch. 65, sec. 18 *et sequ.*, secs. 29, 31 were referred to in the argument.

Burns, J., delivered the judgment of the court.

This case is a most curious one in many respects, and exhibits the ingenuity of the human mind to devise ways and means for evading payment of what the legislature thought was perfectly plainly expressed. We mean in cases where people think their pockets are touched upon by those having such power as school trustees and others in a similar position,

We take it to be perfectly plain, from reading the Common School Act, chapter 64 of the Consol. Stats. of U. C., chapter 65, providing for separate schools, and chapter 55, the Assessment Act, that the legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separists as availed themselves of the provisions in their favour.

The persons mentioned as having signed the notice before stated have not in that notice, which Mr. Brush seems to have very strangely acted upon, told us that they were or are Roman Catholics. All they have said is that they claim to be exempted from all rates relating to common schools, because they are subscribers to the Roman Catholic school. That is not the class of persons the legislature was providing for. The provision was and is for those who not only supported the separate school, but for such persons as were in a position to claim the exemption from paying to the common schools by reason of their being Roman Catholics. The two things must combine, and in the present case it would be impossible to bring into operation the provisions of the 31st section of the act, chapter 65, with regard to the penalty for making a false statement in the notice, for though it may be quite true the persons are supporters of the separate school, a thing perfectly legal if they choose to do so, yet they have not said they are supporters because they are Roman Catholics.

The 29th section of the Act has not been complied with by those who were claiming the exemption from paying the school rate.

But suppose the notice given might be considered as sufficient to exempt the persons signing it from payment, we must see how Mr. Brush has acted upon it. He seems to have thought that he, as the clerk of municipality, had a right to omit on the collector's roll carrying out the rate to his own name and the others who signed that notice. This is a clear violation of his duty as prescribed by the 89th and 90th sections of the Assessment Act, chapter 55 of the Consol. Stats. U. C. When the town council passed the by-law authorising the levying of such sum as the school trustees required, it was the duty of the clerk to calculate the rate that each person should pay according to the assessed value of his property, and set the sum down in the collector's roll. Whether the individuals named in the collector's roll would be exempt from payment of any sum or rate mentioned in the roll depended upon something else, which the clerk in the discharge of his duty, as far as making out the roll according to law, had nothing to do with.

The 29th section of chapter 64 does not exempt those who are Roman Catholics supporting a separate school from having taxes imposed upon them; it only exempts them from the payment of all rates imposed for the year for the support of the common schools, provided they give the notice mentioned in the section. To enable those who are thus by law exempt from payment of the rate imposed the 30th section provides for the clerk of the municipality giving a certificate to the person giving such notice of the effect of it, and the date of such notice, so that when the collector called for the rate the person holding the certificate could shew that he was not liable to pay, but was exempt from paying the rate. When the legislature intended the names of any persons supporting separate schools should be omitted from the collector's roll, they have said so, as in the provisions for separate schools for protestants and coloured persons.—See sections 11, 13, and 14 of chapter 65.

It appears that the roll was delivered to the collector on the 21st of November, 1861, and the collector states that he collected a great portion of the rates before the 14th of December, and that the council extended the time for making his return to the 14th of March, 1862, and by that time he had collected all the rate except from some indigent persons. Whether the roll yet remains in the collectors hands does not appear. Mr. Brush's duty as clerk of the municipality ended when he completed the roll and placed it in the hands of the collector for the collection of the rates. We can no where find that it is laid down, either in the Assessment Act, or the Municipal Act, that it is the duty of the clerk to certify either to the collector or to the treasurer any errors which may have been made. There are provisions with respect to errors and mistakes made, and that the lands stated shall not be exempt from the taxes by reason of the error and mistake, but we can no where find it stated to be a duty upon the clerk of any municipality to certify to any other person or authority when such error or mistakes exists or has been made.

We can see very plainly that in this case Mr. Brush has not discharged his duty as he should have done, but then we cannot see our way clearly to rectify that now, under the circumstances of this case, by the writ of mandamus as sought for. The effect of granting the writ would be to invest the collector, if he still remain in office, with an additional duty and liability, in the event of the roll being now made right, as it should have been when first delivered to him, and in case of the collector being out of office, or the roll returned, to create some confusion in the treasurer's accounts or mode of dealing with the matters provided for in the statute.

The 171st and 173rd sections of the Assessment Act provide for punishing the clerk of a municipality who refuses to do his duty, or who commits malversation in the discharge of it, by indictment. The insinuation thrown out in this case against Mr. Brush are of the latter description. So far as the complaint affects him personally the remedy provided for by statute should be pursued. Adopting such a course or omitting to do so would not in either case prevent the remedy by mandamus in order to correct the error in the discharge of the duty of the clerk, if the duty be plain and clear. There is no difficulty in pronouncing that the clerk in this instance did not discharge his duty according to law, but the difficulty consists in saying that we can by mandamus at this stage of the proceedings order him to do any thing which will have the effect of remedying the defective execution of his duty.

After giving the matter much thought and consideration, we have arrived at the conclusion that we must discharge the rule for the mandamus.

Rule discharged, without costs.

ECCLES ET AL., EXECUTORS OF HUGH ECCLES, v. PATERSON AND HOLE.

Ejectment—Proof of Title.

In ejectment against two defendants the plaintiffs proved a mortgage in fee made by one while he was in possession as owner, and duly assigned to them, and that the other defendant came in after, without shewing how.

Held, sufficient, *primâ facie*, to entitle the plaintiffs to a verdict against both.

(T. T., 26 V., 1862.)

EJECTMENT.—The plaintiffs proved a mortgage in fee from defendant Paterson, duly assigned to their testator.

At the trial, at Toronto, before Morrison, J., one James Paterson, the son of the defendant, swore that he knew the lot; that his father (the defendant) was in possession as owner when the mortgage was made. The defendant Hole, he said, went into possession after, he did not know how; his father was not in possession at the time of the trial.

It was objected that there was no evidence to entitle the plaintiffs to recover possession. This the learned judge overruled, holding that a *primâ facie* case had been made out, and there was a verdict for the plaintiffs.

Robert A. Harrison moved for a new trial as regarded Hole, for misdirection, citing *Doe Wilkes* v. *Babcock*, (1 U. C. C. P. 392,) and *Doe Crew* v. *Clarke*, Rob. & Har. Dig. "Title" 14.

HAGARTY, J., delivered the judgment of the court.

The latter case is not, we think, applicable. There may be some expressions in the former case that give colour to the application, but on the plaintiffs' own evidence there the title was clearly shewn to be in the Crown, and defendant could not be assumed to be a wrong-doer. In fact the plaintiff shewed that he himself had not title as against defendant.

We have always understood it to be the rule, and a most wise and salutary rule it is, to hold such evidence as was given in this case to be sufficient *primâ facie*, and that in the absence of any contradictory proof from defendant, to direct a jury in favour of the plaintiff.

A man in full possession, claiming to be owner, makes a deed in fee to one through whom the plaintiffs claim. After this time another gets into possession in some unexplained manner, and to a process in ejectment the mortgagor and this person appear and defend.

We think the latter may be described in the words of Bramwell, B., in *Davison* v. *Gent* (1 H. & N. 748):—"The defendant" (there were two) "is in this dilemma: either his entry was altogether tortious, or he came in under the tenant, and is therefore estopped from denying the plaintiff's title."

We also refer to *Doe Hughes* v. *Dyeball* (M. & M. 346); *Hogg* v. *Norris* (2 Fos. & Finl. 246); *Bikker* v. *Beeston* (1 Fos. & Finl. 685); *Homes* v. *Pearce* (Ib. 283).

As Sir W. Erle remarks in one of these cases, if defendant Hole had any title he could easily have offered proof of it. We think there should be no rule.

Rule refused.

COMMON PLEAS.

(*Reported by* R. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN IN A CAUSE OF MEDCALFE v. WIDDIFIELD.

County Court—Jurisdiction of—Penalty—Con. Stat., Can. ch. 6, sec. 81.

Held, that the County Courty has jurisdiction in an action for the penalty imposed by the 81st section of Con. Stat. of Can., ch. 6, for selling spirituous or fermented liquors on polling days.

[T. T., 26 Vic.]

D. B. Read, Q. C., obtained a rule *nisi* for a writ of prohibition to the County Court of the County of Elgin, and to the judge thereof, prohibiting any further proceedings being taken in the said cause either to enter judgment or to issue execution, or any other proceeding in the cause, on the ground that on the face of the proceedings it appears and is shewn by the affidavits and papers filed that the said County Court had no jurisdiction over the said cause, or the cause of action on which a verdict has been recovered therein, or to entertain the same, and to shew cause why the plaintiff should not pay the costs of this application.

The writ issued from the County Court on the 8th of August, 1861, and the declaration was filed on the 22nd day of the same month. It claimed two penalties of $100 each from defendant, in separate counts, for neglecting to close and keep closed his tavern, by Consol. Stat. of Canada, ch. 6, and for selling spirituous and fermented liquors to divers persons in his tavern contrary to the provisions of that act.

The pleas were, 1st, *nil debet*. 2nd, that at the time when, &c., the liquor sold or given was by way of refreshment to travellers lodging at defendant's tavern, but not otherwise. 3rd, to so much of the declaration as alleges the not closing and keeping closed the tavern, that there was not at the time of passing the said act, or before the passing thereof, any law requiring taverns or hotels to be closed on Sunday during divine service.

Issue was taken on the 1st and 2nd pleas, and there was a demurrer to the second and third pleas, and defendant gave notice of exceptions to the declaration.

It was sworn that the issue was tried on the 11th of March, 1862, and a verdict rendered for the plaintiff for $100 on the second count. That plaintiff had served a copy of his bill of costs on defendant's attorney with notice of taxation. That judgment had not been entered.

Crombie shewed caused. He referred to the Consol. Stats. Canada, ch. 6, sec. 81, and the Interpretation Act., ch. 5, sec. 6, sub-sec. 17, and cited *O'Reily qui tam* v. *Allan*, 11 U. C. Q. B. 526; *Apothecaries' Company* v. *Burt*, 5 Exch. 363; *In re Birck*, 15 C. B. 743; *Ricardo* v. *Board of Health*, 2 H. & N. 257; *In re Chivers* v. *Savage*, 5 E. & B. 697.

Read, Q. C., contra, cited *Roberts* v. *Humby*, 3 M. & W. 120; *In re Hunt* v. *North Staffordshire R. W. Co.*, 2 H. & N. 451; *Marsden* v. *Wardle*, 3 E. & B. 695; *Jones* v. *Owen*, 5 D. & L. 669; *Darby* v. *Cosens*, 1 T. R. 552; *Leman* v. *Goulty*, 3 T. R. 4.

DRAPER, C. J.—The action in the County Court is founded on the 81st section of the Consol. Stat. Canada, ch. 6—"Every hotel, tavern and shop, in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service, and no spirituous or fermented liquors or drinks shall be sold or given during the said period under a penalty of $100 against the keeper thereof, if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors or drinks as aforesaid." And in sec. 87 of the same act, "All penalties imposed by this act shall be recoverable with full costs of suit by any person who will sue for the same by action of debt, or information in any of her Majesty's courts in this province, having *competent jurisdiction*, and in default of payment within the period to be fixed by such court, such offender shall be imprisoned in the common gaol of the place until he has paid the amount which he has been so condemned to pay and the costs."

The case of *In re Apothecaries' Co.* v. *Burt*, 5 Exch. 363, is, as regards the language of the statute, nearer the present case than *O'Reily qui tam* v. *Allan*, though it may be difficult to draw any solid distinction between the language of our act 4 & 5 Vic., ch. 12, and the English act 55 Geo. III., ch. 194, sec. 26. The court refused a writ of prohibition in that case, which was applied for because it was contended that the action was brought in such a form as to assert a claim for four penalties of £20 each, whereas the County Court, under the English act, 9 & 10 Vic., ch. 95, only had jurisdiction in "all pleas of personal actions where the debt or damage claimed is not more than £20, whether on balance of account or otherwise." Neither at the bar nor by the court does it appear to have been doubted that the County Court had jurisdiction, provided the debt claimed was not more than £20.

I think that if the case in the Exchequer conflicts with *O'Reily qui tam* v. *Allan*, we should rather be guided by the former. In the statute under our consideration the jurisdiction is given to any court of competent jurisdiction. And looking at the Consolidated

Stat. Can., ch. 5, sec. 6, sub-sec. 17, jurisdiction over suits for pecuniary penalties is given (when no other mode is prescribed) to "any court having jurisdiction to the amount of the penalty in cases of simple contract." We may, I think, call in aid the language of the Interpretation Act, and construe the act under consideration as conferring jurisdiction on any court, whether of record or no, which has jurisdiction to the extent of the penalty imposed. We are not obliged to dissent from *O'Reily qui tam* v. *Allan*, because of the different words of the two acts.

I think, therefore, this rule should be discharged.

Per Cur.—Rule discharged.

Morris v. Cameron.

Warranty—Breach of—Damage—Jurisdiction of Division Court.

Held, that an action arising on breach of a warranty of a horse when the damages recovered were over £40 and under £100, was within the jurisdiction of the Division Court, and that costs according to the tariff of that court only were taxable therein.

[T. T., 26 Vic.]

Declaration stated that in an action of the County Court of York and Peel, in which plaintiff was plaintiff and one J. B. defendant, plaintiff recovered a verdict for £12 10s., and was about to enter final judgment; and that in consideration that plaintiff would forbear to enter final judgment, defendant by an agreement in writing promised plaintiff to pay him the amount of the verdict and his full costs according to the tariff of the County Court. That such full costs amounted to £20.

Breach, non-payment.

Averment, that the action was not of the proper competency of the Division Court.

Plea as to £20, being the cost of the said action, that in that action the plaintiff declared as and for a breach of contract against J. B., as follows: "For that the defendant by warranting a horse to be eight years old, sound, free from vice, quiet to ride or drive in single or double harness, sold the said horse to plaintiff; yet the said horse was not then sound, free from vice, and quiet to ride or drive in single or double harness." That the defendant J. B. traversed the warranty and breach in that declaration. That the plaintiff's proof of the warranty was the following memorandum in writing: "Received of James Henry Morris the sum of £30 for a bay mare, warranted eight years old, sound, free from vice, and quiet to ride or drive in single or double harness." That because the mare did not answer the description, the plaintiff re-sold her for £17 10s., and recovered the verdict of £12 10s. as the difference between the £17 10s. and the £30 paid to J. B. That the plaintiff claimed by special endorsement on his writ in that action £23, and for the cause hereinbefore appearing the action was of the proper competency of the Division Court.

Demurrer, because the action appears on the face of it to have been of the proper competence of the County Court.

Eccles, Q.C., supported the demurrer.

M. C. Cameron contra.

Draper, C. J.—I think the 54th section of the Division Court Act has nothing to do with this case, for that points out the cases where the Division Courts have no jurisdiction at all. Here the jurisdiction as to the mere cause of the action is undeniable, provided the amount is not too large, and therefore the question arises, whether it comes within the first or second sub-sections of section 55. If the former, as a personal action where the debt or damages do not exceed $40, then the action is properly brought in the County Court. If the latter, as a claim and demand of debt, account or breach of contract, or covenant or money demand, where the amount or balance claimed does not exceed $100, then defendant is entitled to judgment.

But for the word "debt" in the first sub-section it might be argued that the words personal actions there used meant that class of action to which the old maxim *actio personalis moritur*, &c., applied. It is not easy to point out a personal action of debt to which the second sub-section would not apply.

The English County Court Act enacts that "All pleas of personal actions where the debt or damage is not more than £20 (afterwards extended to £50), whether on the balance of account or otherwise, may be holden in the County Court," and then follow certain exceptions. I take it there is no doubt an action for breach of warranty within the limited amount would lie in the County Court in England. The case of *Aris* v. *Orchard*, 30 L. J. Exch. 21; 3 L. T. N. S. 448, seems conclusive on this point.

In my opinion as to this point, the defendant is entitled to judgment.

Per cur.—Judgment for defendant.

Gillespie et al. v. City of Hamilton.

Assessments—Arrears of—Addition of 10 per cent. thereon—Computation of.

Held, that the 10 per cent. charged upon arrears of taxes due upon land is to be added to the whole amount due upon the lot, and not upon the amount of each year's taxes separately, thereby making it a compound computation of 10 per cent. each year.

[T. T., 26 Vic.]

This was an action brought by the plaintiffs against the defendants for the recovery of the sum of $10 25, money paid by the plaintiffs to the defendants under the circumstances set out below, and by consent of the parties, and by an order of Hagarty, J., dated the 28th of August, 1862, according to the Common Law Procedure Act, the following case was stated for the opinion of the court, without any pleadings:

Special Case.

The plaintiffs were the owners of lots Nos. 12, 13 & 14, fronting on James street, and lots Nos. 12, 13 & 14, fronting on Hughson street, in block No. 23, in St. Andrew's ward, in the city of Hamilton, the same being vacant lands.

On the 1st May, 1862, the chamberlain of the said city entered in his books against the said lands the arrears of taxes chargeable thereon at that date, at the sum of $855 25, made up as follows:

Taxes on lots 12, 13 & 14, James street, and 12, 13 & 14, Hughson street, 1859	$250 00	
1st May, 1860, addition 10 per cent	25 00	
		275 00
Arrears at 1st May, 1860	275 00	
Taxes of 1860	250 00	
	525 00	
1st May, 1861, addition 10 per cent	52 50	
		577 50
Arrears at 1st May, 1861	577 50	
Taxes of 1861	200 00	
	$777 50	
1st May, 1862, addition 10 per cent	77 75	
		855 25
Arrears at 1st May, 1862	$855 25	

The plaintiffs contended that the taxes chargeable against the said lands should have been computed as follows:

Taxes for 1859	$250 00	
1st May, 1860, addition 10 per cent	25 00	
		275 00
Arrears at 1st May, 1860	275 00	
Taxes for 1860	250 00	
10 per cent. on $500	50 00	
		575 00
Arrears at 1st May, 1861	575 00	
Taxes for 1861	200 00	
10 per cent. on $700	70 00	
		845 00
	$845 00	

The question for the opinion of the court was, whether the chamberlain was authorized in adding 10 per cent. to the several amounts in arrear on the 1st of May in each year, including the previous additions of 10 per cent., or simply on the actual amount of taxes then in arrear.

Freeman, Q. C., for plaintiffs, *Burton* for the defendants, reference was made to Consol. Stat. U. C. cap. 55, secs. 115, 121.

Draper, C. J.—By sec. 168 of the Assessment Act, arrears of taxes due to cities on the lands of non-residents shall be funded, collected and managed in the same way as like arrears due to other municipalities, and the chamberlain and high bailiff shall for those purposes perform in the case of cities the like duties as are

hereinbefore in the case of other municipalities imposed on the treasurer and the sheriff.

Sec. 115 requires the treasurer of every county to keep books, in which he shall enter all the lands on which it appears from the clerk's return and the collector's rolls there are any taxes unpaid, and the amounts so due; and on the 1st of March in each year, he shall complete and balance his books by entering against every parcel of land *the arrears* (if any) *at the last settlement*, and *the taxes* of the preceding year which remain unpaid, and he shall ascertain and enter therein the total amount *of arrears* (if any) chargeable upon the lands at that date.

Sec. 121.—If at the balance to be made on the 1st of May in every year, it appears that there is any *arrear of tax* due upon any parcel of lane, the treasurer shall add to the *whole amount then due* 10 per cent. thereon.

It is upon these sections that the question is raised for our decision upon facts which may be condensed into the statement following:

City taxes were due on lands in Hamilton, on the 1st of May, 1860, for the year 1859. The chamberlain charged the taxes against these lands, and added 10 per cent. to the charge. The sum of these two items formed the amount due on the 1st of May, 1860.

On the 1st May, 1861, the chamberlain again completed and balanced his books as regarded these lands by charging, 1st, the amount appearing due thereon, by the preceding account; 2nd, the taxes due for the year 1860; 3rd, 10 per cent. on these two amounts as forming the whole amount then due. The sum of these three items formed the amount due on the 1st May, 1861.

On the 1st May, 1862, the chamberlain charged the lands with the amount so due, adding the taxes for 1861, together with 10 per cent. on the sum of these two items.

The question is, if the 10 per cent. should be charged on the gross amount of arrears appearing due at each annual settlement, or only on the amount of taxes due for the several years: in other words, whether the amount on which the 10 per cent. is to be calculated on the 1st of May, 1862, is to include the preceding addition of 10 per cent. made on the 1st of May, 1860 and 1861, respectively.

I think the Legislature have used language very clearly indicated an intention that 10 per cent. should be added every year, calculated on the whole amount which is in arrear and due upon the lands at the time the charge is made. In the present case the lands were liable to satisfy a given sum on the 1st May, 1862, which sum included taxes for preceding years, and 10 per cent. added thereto at the preceding 1st of May. To that sum which constituted the whole amount due on the lands, the statute, as I read it, directs that 10 per cent. should be added.

I am therefore of opinion judgment of *nolle prosequi* should be entered, according to the agreement of the parties.

Per cur.—Rule accordingly.

GRIFFIN v. JUDSON.

Promissory note—Dated and payable in Ogdensburg—Protest by a foreign notary—How far protest evidence—Interest—Currency of dollars and cents—Proof of value.

In an action on a promissory note, dated and made payable at Ogdensburg, in the State of New York;

Held, that the production of a protest of a notary of that State was no evidence of the facts therein stated; our statute, under which a protest is made *primâ facie* evidence of those facts, only applying to protests made by notaries of Upper and Lower Canada.

2nd. That it was not necessary, in such an action, to prove the value of dollars and cents in the States, we having a corresponding currency, and no par value for the American currency being fixed by law.

3rd. That interest at the rate allowed by our law was chargeable upon such a note.

[T. T., 26 Vic.]

The defendant was sued as endorser of a note, dated at Ogdensburg, in the State of New York, and made payable at a bank there. The declaration contained the usual averments of presentment, dishonor, and notice to defendant. The defendant denied presentment and notice by his pleas.

To prove these two facts, the plaintiff, at the trial, put in the note and an instrument under the hand and seal of a notary, as follows:

"*Advance Office*, Ogdensburg, N.Y.

"United States of America, } S. S.
"State of New York. }

"On the twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-one, at the request of the Judson Bank, I, John D. Judson, notary public, duly admitted and sworn, dwelling in the village of Ogdensburg, county of St. Lawrence, and State of New York, did present the original note for $207 22 and interest, hereunto annexed, to the teller of the said bank, and of him did then and there demand payment thereof, which was refused.

"Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the maker and endorser of the said note, as against all others it doth or may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, and to be hereafter incurred, by reason of the non-payment of the said note.

"And I further certify and declare, that on the same day and year above mentioned, I served notice of the foregoing presentment, demand, refusal and non-payment of said note upon the endorsers, whose names are written below, by depositing said notices, partly written and partly printed, in the post-office in the village of Ogdensburg, and pre-paid the postage thereon, which notices were directed to the said endorsers, parties to the said note, at the places written opposite to their respective names.

"To P. S. Glassford, Ottawa City, C.W.
"To Edward Griffin, Ottawa City, C.W.

"In witness whereof, I have hereunto subscribed my name and affixed my seal of office, the day and date above mentioned.

(Signed) "J. D. JUDSON,
[L.S.] "*Notary Public.*"

The note itself was drawn for the amount of $207 22, with interest.

For the defence it was objected, 1st, that the document purporting to be a foreign protest, was not legal evidence of the notice of dishonor; 2nd, that the plaintiff should have proved the value of dollars and cents, which, in a note dated in the United States, must be taken to be a foreign currency; 3rd, that interest was not recoverable for want of proof of the rate of interest in the foreign country.

A rule nisi having been obtained in the court below was afterwards discharged.

C. S. Patterson, for the appellant, cited Con. Stat. U.C. cap. 42; Story's Conflict of Law, s. 272, A.; *Bonar* v. *Mitchell*, 5 Ex. 415.

R. A. Harrison, contra, referred to *Ewing* v. *Cameron*, 6 O. S. 541; 7 Vic. cap. 4, sec. 2; 13 & 14 Vic. cap. 23, sec. 6; *Smith* v. *Hall*, 5 U. C. Q. B. 315; *Codd* v. *Lewis*, 8 U. C. Q. B. 242; Con. Stat. U. C. cap. 42, sec. 21.

DRAPER, C. J.—I felt some doubt on the first point, as to whether the Con. Stats. of Canada, cap. 57, sec. 6, was not confined to protests of notaries public in Upper and Lower Canada. On further consideration, I do not think the general language should have the same full effect given to it—"*All protests* of bills of exchange and promissory notes shall be received in all courts as *primâ facie* evidence of the allegations and facts therein contained"—as if it stood alone.

The 7th section enacts, that "any note, memorandum, or certificate, at any time made by one or more notaries public, either in Upper or in Lower Canada, in his own handwriting, or signed by him at the foot of *or embodied in any* protest, or in a regular register of official acts kept by him, shall be presumptive evidence in Upper Canada of the fact of any notice of non-acceptance or non-payment of any promissory note or bill of exchange having been sent or delivered at the time and in the manner stated in such notice, certificate or memorandum."

This immediately follows, and, as I think, qualifies and explains sec. 6. If that section were, by its own force, to make every protest evidence of every fact set out in it, then so much at least of section 7 as makes a note, memorandum or certificate, "embodied in any protest," evidence of the notice of non-acceptance or non-payment having been sent or delivered, as stated in such note, &c., would be superfluous.

Unquestionably, but for our law, the statement by the notary, protesting a bill or note, that he had sent notice by post to the endorser or drawer, would not be proof of that fact. And if we had no such law, then I should think that section 6 would mean no more than that *all protests* shall be received as *primâ facie* evidence of these facts, which belong to the act of protesting.

A protest made abroad, of non-acceptance or non-payment of a foreign bill, proves itself, but the dishonour of an inland bill was not proved by such a protest. (Chitty on Bills, 224, 10th ed.)

I think the term "protest," in the sixth section, therefore, should be construed according to its ordinary meaning and acceptation among mercantile men; and that to make it evidence of notice of dishonor having been sent to drawer or endorser, it must be made by a notary public in Upper or Lower Canada, in his own writing, and signed by him, that is, it must be in conformity with the 7th section.

Now, on the face of this protest, it appears to have been made in the State of New York, and by a notary resident there, and therefore it is not *primâ facie* such a protect or instrument as the 7th section requires and makes presumptive evidence of notice.

On this ground, therefore, I am of opinion a new trial should be granted.

As to the second objection, I do not dissent from the conclusion of the learned judge of the county court.

On the third point, as at present advised, I think the plaintiff might have recovered interest at the rate allowed by our law.

Per cur.—Judgment accordingly.

In re Bright v. The City of Toronto.

Corporation—By-law—Tavern licenses—Committee—Bar-room closing of.

Held, that the appointment of a committee of the corporation for the purpose o granting or refusing tavern licenses is authorized by sub-sec. 1 of sec. 246 of the Municipal Corporation Act.

2ndly. That it is within the power and scope of the Corporation to compel, by by-law, the closing of bar-rooms within certain hours of the night, and a by-law compelling their being closed between 12 p.m. and 5 a.m. was not deemed to be beyond their power.

3rd. That it was not an excess of authority to compel the removal from over the door of such houses, not licensed to sell liquor, of a signboard or other notice of such license being granted them.

4th. A clause in a by-law which cancelled the license of a person convicted of a penalty for the infringement of a by-law, *held* to be beyond the authority of the corporation, and a clause rendering such infringement a cancellation was quashed with costs.

[T. T., 26 Vic.]

Hallinan obtained a rule *nisi* to quash sections numbered five, eleven, seventeen, nineteen and twenty of by-law No. 810, respecting the licensing and regulating hotels, taverns, and other places of public entertainment and places where spirituous liquors are sold, passed the 20th of February, 1860, on the ground of illegality in this, that the corporation therein try to exceed the powers given by law to them to pass by-laws for the purposes mentioned in the by-law, that they have no power to pass such sections or to delegate their powers to a committee.

The sections objected to were as follows:

Section 5. "The committee on licenses shall examine all applications for license or transfers of license, which the inspector may lay before them, and in their discretion grant or refuse the same, and if granted, approve of the names of sureties tendered by the applicant for such license or transfer, and the chairman, with two members of the committse, shall countersign the license or transfer to be issued.

Section 11. "The bar-room of every hotel or tavern, and of every other place licensed under this by-law, shall be closed on every Monday, Tuesday, Wednesday, Thursday and Friday night at twelve o'clock, and shall remain closed until five o'clock on the morning following each of the said days respectively; and every such place shall be closed on every Saturday night at eleven o'clock, and remain closed until five o'clock on the Monday morning thereafter.

"And whereas by statute 22 Vic. cap. 6, it is enacted," &c., (setting out the first section, which prohibited the sale of intoxicating liquors from seven on Saturday night until eight on Monday morning, but omitting the following words, "and during any further time on the said days, and any hours on other days, during which by any by-law of the municipality wherein such place or places may be situated, the same or the bar-room or bar-rooms thereof ought to be kept closed.") This section, commencing by words importing a recital, "and whereas," &c., contains nothing but a portion of the first section of the statute.

Section 17. "No person who has not a tavern license shall exhibit, or suffer or permit to be exhibited or continued over his or her door or otherwise, 'licensed to sell wines, beer, or other spirituous or fermented liquors,' or the words bar-room or tavern, or inn or saloon, or any other words or sign or signs, or sign-boards, indicating that the person keeps or that the person is authorized to keep such bar-room, tavern, inn or saloon, or any house or place of public entertainment.

Section 49. "In case any person who has taken out a license under this by-law is convicted of a breach of any of the provisions of the same, or of this by-law, such person, upon such conviction, in addition to the penalty imposed for the infraction thereof shall, in the discretion of the convicting magistrates, there being not less than three convicting magistrates concurring in such forfeiture, forfeit his or her license for the remainder of the current year; and the general inspector of licenses is required to notify the party in writing thereof.

Section 20. "Every person who has not a tavern license, who shall, after the passing of the by-law, exhibit any word or words, or sign or sign-boards, contrary to the seventeenth section of this by-law, shall be liable to a penalty of not more than fifty dollars, exclusive of costs, upon every conviction for any such offence."

J. H. Cameron, Q. C., showed cause.

Draper, C. J.—I think the 5th section is within the power given by the Municipal Corporation Act, sec. 246, sub-sec. 1, which enables the councils to pass by-laws for granting tavern licenses. I think the word "granting" does not impose the necessity of the council sitting with a majority of the whole number present, to consider or determine on granting or refusing a license to each applicant, and to pass a by-law or by-laws granting licenses to those whose application is acceded to. I think the mode of dealing with the applications, considering and granting, and refusing applications and issuing licenses, is intended by the language used. When the license is granted it is under such by-law the act of the corporation.

I also think the 11th section is good. It does not contravene the statute which it recites, but it adds to it provisions which may lawfully be done, as to the times and hours when the *houses* and bar-rooms must be kept closed. Its provisions may be administered in compliance with those of the statute.

I have had more difficulty as to the 17th section. No part of the Municipal Corporation Act was pointed out to us, which in direct terms or even by obvious inference, confers authority to make such a law. The nearest approach to it is in the 5th sub-sec. of sec. 282. The "suppressing of tippling houses" may, to some extent, be aided by this regulation. And I am the more disposed to uphold it, because no one can or ought to complain of injury arising from being prevented from exhibiting publicly a false notification, the principal object of which may well be deemed to be to induce persons in the streets to enter, and so to facilitate some illicit or immoral proceeding within.

The 20th section depends on the 17th, the one creating the offence, the other imposing the penalty. If the first can be supported, as I think it may, the latter is sanctioned by sub-sec. 6 of sec. 243, of the Municipal Corporation Act.

I think the 19th section must be quashed. I fail to distinguish this case from that of *Smith* v. *The City of Toronto*, 10 U. C. C. P. 225. The 5th section of this by-law is of the same character as the 254th section of the Municipal Corporation Act. The very next section of the statute imposes a penalty of not less than $20 with costs for a first offence against its provisions; for a second offence not less than $40 with costs; for a third, not less than $100 with costs; for a fourth, not less than three months' imprisonment with hard labour, but in no case forfeits the license for such offence, however frequently repeated. The 264th section of the statute authorizes a forfeiture of the license on a conviction of having a riotous or disorderly house, but it gives the power to the mayor, or police magistrate of a town or city, with one justice having jurisdiction therein, or to the reeve of a township or village, with one justice having jurisdiction therein. The Legisla-

ture have not seen fit to declare that the council of the corporation may grant the license, the principal part of the sum paid for which goes into their own treasury, and also impose forfeiture thereof as a penalty, for breaking any regulation to which they may subject the holders of such licenses; and I do not infer from anything the Legislature have declared, that such was their intention.

I am of opinion that so much of this rule as relates to quashing the 19th section of this by-law should be made absolute, and that the residue of the rule should be discharged, and that the costs be taxed to the applicant only as to the part of the rule on which he has succeeded. I should probably have thought this a fit case to withhold costs, as the applicant has asked for much on which he has failed; but this by-law was passed after the rule *nisi* in *Smith* v. *The City of Toronto* was granted, and the corporation did not oppose the rule. They must be taken to have had notice of the judgment on it, and yet they have permitted this 19th section to remain unrepealed.

Per cur.—Judgment accordingly.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*)

McLENNAN v. HEWARD.

Administrator de bonis non—His right to call the estate of a predecessor to account—Rests—Agent—Commission.

The principle upon which an administrator should be charged with interest on funds belonging to the estate considered and acted on.

An administrator *de bonis non* having obtained a decree against the representatives of a deceased administrator for an account of his dealings with the estate: *Held*, that he was entitled to charge the representatives with interest, &c., in the same manner, and to the same extent, as one of the next of kin might have done.

Where an administrator who had acted as agent for the intestate during his life-time, had, with the assent of the deceased, used moneys belonging to him, without any attempt at concealment as to his so using them, the court refused to take the account against the administrator with rests; and the master having allowed the estate of the administrator a commission of 5 per cent. on moneys passing through the hands of the administrator in his life-time, the court refused, on appeal, to disturb such allowance.

This was an administration suit, in which the usual reference had been directed at the hearing. The master having made his report thereunder, both parties appealed on the grounds stated in the judgment.

McLennan in person. *A. Crooks* contra.

VANKOUGHNET, C.—This is an appeal by both parties from the Master's report, by which it is found that on taking an account of the estate of the late Alexander Wood, deceased, there is a balance due by the personal representatives of the late administrator of the deceased amounting to £4088 10s. 7d. for principal and interest. The plaintiff sues as administrator, *de bonis non*, being the second in succession in that charactor. The following exceptions are taken to the Master's report by the defendant.

1st. That an administrator, *de bonis non*, cannot charge his predecessor in that office with breach of trust or dereliction of duty, or claim from his estate interest upon moneys retained by him, although such interest might be properly charged at the suit or instance of the next of kin of the intestate.

2nd. That at all events, in order to make such charge, a proper case should have been set out in the bill.

3rd. That the Master should not have charged interest at all, either upon the moneys of the intestate in his life time loaned to or received by the administrator for him, as there was no agreement or understanding between them that interest should be paid, and that no account of his dealings as agent, but only as administrator, is sought in this suit; or upon the moneys held by the administrator as such after the death of the intestate, or held by him between that time and the time of his appointment as such administrator, because there was not, during those periods, any person to whom the administrator could safely pay over the moneys, the right to them being in litigation in Scotland between rival claimants, and there being nothing to show that the administrator was not at any moment ready to account and pay over the money. That he could not invest, as the period when he might be called on to pay was uncertain, depending upon the issue of the litigation; and that it does not appear that any of the parties interested ever called upon him to invest the moneys.

4th. That the defendants are not liable for interest, since the death of the administrator, without proof of sufficient assets to meet the claim.

5th. That the Master's mode of computing interest was erroneous in deducting the payments from the receipts in each year and calculating interest on the balance from the end of the year, and that he should have calculated interest upon the receipts and payments respectively and severally from their dates.

6th. That no case is made by the pleadings or otherwise for taking the account with rests, or charging at the most more than simple interest.

7th. That a reasonable commission should be allowed to the administrator's estate, and the Master has found that five per cent. on the gross receipts would, in his opinion, be a fair allowance therefor.

The cross appeal claims that the account should have been taken with rests, and that the master should not have made any report about allowance as commission.

The facts necessary to the determination of the question thus raised may be shortly stated as follows:—

Alexander Wood, the intestate, for many years a resident in this city, in the spring or summer of 1842, proceeded to Scotland, where he remained till his death, in the month of September, 1844. At the time of his departure from Canada, he owned a large real estate in the country, and had a deposit at his credit in the Bank of Upper Canada, in Toronto, amounting to about £1888. Prior to leaving, and about the 21st of May, 1842, the intestate prepared a memorandum of instructions addressed to two of his most intimate friends, Mr. Crookshank, the administrator, and Mr. Gamble, in which, after thanking them for their kindness in having undertaken to look after his property in his absence, (which, it seems, was not intended to be permanent,) he enters into details of various matters, and among them states:—"A considerable sum of money stands at my credit in the Bank of Upper Canade, which I was or am authorised to invest, and had intended to do so in government debentures, but there are none such in the bank at present: it has to be at command on short notice, or I could have got ample security for the use of it, as money seems much wanted at present, but it is necessary that I shall have it in my power to pay it out at any time when called for, though perhaps it may be permitted, or part of it may be permitted to lie for some time if well secured, and the interest regularly paid; but of this I am not certain. At my credit stands about £1300, and Mr. Webster has promised to pay Mr. Gamble the debt due by him as he can spare the money. Should I require the money timely notice will be given." Whether this last sentence refers to the deposit or to Webster's debt, or to both, is not very clear. Again, he says, "my dividends at the bank, if any are declared, will be due in July, and a special power of attorney being required for the purpose of discharging the bank, I have filled up one to Mr. Crookshank. These will enable you to satisfy any outlay called for on my account." Mr. Crookshank and the intestate appear to have continued on the most friendly terms to the last, and the utmost confidence seems to have been reposed by one in the other. Both were men of large properties, and appear to have been most intimate associates for years, and Mr. Crookshank appears to have undertaken the duty of looking after his friend's affairs in his absence from pure friendship, and not from any expectation of reward, and so far as I can see he discharged that duty most faithfully and honourably. The personal property of the intestate is alone in question here. A great many letters from the intestate to Crookshank, and extracts of letters, (the originals not being forthcoming,) from the latter to the former, reaching down to within a month of his death, are put in. The first in date is one of the 6th September, 1842, written by the intestate, and in which, after alluding to a previous letter of the 20th of August, he says: "my deposit in that institution (meaning the Bank of Upper Canada) is too large to be lying idle, if it can be properly placed out at interest for a time, the proceeds will aid me, for I am not without the need of it, times are so hard here."

On the 17th of October the intestate writes: "I have just had the pleasure of your different respected letters of the 23rd and 26th ultimo. Mine, despatched only three days ago will, in a measure, have anticipated your wish. My deposit in the bank is idle there, and I wished of you to take the trouble of getting it invested so as to bring me something. Now, as you can employ it so as to serve you, I shall be quite pleased if you do so to the extent you require. It will be serving me quite as I wish." On the 26th of October the intestate, after stating the receipt on the 17th of the letters already referred to, says, "on the day yours got here, I immediately answered them in a few lines, to say that any thing of mine in the Bank of Upper Canada is completely at your service. The time was short, but I hope my previous letter would answer the purpose." On the 22nd of October, by the extract produced, Mr. Crookshank appears to have written to Mr. Wood on a variety of matters, and among them the bank deposit, and proposes to take all the intestate's funds for two or three years, and offers a mortgage in security. He had not then, of course, received the letter of the seventeenth of October, and the contents of the letters therein alluded to are not shewn, though they, or one of them, evidently contained a proposal to take the money. On the 24th of November, Crookshank appears again to have written that it would have been an accommodation to himself to have got the deposit, proposing several farms and lots by way of mortgage and security, and expressing a wish that the mortgage should not be registered, and stating that the deposit was £1385 2s. 11d.; that a dividend of £52 had been received, out of which some small payments had been made, and that Mr. Wood's cheque would be required to draw the money. On the 30th of November the intestate writes: "the particular matter interesting to yourself was, I presume, satisfactorily anticipated by my former letters. I think the power I left you (meaning the memorandum of instruction) would be sufficient to enable you to draw out of the bank. Then I suppose my dividend at last time was placed at my credit, with ten pounds from Captain Macaulay, would be £62; the dividend on insurance stock only a few shillings." On the 19th of December, 1842, Wood writes: "Mr. ———'s letter does propose to borrow my funds in the bank. I have written to him that I had requested of you to invest these funds three months since. I think the power of attorney will enable you to draw out by cheque my deposit. It would be rather hazardous to enclose one in a letter from this. If I should surprise you sooner than expectation it will be necessary for me to have some funds at my command, as times here are so bad. I see you state exactly the amount at my credit in the bank when I left; of course the dividends would, and I hope will be paid. Of course any demands made, you will be so good as to discharge, though I know of none except taxes and any little matter. Fenwick (a servant left in charge of his house) may need to keep things a little to rights. 'The Patriot' (newspaper) of course once a year." On the fifteenth of December, 1842, Wood writes: "I shall be glad to hear that the business with respect to money transactions has fully answered your wishes."

On the 26th of January, 1843, the intestate writes, "I would send you a cheque on the bank if I was not sure the cashier would have no hesitation in answering your own under the power of attorney I left, for it was intended to enable you to do so in case I required a remittance. I kept an exact copy of the power." And he enclosed him a letter to Mr. Ridout, cashier of the bank, instructing him to honour Mr. Crookshank's cheque for all or any part of the money standing at his credit.

On the 28th of March, 1843, the intestate writes, "My last covered a note to the cashier of the Bank of Upper Canada, though I am pleased you have done without it. I do not wish any deposit in my name in the Bank of Upper Canada; if you do not want it, get it invested in some other safe way, to be at my call when necessary." And he asks Crookshank to draw a small dividend from the assurance company. On the 24th of May, 1843, the intestate writes: "I shall be glad that you have received all my deposit, as I could not afford to leave it at such risks, though this is between ourselves. Would you advise to sell out?" alluding to his bank stock. On the 29th of April, 1844, the intestate writes a long and affectionate letter on various subjects, part of them business, and expresses his wish to be again in Toronto, but fears it cannot be realized in that year. On the 13th of August, in the same style and about many matters, is written the last letter from Wood to Crookshank. It contains this passage: "I also mention to Mr. G. that you will be remitting me money, and if any of my own remains in his hands to give it to you, that one remittance may serve. I shall hereafter inform you how much I want; so if he offers you any, take it." "He says, suffering it to remain, they will pay me interest for it." In the following month, as already stated, Mr. Wood died. Mr. Crookshank died in the year 1859.

Had these two old fond friends lived to come together again, doubtless they would have settled all matters between them without the intervention of any third party. They have gone, and the court is employed in adjusting the same matters, and those which have naturally grown out of them, between their respective representatives.

A general power of attorney, dated the 27th of December, 1844, from several persons named Barclay, and from some others, claiming to be next of kin and co-heirs of the intestate, was executed in favour of Mr. Crookshank. What pretence of right these parties made does not appear: they were probably the rival claimants to Mrs. Farrell, whose title to the intestate's real property seems to have been established at the close of the year 1850. About the same time an arrangement seems to have been come to among the relatives of the deceased as to the distribution of his personal estate, though not perfected till some time afterwards. About the 27th of December, 1845, the bill alleges, and it is not denied, Mr. Crookshank took out letters of administration to Wood's estate; upon whose request, unless under the first-mentioned power of attorney, does not appear. On the death of Mr. Crookshank, and about the 19th of February, 1860, the late Mr. Ewart, who for some years previously had been acting as agent for the heiress and next-of-kin, obtained administration *de bonis non*, at the instance of the next-of-kin of the intestate, and instituted the present suit, which, on his death, after decree made, was, on the 21st of December last, revived in the name of the present plaintiff as successor in the administration *de bonis non*. The master's report was made on the 9th of May, 1862. A general power of attorney to manage all the intestate's real and personal estate, to receive rents, get in and collect debts and moneys due him, &c., and dated the 25th of March, 1846, was executed by Mrs. Farrell, and sent to Mr. Crookshank. Another power of attorney from the same claimant, dated the 14th of March, 1850, and relating exclusively to the real estate, was also furnished.

As I have already stated, the rights of the several claimants to the intestate's real and personal estate do not appear to have been settled to the end of the year 1850; and the arrangement in regard to the personalty not completed probably till the beginning of the following year. On the 9th of November, 1850, a letter from Mr. John Falconer and Mr. James Edmund, representing, together apparently, those interested in the personal estate, is written to Mr. Crookshank in the following words:

"Aberdeen, 9th November, 1850.

"Dear Sir,—It is a long time since we last addressed you. We have satisfaction in now communicating, that all opposition has been withdrawn to the claims of our clients to the estate of Mr. Wood. In writing together, we write, as you are aware, with regard to the personal estate only; and as to that property, the forms are in progress, and will be shortly closed, for declaring the right to it of one of our clients. In that view it will be convenient to prepare, in other respects, for the transmission hither of the funds which are abroad. And it will advance us a step, if you will be so good as send us now an account of the matter, as it presently stands. Be so good also as inform us what form of discharge you will require, when accounting to us as the representatives of the relations on both sides of the deceased.

"We are, dear Sir, yours truly,

(Signed) "JOHN FALCONER.
(Signed) "JAMES EDMUND.

"The Hon. Geo. Crookshank, Toronto."

Up to this time, no account of the personal estate appears to have been asked for, no enquiry in respect of it made, no direction given. All parties seem to have rested satisfied with Mr. Crookshank's management and responsibility. About the beginning of

the year 1843, as well as I can ascertain, Mr. Crookshank, under the authority given him by the intestate, drew from the bank the deposit so often referred to, of £1,383. And the question of interest arises first as to it. Before, however, expressing an opinion thereon, it may be well to dispose of certain questions preliminary as well as technical and formal. I think there is nothing in the first objection that the administrator *de bonis non* cannot claim interest on such allowances as the court will make for breach of trust in his predecessor. He is appointed in succession to act for the court, which empowers him in getting in all that properly belongs to, or can be claimed for, the intestate's estate, and which the administrator has neglected to get in. Both the administrator and his successor merely act for the court—are both accountable to it; and the one and the other can be made accountable in this court, and can seek the aid of this court in the administration. If there be any objection to the claim of the administrator *de bonis non*, it must be this, that the administrator *de bonis non* cannot call the estate of the deceased administrator to account, but that this can only be done by the court, or under the authority of the court, which has appointed him. The objection cannot be that the administrator *de bonis non* does not represent the next of kin as fully as the original administrator, for his office, his duty, his authority, his mode of appointment from the same power, is precisely similar. But that objection has not been made; a decree for an account has been consented to; and were the point a debatable one, I am not now at liberty to consider it, but must treat the estate of the deceased administrator as accountable at the suit of the plaintiff. The second objection, and so much of the sixth as relates to the pleadings, are answered by the provisions of section 13 of general order 42, of the court, and by the decree itself. The fourth objection is displaced by the decree, which states that the defendants admit assets of the said Geo. Crookshank come to their hands sufficient to pay the plaintiff's claim; that claim being, of course, whatever the plaintiff can make himself out entitled to under the decree, according to the practice and law of the court. It thus differs from the case *Davenport* v. *Stafford*, 14 Beav. 319.

Then, as to this deposit of £1383, which, with the intestate's permission, Crookshank drew from the bank and used. It was I think, looking at the correspondence, the intention and understanding of both parties that Crookshank should pay interest for it, and yet the intestate never appears to have applied for or received any interest on this sum. It is doubtful whether it was his own money. His allusion to it in the memorandum of instructions would imply that it was not. He states that it must be kept on call or short notice. He refused to invest it on mortgage; and he lets Crookshank have it without mortgage, though the latter appears at one time to have offered him such security if he could get the money for two or three years. Still, he writes to have the money invested so as to bring him in something, though it is to be called in on short notice; and he seems rejoiced when Crookshank has taken the use of it, as he evidently considers it safe with him, and to produce something. Money held on call would not generally yield the same rate of interest as that borrowed for a fixed period, and yet I do not know what rate of interest other than six per cent. can be charged in the absence of any arrangement by Crookshank with the intestate for a lesser sum, and of any evidence shewing any other usual rate. I think he must be so charged during the intestate's life. The time at which this sum was received does not very clearly appear, nor whether in one sum or several sums. If the latter, a time should be ascertained from which interest should be charged, considering that the money was to be on call. I think that as six per centum is to be charged, it would be but fair to charge interest only from the time when the last of the sums was drawn out, if it was all taken within a short time. On the other sums received during the intestate's life-time, I think no interest should be during that period charged, for it is evident that the intestate intended Crookshank to hold these moneys for the discharge of any claims payable by him, and to be remitted to him at any moment he might require a remittance. Neither, of course, should any interest be allowed on payments made during the same period except where and on so much as they exceed the amount in hand to meet them.

This disposes of the subject of interest down to the intestate's death, and it is now to be considered how it is to be dealt with during the four subsequent periods. The 1st, from that death down to the time letters of administration were obtained by Crookshank. The 2nd, from that period down to the year 1851, when the rightful claimants were ascertained. The 3rd, from that time down to the institution of this suit. And the 4th, during the pendency of the suit until the final order for payment shall have been made. I have made this division of time because the learned counsel for the defendants contended that different rules might be applied to them respectively. On looking at the accounts, it does not appear that the administrator received any thing from the death of the intestate until after letters of administration were granted to him, but he retained during that period the deposit of £1383; and as I have already found that he was to pay interest for it, he must during this period be charged still with interest in the same way as if the debt was owing to the intestate's estate by a third party. And so, throughout the subsequent periods enumerated until the money was refunded. It is quite true as to it as well as to other moneys received and held by the administrator during the second of those periods that there was no one to whom he could have paid them over, and that it was uncertain when he might be called upon for them. An administrator in such a case is in an awkward position, but I have found no case which has decided that this is a sufficient excuse for his retaining moneys in his hands uninvested, or a good reason for not charging him with interest on the moneys of the estate which he has used. In England he has no difficulty in making investments, as he can purchase government securities in the market every day. Here there is greater difficulty, and the only course I think which can be properly taken is when a certain amount, such as one would think sufficient to offer as a loan, has accumulated in his hands to allow the administrator a reasonable time to seek a safe investment; and if he shall not have made one, then, after the lapse of that time, to charge him with interest unless he can shew that he has used all proper deligence to obtain an investment, and has failed, and that he has not himself used the money. If, while the parties entitled to the estate are unknown, the administrator makes investments of such a character as this court sanctions, those parties on establishing their title cannot complain that the money is so invested and is not in specie ready to their hand. Looking at the position, then, in which this estate stood, the discretion with which, during their pendency of the litigation, Mr. Crookshank appears to have been intrusted by the claimants, and the absence as already remarked of any desire by them that any of the moneys should be hung up in investments, and the expectation apparent in the letter of the 7th of November, 1850, that the funds were in a state to be transmitted so soon as all legal formalities for confirming the title of the next kin to them had been completed, I think the master exercised a fair judgment in charging the administrator with interest from the end only of the year in which the receipts had accumulated, after deducting the payments in that year, when such balance amounted to a sum sufficient for an ordinary investment, which could hardly be less than £100. When a balance equal to at least that sum was not in hand, it might well be carried on into the next year, and until in the receipts of that year, a sufficient accretion had been made to call for an investment. From the time when the parties entitled to the moneys were ascertained, and reasonable time had elapsed for arranging with them what was to be done with the estate belonging to them, and how it was to be transmitted or invested, the estate of the administrator must be charged with interest on all moneys then in his hands, or afterwards recovered and held by him without the assent of the parties entitled thereto, except for such reasonable time of course as would be necessary for their payment over, or transmission; and from the time of Mr. Ewart's authority to act for the next of kin, and to receive their property, being established and made known to the administrator, there could of course be no difficulty in paying over the moneys in hand, or as required from time to time. On the 4th of October, 1851, Mr. Crookshank transmitted to the agents in Scotland of the next kin, a bill of exchange for £2500 sterling, amounting to upwards of £3000 currency, and as it is not certain at what time in that year the rights of these parties were finally fixed, I cannot say that there was any unreasonable delay in transmitting those

moneys, chargeable, as they were, with interest. Mr. Crookshank may have thought and considered that this was all he owed.

He had now become an old man, and during the residue of his life was much enfeebled by age and growing infirmities, and for some time before his death was quite imbecile. It does not appear that he was engaged in business at any time, or that he was other than a gentleman of property living on the means which it afforded him. I have said already that Mr. Crookshank appeared to have discharged his voluntary duty to his friend, the intestate, most faithfully, and I see nothing in his dealings with the estate, after he assumed to be its administrator, from which I should infer that he intended to act otherwise, although he has rendered himself liable to charges, which from the relation in which he had stood to the intestate, and from a mistaken notion of his own obligations, he might probably have considered himself free. I have seen nothing to shew that Mr. Crookshank would himself have declined to account for the money which he borrowed from the estate with interest upon it. Indeed Mr. Ewart says that he never heard of that pretence till lately.

The defendants were not parties to the transaction, and were ignorant of it in its inception, and cannot be said to have improperly raised the question as guardians of their testator's estate. For the delays which have occurred of late years in the not rendering of proper accounts, and the paying over of any balance which on these adjustments might be found due, though legally he, Crookshank, cannot be considered morally responsible. His agents, from Mr. Ewart's evidence, are evidently to blame; and although it may be unfortunate for the estate that the evidence of McLean has not been procured, still I think the master would not have been justified in further delaying this report for it. The defendants have waited taking the risk of his return to the country instead of examining him abroad, and they must abide by it.

I have not failed to consider the objection that this is a bill for an account of Mr. Crookshank's transactions, as administrator, and not as agent of Wood in his life-time; but I think the latter are necessarily involved in the other, for it was his duty as administrator to call himself to account with himself as agent.

Mr Crooks insisted again at the close of the argument that the Master's mode of computing interest was wrong, and that interest should be calculated on payments and receipts from time to time; and Mr. McLennan, for the plaintiff, assented to it. If the defendants still wish for this mode, I will order it, though I have already stated I would not have subjected the estate, under the circumstances, to such a rigid rule. The claim for exemption from interest during the pendency of this suit cannot be maintained. An accounting party runs the risk of a report in his favour, or a balance being found against him; he ought to know the state of his own accounts, and what moneys he has in hand, and if he disputes his indebtedness he must be charged with interest on any balance found against him.

I think the cross appeal must be dismissed. This is not a case for compound interest; and any calculation of the master which would charge it should be disallowed. There has been here no wasting of the funds; no trading with them; no concealment of receipts; no making of profits with them; no delaying in accounting or paying over, which can be considered the fault of the administrator himself, though legally responsible for the neglect of his agents. I think also, it is a proper case for the allowance of a commission. In all the powers of attorney referred to, a reasonable compensation, or as the Scotch phrase used expresses it, "gratification" for the services of the administrator is guaranteed him, and I think under the 18th section of the General Order before referred to, the master was right in reporting upon it, though perhaps it will be more proper to allow the sum recommended on the hearing on further directions than now.

I have carefully considered all the cases cited on the argument, and I cannot but feel that there will be often difficulty, and sometimes great harshness in applying rigidly in this country, the rules usually adopted in England. I say usually, because they meet there with frequent relaxation, and, as they should, in no case more often than when there has been a total absence of *mala fides* in the administrator.

COMMON LAW CHAMBERS.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

In re Slater and Wells.

Con. Stat. Can., cap. 105, sec. 16—Form of conviction—Habeas Corpus—Liberty of the subject.

It is the duty of a judge hearing an application for discharge from custody on *habeas corpus*, where a person is restrained of liberty under a statute, to discharge the person, unless satisfied by unequivocal words in the statute that the imprisonment is warranted by the statute.

A conviction under Con. Stat. Can., cap. 105, for keeping a house of ill-fame, or being an inmate of such a house, adjudicating that the accused should pay a fine of $50 forthwith, and be imprisoned for three months, unless the fine be sooner paid, is not warrant d by sec. 16 of the statute.

(Chambers, December 26, 1862.)

On 18th December last, upon the application of Eliza Slater and Catharine Wells, two prisoners in the common gaol of the county of Wentworth, Mr. Justice Morrison ordered the issue of a writ of *habeas corpus ad subjiciendum* out of the court of Common Pleas.

The writ was in the following form:—

[L. S.] Victoria, &c.

To the keeper of our common gaol in and for our county of Wentworth:

We command you, that you have before the Honorable William Henry Draper, C.B., Chief Justice of our Court of Common Pleas for Upper Canada, at Toronto, or other the presiding judge, in Judge's Chambers, at Osgoode Hall, in the said city of Toronto, immediately after the receipt of this our writ, the several bodies of Elizabeth Slater and Catharine Wells, being committed to, and detained in your custody as it is said, together with the day and cause and days and causes of their being severally taken and detained, by whatever names they may called therein, to undergo all and singular such matters and things as our said Chief Justice or other the judge sitting in Judge's Chambers as aforesaid shall then and there consider of and concerning them the said Eliza Slater and Catharine Wells, or either of them, in this behalf.

Witness, &c.

(Signed) L. Heyden.

Per Statutum tricesimo primo Caroli Secundi Regis. } Jos. C. Morrison, J.

On 19th December last the writ was returned.

The return annexed to the writ was in the following form:—

I, George Jamieson, of the city of Hamilton, keeper of the common gaol of the county of Wentworth, to whom the herewith annexed writ has been directed, do hereby humbly certify, that in obedience to the said writ I have present the bodies of Eliza Slater and Catharine Wells therein named, together with the day of their commitment and cause of their detention in my custody, and that such day and cause will more fully appear by the warrants of commitment hereunto annexed, marked with the letter B, under and by virtue of which warrants the said Eliza Slater and Catharine Wells are and have been detained in my custody at hard labor.

(Signed) Geo. Jamieson,
Keeper of said Gaol.

Annexed were two sets of warrants of commitment bearing date on the same day. The second set, though in no way referring to the first, were evidently substituted for the first—the first being defective in several respects.

The second or amended warrant, under which Eliza Slater was detained in custody, was in the following form:—

City of Hamilton, to wit: } To the Chief of Police, or any constable of the city of Hamilton, and to the keeper of the gaol of said city:

Whereas, Eliza Slater was, upon the complaint of George Graham, police constable of said city, duly convicted before me, G. H. Armstrong, Police Magistrace of the said city, for that she on the third day of December, 1862, in the said city, was guilty of keeping a house of ill-fame in said city, contrary to the provisions of chapter 105 of the Consolidated Statutes of Canada, and was by me adjudged to be committed for the said offence to the common gaol of the county of Wentworth, there to be kept for the space of three months, unless she pay the sum of fifty dollars fine.

These are therefore to command you, the said Chief of Police, or constable, to convey the said Eliza Slater to the said gaol, and her to deliver to the keeper thereof, together with this warrant.

And I do hereby command you, the said keeper, to receive the said Eliza Slater in your custody in the said gaol of the said city, and her there safely keep for the space of three months, unless aforesaid amount is sooner paid; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, at Hamilton, this third day of December, in the 26th year of the reign of our Sovereign Lady Queen Victoria, in the year of our Lord 1862.

(Signed) G. H. ARMSTRONG, P. M.

The second or amended warrant, under which Catharine Wells was detained in custody, was in the following form:—

CITY OF HAMILTON, TO WIT: } To the Chief of Police, or any constable of the city of Hamilton, and to the keeper of the gaol of the said city:

Whereas, Catharine Wells was, on the complaint of Robert Graham, police constable of said city, duly convicted before me, G. H. Armstrong, Police Magistrate of the said city, for that she on the third day of December, 1862, in the said city, was guilty of being an inmate of a house of ill-fame, in said city, contrary to the provisions of chapter 105 of the Consolidated Statutes of Canada, and was by me adjudged to be committed for the said offence to the common gaol of the county of Wentworth, there to be kept for the space of three months, unless she pay the sum of fifty dollars fine.

These are therefore to command you the said Chief of Police, or constable, to convey the said Catharine Wells to the said gaol, and her to deliver to the keeper thereof, together with this warrant.

And I do hereby command you, the said keeper, to receive the said Catharine Wells into your custody, in the said gaol of the said city, and her there safely keep for the space of three months, unless aforesaid amount is sooner paid, and for so doing this shall be your sufficient warrant.

Given under my hand and seal, at Hamilton, this third day of December, in the 26th year of the reign of our Sovereign Lady Queen Victoria, in the year of our Lord 1862.

(Signed) G. H. ARMSTRONG, P. M.

Robert A. Harrison having asked for and obtained leave to file the writ and return, moved to discharge the prisoners, upon the ground, among others, that an imprisonment for three months, unless the fine imposed were not sooner paid, was illegal, inasmuch as by the statute the proper mode of enforcing payment of such fines is by distress of the goods and chattels of the persons subject to the fine; and it was not shewn that any effort had been made so to collect the fine. He referred to Con. Stat. Can., cap. 105, sec. 16; *Rex* v. *Chantler*, 1 Ld. Rayd. 545; *Rex* v. *Whitlock*, 1 Str. 263.

T. H. Spencer shewed cause, contending that the warrants substantially complied with the statute, and argued that if defective in form they could not be held void because supported by good and valid convictions. He produced the convictions, and referred to sec. 29 of Con. Stat. Can. cap. 105.

The following is a copy of the conviction of Eliza Slater:

CITY OF HAMILTON, TO WIT. } Be it remembered, that on the third day of December, in the year of our Lord one thousand eight hundred and sixty-two, at the city of Hamilton aforesaid, Eliza Slater, being charged before me, the undersigned George H. Armstrong, Esquire, police magistrate of the said city, by Robert Graham, a police constable of the said city, is convicted before me in open court, for that she, the said Eliza Slater, at the time the said information was laid, had been keeping and then was keeping a house of ill-fame within the said city of Hamilton, and I adjudge her, the said Eliza Slater, for the said offence, to pay a fine of fifty dollars to me as such police magistrate forthwith, to be applied by me in accordance to the provisions of chap. number 105 of the Consolidated Statutes of Canada, and in default of such payment to be imprisoned in the common gaol of the county of Wentworth, situate within the city of Hamilton, for the period of three months or until such fine be paid, if the same shall be paid within said three months.

Given under my hand and seal the day and year first above mentioned, at Hamilton aforesaid.

(Signed) G. H. ARMSTRONG, P. M. [L.S.]

The following is a copy of the conviction of Catherine Wells:

CITY OF HAMILTON, TO WIT. } Be it remembered, that on the third day of December, in the year of our Lord one thousand eight hundred and sixty-two, at the city of Hamilton aforesaid, Catharine Wells, being charged before me, the undersigned George H. Armstrong, Esquire, police magistrate of the said city, setting in open court, by Robert Graham, police constable of the said city, with being an inmate of a house of ill-fame kept by one Eliza Slater, within the said city, and such charge being brought against her, the said Catharine Wells, she confessed before me in open court that she resided in said house of ill-fame and was an inmate thereof, and therein had carnal communication with men visiting said house of ill-fame. She is upon her own confession convicted before me, for that she, the said Catharine Wells, at the time the said information was laid, was an inmate of a house of ill-fame within the said city of Hamilton.

And I adjudge the said Catharine Wells, for the said offence, to pay a fine of fifty dollars to me as such police magistrate forthwith, to be applied by me in accordance to the provisions of chap. number 105 of the Consolidated Statutes of Canada, and in default of such payment to be imprisoned in the common gaol of the county of Wentworth, situate in the city of Hamilton, for the period of three months or until such fine be paid, if the same shall be paid within the said three months.

Given under my hand and seal the day and year first above mentioned, at Hamilton aforesaid.

(Signed) G. H. ARMSTRONG, P. M. [L.S.]

Mr. Harrison argued that the convictions so far from being good and valid were themselves void, on the same ground of objection that he urged against the warrants.

HAGARTY, J.—The second warrants of commitment produced by the gaoler in return to the *habeas corpus*, shew that each of the prisoners was convicted by the police magistrate and adjudged to be committed to gaol for three months, unless she pay $50 fine; and the gaoler is commanded to keep her "for the space of three months, unless the aforesaid amount is sooner paid." The convictions which are produced shew an adjudication that prisoners should respectively pay a fine of $50 to the police magistrate forthwith, and in default of such payment be imprisoned for three months, or until such fine be paid.

The case turns on the 16th section of cap. 105 Con. Stat. Can. The recorder (or police magistrate) is authorized to commit the offender to gaol, with or without hard labor, for any period not exceeding six months, or may condemn her to pay a fine of not exceeding, with the costs, $100, or to both fine and imprisonment not exceeding the said period and sum; and such fine may be levied by warrant of distress, &c.; or the party convicted "may be condemned (in addition to any other imprisonment in the same conviction) to be committed to the common gaol for a further period not exceeding six months, unless such fine be sooner paid."

We are told in sec. 26 that we must not refer to either of the acts in the same volume in relation to summary convictions, or as to indictable offences for guidance.

I feel no small difficulty in construing the 16th clause from the peculiar wording of the latter part of it.

In the cases before me no imprisonment is awarded as a substantive sentence or punishment. The fine is the only penalty if paid. But it was not paid, nor does it seem that any attempt was made to levy it by distress. The magistrate adopts the last alternative of the section, viz., imprisonment to enforce payment, or for non-payment. The words are that he may award the offender to be committed (in *addition* to any other imprisonment on the same conviction) to be committed for a *further* period, unless the fine be sooner paid. I think, according to ordinary grammatical construction, I might read the sentence without the parenthesis; and were it not for the use of the word "further" no difficulty might arise. But can this word be rejected? Did the legislature mean by a *further* period, especially after the words in the paren-

thesis, to give the power of commitment, except in a case where imprisonment had been awarded as a substantive punishment. Here lies the whole difficulty. I am not bound to reconcile doubtful terms, or shew a reason for any peculiarity of expression; but am bound to see if an imprisonment be warranted by clear, unequivocal words in the statute which confers a new power over personal liberty.

It may be the legislature considered that in ordinary cases a magistrate could readily ascertain if the parties could pay a fine, and when a fine only was awarded by him, could levy it by distress on the offender's chattels, and no imprisonment would be necessary; but that when the case was of that nature that the magistrate could readily see that imprisonment should be awarded substantially as a punishment besides a fine, that he should commit to gaol at once, and super add to the first imprisonment a further time, unless the fine were sooner paid. Magistrates attended by a staff of policemen can generally in cases like these readily ascertain if the parties can pay a fine, or have personal property to meet it, so that little practical difficulty need be apprehended. In the case of rich offenders a fine alone is often a slight punishment, and imprisonment has to be resorted to as a substantial punishment. Thus the clause in question can easily be applied. It is not difficult to imagine a case in which where a fine alone was awarded, and no distress attempted, but an immediate commitment till this fine be paid, that the person committed would be debarred of the means of raising the amount of the fine, in which case imprisonment, though only resorted to to enforce payment, would be turned into a substantial punishment.

I have felt much doubt about this case, but on the whole think I am bound, when personal liberty is concerned, to discharge the prisoners, unless I see unequivocal words used by the legislature warranting their imprisonment.

I direct the discharge of the prisoners.

Bleakley v. Easton.

Venue—Change on application of plaintiff—Terms.

In all transitory actions it is in the power of the court or a judge to change the venue, upon application either of plaintiff or defendant.

If plaintiff apply, he must show reasonable grounds for the application.

Where it was sworn that unless the venue were changed, plaintiff would be in danger of losing his debt, this was held to be a reasonable ground.

Where the application is made by plaintiff, it will only be granted upon payment to defendant of the costs of the application.

(Chambers, Dec. 27, 1862.)

Durand obtained a summons, calling on the defendant to show cause why the venue in this cause should not be changed from the County of the City of Toronto to the County of York, one of the United Counties of York and Peel, upon grounds declared in affidavits filed.

He filed two affidavits. The principal affidavit was that of plaintiff, in which it was sworn that the action was brought to recover upwards of $3005; that the greater part of the sum was for money lent to the defendant for the purpose of getting the Toronto Street Railway into operation, and for other purposes specified; that defendant agreed to pay $4000 in September last, in settlement of accounts between the parties; that he (plaintiff) could have sued defendant at the last October assizes for the United Counties of York and Peel, but postponed payment upon the undertaking of defendant to pay interest at the rate of 2½ per ct. per month; that defendant was, on the 18th November last, then being in New York, served with a writ of summons, as a British subject resident in a foreign country, and had fifteen days to appear; that he (plaintiff) was anxious to have the cause tried as soon as possible, and believing the debt to be in danger had the venue in the County of the City of Toronto, the assizes for which county preceded the assizes for the United Counties of York and Peel, but, owing to the time the defendant had to appear, and the course of pleading adopted, and other things arising in the progress of the suit, the case, unless the venue be changed, could not be tried at the then approaching assizes for the County of the City of Toronto: that the defence set up by defendant was one purely for delay, and the cause was one which, owing to the existence of the Toronto Street Railway, could be more impartially tried by a country than by a city jury; that he (plaintiff) was credibly informed that defendant was making efforts to sell his interest in the Street Railway, and had removed considerable amounts of his personal property out of Canada, and, apart from his interest in the road, had not much property in Canada; that he (plaintiff) verily believed he was in danger of losing his debt if the venue were not tried at the Toronto winter assizes; and that the causes of action involved in the suit arose partly in the County of the City of Toronto, and partly in the County of York.

The remaining affidavit was that of Mr. Durand himself, in which the course of the proceedings in the cause was set out, and from which Mr. Durand concluded that he was thrown over the assizes for the County of the City of Toronto through the tricks of the defendant. Nothing turned upon this affidavit, and so no further reference is here made to it.

D. McMichael (with him *A. McNab*) showed cause. He filed an affidavit of Mr. McNab, in answer to the affidavit of Mr. Durand, which also set out the course of proceedings on the cause, and from which he (Mr. McNab) concluded that Mr. Durand was thrown over, not by reason of any act of the defendant or his attorney, but by reason of his own course of procedure. No affidavit was filed in answer to the affidavit of plaintiff, showing grounds for the belief that the debt was in danger. It was concluded on the part of the defendant that plaintiff having selected the County of the City of Toronto as his venue, should be held to that selection, and that the summons should be discharged. *Fife* v. *Bousfield*, 2 Dowl. N. S. 705, and Rule Pr. No. 19 (Har. C. L. P. A. 599), were cited for defendant.

R. A. Harrison (with him *Durand*) supported the summons, and argued, first, that the application was one of right (*Robertson* v. *Hayne*, 16 C. B. 560), and, secondly, even if one in the discretion of the court or judge, that reasonable grounds were shown for the exercise of that discretion, inasmuch as the trial, so far as defendant was concerned, could be as conveniently had at the assizes for the County of the City of Toronto, as at the assizes for the United Counties of York and Peel (24 Vic. cap. 53); and it was sworn (and not contradicted) that unless the cause were tried at the assizes for York and Peel, his debt would be in danger. (*Mercer* v. *Voght*, 4 U. C. L. J. 47; *McDonell* v. *The Provincial Insurance Company*, 5 U. C. L. J. 186.)

Hagarty, J., having taken time to consider his judgment on a subsequent day, said he considered the application governed by *Mercer* v. *Voght* (4 U. C. L. J. 47), and upon the authority of that case would make the summons absolute to amend the declaration by changing the venue from the County of the City of Toronto to the County of York, one of the United Counties of York and Peel, as asked, but only on payment of costs. He referred to *Comerford* v. *Daly*, 11 Ir. Com. Law Rep. 62.

Summons absolute, on payment of costs.

Robinson, Demandant, v. Blandshard et al, Tenants.

Dower—Infant tenants—Compelling plea—Practice.

Where, in an action of dower after declaration filed, and notice to plead served upon infant tenants, the latter neglect to plead, an order *nisi* may be made that unless the infants plead within a given time, the demandant may assign John Doe for their guardian; which order *nisi* afterwards, upon an affidavit of service and affidavit that no plea filed, will be made absolute.

(Jan. 7, 1863.)

This was an action of dower.

The declaration was in the ordinary form, and averred that the husband of demandant died seized of the land, and that since his death she was wrongfully deprived of her dower in the land, and therefore besides dower claimed damages.

Annexed to the declaration was the notice prescribed by Con. Stat. U.C. cap. 28, sec. 4, wherein the tenants were informed that unless they pleaded to the declaration within twenty days from the service thereof, judgment would be signed against them by default, and execution follow thereon according to law.

Copies of the declaration and notice were served on William Blanchard and Mary Jane Potter, wife of Thomas Potter, a defendant, on the 3rd and 8th December, respectively.

William Blanchard and Mary Jane Potter were both, at the time of service of declaration and notice, minors.

The time for pleading expired, and no plea was filed on behalf of either of the minors.

R. A. Harrison, on behalf of the demandant, having filed an affidavit showing the foregoing facts, made application for an order that unless the infant tenants should plead by guardian within three days after service of the order, demandant should be at liberty to assign John Doe for their guardian, enter judgment for default of a plea, and take all other necessary proceedings in the cause.

Mr. Harrison, in support of his application, cited 2 Chit. Arch. 9 Ed. 1170, and cases there noted.

McLEAN, C. J., on 31st December last, made the order as follows: "Upon reading the affidavits and paper filed, I do order that unless the above named infant tenants shall plead in this cause (by guardian) within three days after service hereof, the demandant may assign John Doe for guardian of the infant tenants, William Blanshard and Mary Jane Potter, and enter judgment thereon for default of a plea, and take all necessary proceedings in this cause in the ordinary way."

The order was served on 2nd January, 1863.

After the expiration of the three days limited by the order, *John Paterson*, upon an affidavit of the service of the order and of search for plea, and no plea filed, applied for an order absolute.

DRAPER, C. J., made the order absolute. It was in the following form: "Upon reading the order made in this cause on 31st December last, by the Honourable Archibald McLean, Chief Justice of Upper Canada, that unless, &c. (reciting order of McLean, C. J.), and upon reading the affidavit of service thereof, and an affidavit that no plea has been pleaded by said infant tenants, I do order that the above named demandant may assign John Doe for guardian of the infant tenants, William Blanshard and Mary Jane Potter, and enter judgment thereon for default of a plea, and take all necessary proceedings in the cause, in the ordinary way."

COBOURG FALL ASSIZES.

CHIEF JUSTICE DRAPER Presiding.

(*Reported by* THOMAS MOSS, Esq., M.A., *Barrister-at-Law.*)

HUTCHESON (Judgment Creditor) v. ALLEN (Garnishee) WILMOT ET AL (Judgment Debtors).

Held, the judgment debtor admissible as a witness on behalf of the plaintiff in an action under a garnishee order.

This was a garnishee action brought by the plaintiff, a judgment creditor, to recover the amount of a debt alleged to be due from the garnishee to the judgment debtors, under the usual order for the issue of a writ.

Wilmot, one of the judgment debtors was tendered as a witness on behalf of the plaintiffs.

Cameron, Q. C., acting for defendant (the garnishee) objected.

The learned JUDGE, considering the evidence admissible, overruled the objection.

The verdict was for the defendant.

ENGLISH REPORTS.

(*From the Law Times Reports.*)

RIDGWAY v. WEBBER AND ALGAR.

Costs—Taxation—Striking out co-deft.—C. L. P. A. 1852—15 & 16 *Vict. c.* 76, *s.* 37.

The same rule prevails on taxation of costs in actions of contract where the name of a co-deft. is struck out by the judge at the trial, as prevails in actions of tort where the verdict is in favour of one of two co-defts. and against the other; that is to say, the party exonerated from liability is entitled to a moiety of the costs. [Nov. 8 and 11.]

This was an action on a contract brought against the defendants as co-owners of a ship. The cause was tried before Blackburn, J., at Exeter spring assizes. At the close of the plaintiff's case the judge suggested that there was no evidence of authority in the defendant Algar to bind his co-partner. He allowed the name of the defendant Webber to be struck out, and the action then proceeded, and a verdict was given against Algar for £113. When the costs came to be taxed it was found that nothing appeared on the record as to the striking out of the name of Webber. Application was then made to a judge at chambers, and Blackburn, J., made an order under the C. L. P. A., 16 & 16 Vic. c. 76, s. 37, that the name of Webber be struck out of the record. The judge's order was in general terms, and did not specify the course as to costs. On taxation the master allowed the defendant Webber one-half of the costs.

Karslake now moved for a rule to show cause why the order of Blackburn, J., should not be amended, and why the master should not be directed to review his taxation. The question arises on what principle the costs should in this instance be taxed. The master having allowed Webber one-half of the costs of the defence, the plaintiff, who has succeeded against the other defendant, only gets one-half of his costs, the defendant Webber taking the other. The question is, whether that is, under the statute, the proper principle for the taxation. [WILLIAMS, J.—Both are liable, as between attorney and client, for the whole costs.] Yes. The effect at present is, that instead of getting the full costs from Algar, who defended the action, and against whom he succeeded, the plaintiff gets only half the costs from him.

ERLE, C. J.—If there is an established practice in such cases, we will not disturb it; if there is not, we will consider and settle the principle on which costs in similar cases should be taxed. We will inquire of the other courts.

ERLE, C. J., now delivered the judgment of the court.—This was a rule moved for by Mr. Karslake, to review taxation. On the suggestion of the judge, judgment was to be entered for one of the defendants, and the case was to proceed against the other of the defendants. One of the defendants being, therefore, exonerated from liability by the interference of the judge, under the C. L. P. A., the question was, what was the principle on which the costs of the defendant were to be taxed? The master proceeded on this principle. He considered what was the sum total of costs to be paid by the defendant, and divided the same. He considered the defendant who was exonerated from liability was entitled to a moiety of the costs which would have been due if both the defendants had succeeded. It was contended by Mr. Karslake that the costs of the plaintiff would be just the same, and the costs of the other defendant were not altered at all by this proceeding. We find there has been one understood and undisturbed rule of practice. In such a case as stated, the same principle was adopted as in an action of tort, where the verdict was in favour of one defendant and not the other. That is the principle upon which the masters have estimated the costs. They have treated it by analogy in actions of contract, where the case goes not against the first defendant; and, as at present advised, the court being informed by the master that this has not been disturbed, and the court not being aware of any better principle than that, they say, *primâ facie*, they will assume that the master is right. That may not be the case where the rule should not be carried out in utter strictness, and where the circumstances of the case require a variation. In the present case there are no circumstances brought forward that require variation, and the rule will be refused. Rule refused.

UNITED STATES REPORTS.

QUARTER SESSION CASES.

COMMONWEALTH v. LOWRY.

1. It is wrong for a party to commence a criminal prosecution against his adversary in a civil suit, for a supposed perjury committed in some collateral proceeding, during its pendency and before its termination.
2. When one is charged with a criminal offence, complaint should be made to a magistrate, who issues his warrant upon which the accused is arrested, and has a preliminary examination, and is bailed, or committed in default thereof or discharged.
3. This practice has been uniform since the organization of the Commonwealth, and what time and usage has thus matured should be regarded as a fundamental right.
4. The law is jealous for the reputation and protection of the citizen, and will not needlessly subject him to the severe ordeal of judicial investigation for an alleged offence, on the first imputation of it, when a more mild, less exposed and less expensive one will answer as well.

5. The sending of a bill to the Grand Jury without a preliminary complaint, arrrest and examination, is in violation of law.

6. Cases of violations of the revenue laws, and of innovations upon the peace and good order of society, are exceptions to these rules.

In the Court of Quarter Sessions of Erie County.

Indictment for Perjury.

The facts are fully stated in the opinion of the Court.

Davenport, Dist. Atty., and *Galbraith*, for Commonwealth.

Marvine, *Marshall*, *Sill* and *Douglass*, for defendant.

The opinion of the Court was delivered by

DERRICKSON, J.—The motion to quash the indictment in this case, is based upon several errors alleged to be apparent in the facts embraced in the following statement.

The defendant brought an action in Foreign Attachment against Fox & Van Hook of Washington City, in the Common Pleas of this county, and at the meeting of the court in May last a rule was taken on the plaintiff to show his cause of action, and why the suit itself should not be quashed. In obedience to this rule, the plaintiff made an affidavit in which he set up various matters arising out of dealings which had taken place between himself and the defendants, and in which he alleged he had been wronged to the amount of several thousand dollars, and claimed the right to receive the same in the light of consequential damages. The court being satisfied that the action was not founded in contract, made absolute the rule and the suit was dismissed. On the same day, or the one following, the defendants went before a magistrate of the city and made a formal complaint against the defendant of perjury, said to have been committed in this affidavit, upon which a warrant was issued and the defendant arrested; but after a hearing and examination of the charges before the magistrate, he was discharged on the grounds—as the transcript from the justice's docket states—that the averments in the affidavit were immaterial. Lowry then brought suit by ordinary process against the same parties for the same cause of action on which the foreign attachment was instituted, and that suit is still pending and undetermined in court. From an affidavit made on the hearing before us, it appears that Lowry was requested by citizens of Erie, in a public meeting, to proceed to Washington to aid in securing the appointment of a certain naval officer to a particular vessel, with which he complied. This was the week of the August Sessions, and on the day he left, or on the one following, Fox & VanHook went to another magistrate of the city and made a sworn complaint for perjury, similar to the one previously made against the defendant, on which a warrant was issued and placed in the hands of a constable, who returned it the same day—that the defendant could not be found. A certificate of this was made out and handed to the District Attorney, by whom a bill of indictment was prepared and sent to the grand jury, and was returned into court as true.

These are the material facts; and the complaint made in relation to them is, that the sending up of a bill of indictment without a previous opportunity being offered the defendant of an examination and hearing before the magistrate, and especially after he had been arrested and discharged on a former warrant and hearing was illegal and oppressive; also, that the charge itself was premature and unwarranted while the suit in which the affidavit was made as the cause of action was still pending in Court; and further, that the averments in the affidavit were immaterial and collateral to the real question before the Court in the application to quash the foreign attachment, and not sufficient to warrant a charge of perjury.

In determining the motion before us, we do not deem it essentially necessary to decide that the complaint for the alleged perjury was prematurely made, as this is one feature in the law which gives controlling influence in the disposition we must make of it. We take occasion, however, to say that as a general rule it is wrong for a party to commence a criminal prosecution against his adversary in a civil suit, for a supposed perjury committed in some collateral proceeding, during its pendency and before its final termination; and no Court will knowingly allow it to be done unless the course of justice would suffer to refuse it. A contrary practice would have a tendency to produce the most serious mischief, and induce many an honest but timid creditor to forego his rights, rather than have himself subjected to the imputation of crime, however groundless and corrupt the charge of it might be; and if countenanced, how many offenders would go unwhipped of justice by the commencement of a similar prosecution against the accuser in the previously instituted one, and this for the sole purpose of bringing about an amicable cessation of hostilities, or to operate on the fears of the adversary, and thus stifle prosecutions which, if carried on, would bring offenders to justice and merited punishment. Courts of justice should never give countenance to a practice like this, or it would be subversive of the ends of their creation—the protection of creditors and injured persons in their legal rights, and the punishment of evil doers. In general, it is time enough after the civil suit, or the criminal charge has passed the test of judicial trial, or been otherwise disposed of, to commence the investigation of offences which have originated during their progress. If it is attempted before this, it should not be without some apparent necessity for it, or the direction of the Court. This course will leave causes and criminal charges to be disposed of on their intrinsic merits, without being affected by the prejudices which might attach to them from prosecutions subsequently got up involving the purity of the prior moves, motives and actions.

The insufficiency of the averments in the defendant's affidavit as a ground of perjury, because not pertinent or material to the court's adjudication in quashing the suit of foreign attachment, however much we might be disposed to regard them in that light, (were the present the proper time for their consideration) would more properly be noticeable on a traverse of the indictment; and we therefore pass them by, and come to the point on which we dismiss the bill as improperly brought into court. The defendant had been once arrested and discharged by the magistrate because, in his opinion, the grounds of the accusation against him were insufficient to predicate legal guilt upon; and although this would by no means prevent a subsequent complaint for the same supposed or actual offence on which he might be arrested and held to bail, or committed for want of it, yet it should of itself, in the absence of any other cause for it, forbid the sending up of a bill of indictment unless he was a fugitive from justice, which it is not pretended the defendant was when this second complaint and warrant was made and issued against him. The supposed knowledge of the defendant's absence, or of his purpose to leave home for a brief period, when the last complaint was made, and the apparent haste in having the warrant returned and the bill sent to the grand jury, might possibly subject his accusers to a severe criticism for running in the matter at the time and in the manner they did, and as indicating motives more to gratify private ends and feeling than to promote public justice. The motives, however, if ever so impure, would not justify the court in quashing the indictment. With a jury they might have a very decided and controlling influence, but could not, or rather should not, if guilt was clearly established. All that we have to consider is, were the proceedings subsequent to the issuing of the second warrant legally right? In England the established course for centuries has been, when one is charged with a criminal offence, to have complaint thereof made before a magistrate, who issues his warrant, upon which the accused is brought before him for examination and hearing, and when this is through with he is then let go on bail or committed for want of it, or is discharged. If the latter, it is because the magistrate is satisfied of the absence of guilt, or it would be his duty to have the accused detained to answer the charge. Such has been the uniform practice in this commonwealth since its first organization as such; and what time and usage has thus matured should be regarded as a fundamental right, and not to be intruded upon except for palpable reasons.

Indeed the law is jealous for the reputation and protection of the citizen, and will not needlessly subject him to the severe ordeal of a judicial investigation for an alleged offence, on the first imputation of it, when a more mild, less exposed and expensive one will answer as well. If probable guilt is made apparent, the accused is made cognizant of it at the outset, and who his accuser is, and is thus enabled to prepare his defence in court. But of what use is this rule, and what protection can it afford to the citizen, if it may be disregarded at pleasure, or even under a semblance of conformity to it, while it is apparent that the design was to prevent a preliminary examination before the magistrate, the

informer gets before a grand jury, where, unknown to the accused, he secures the finding of a bill, and then for the first time has it in his power to have the defendant arrested? The discharge by the magistrate did not exonerate the defendant from a second arrest by the same or any other justice, but it would serve as an additional reason, if one was wanted, to protect him from liability to arrest on a bill of indictment found in court, without a previous hearing or an opportunity offered him to have one. Nor would it do for a court to be indifferent to the action of the magistrate in discharging the accused after a hearing was had of the complaint. It would be like ignoring a constitutionally appointed official, and in the very road to prevention of the most serious consequences. When it is made to appear that the ends of justice are best subserved by the sending of a bill to the grand jury without a preliminary complaint, arrest, &c., and the court is fully satisfied of this, directions to this effect may be given; but if it is done or attempted without such directions, it is not only without law but in violation of it, and must submit to its merited rebuke. The rule, however, is not without exception, particularly in those cases where the revenue laws or the general peace and order of society are innovated upon. Public necessity in such instances gives rein to a wholesome tolerance of these exceptions, because private prosecutors are not always and but seldom to be found to take the proper notice of them. In the present case there was nothing to bring it within the exceptions, but everything to show that the sending of the bill to the grand jury, and the action upon it it there received, were premature and illegal, and must therefore be quashed.

Indictment quashed.

GENERAL CORRESPONDENCE.

Municipal Law—Qualification—Township Councillor—Township Librarian.

TO THE EDITORS OF THE U. C. LAW JOURNAL.

GENTLEMEN,—I am, and have been, a member of the municipal council of this township for years. We take your excellent *Law Journal*, but from my distance from the post office and other causes, I see but too few of them, otherwise I might not have to trouble you for an answer to the following question.

On Monday two weeks I again intend to run for the office of councillor. I will be opposed by D. W., who has held the office of librarian for this ward. From the first of this year till yesterday two weeks past, the 29th ult., when he came to council and handed in his written resignation as librarian, preparatory to his running against me in this ward for the council. Can he legally run and if elected, will his election be good? A few words in answer to this in the *Law Journal* will ever be remembered with the most lively gratitude.

Yours, with profound respect,

WILLIAM SKELTON.

P. S.—At the time he resigned he named his own little daughter in his own house as his successor. His pay from the council as librarian is $5 per year.

W. S.

Township of Collingwood, Dec. 18, 1862.

[D. W. is in a position to run against you, provided his resignation of the office of librarian is a legal one; provided all accounts between him and the municipality be closed; and provided his property qualification be such as the law requires in the case of a township councillor.]—EDS. L. J.

MONTHLY REPERTORY.

CHANCERY.

V. C. K. LEE V. PAGE.

Partnership—Return of premium—Costs—Arbitration clause—Covenant not to sue.

Where there is a promise in partnership articles for a return of a part of the premium, and the parties dissolve by mutual consent and unconditionally, on bill filed subsequently, the Court will not order a return of any portion.

Misconduct, in the absence of an agreement to dissolve, is a ground for adverse dissolution and a return of the premium.

Where there is an unconditional dissolution by agreement, it is not competent by either party to enter into the question of previous conduct.

A mere delay in making out accounts not amounting to a refusal, does not make the party so delaying liable to the costs up to the hearing.

An agreement in partnership articles to submit disputes to arbitration is not an illegal withdrawal from the decision of the Court; but if a negative covenant not to sue is superadded upon such arbitration clause, such covenant is an illegal withdrawal.

V. C. K. FLEMING V. FLEMING.

Practice—Alteration of law since decree——Petition of rehearing.

Where, since the making of an order, the law has been altered on which the order was founded, the proper course is to present a petition of rehearing of the order to be heard with the cause.

V. C. S. TWYNAN V. HUDSON.

Lien—Advance of part only of a sum agreed to be advanced.

M agreed to give H one-third of the profits of a contract, if H would assist him in performing it by advancing a certain sum. H failed to advance the stipulated amount, but gave bills, some only of which were satisfied by him.

Held, that H had a lien on the said profits for so much as he had actually paid.

M. R. TILDERSLEY V. CLARKSON.

Specific performance—Agreement for a lease—Newly erected house in town—Reasonable state of repair—Onerous covenant to maintain and repair.

A bill for the specific performance of an agreement to take a lease of a newly erected house in town was dismissed with costs, upon the ground that the plaintiff had not delivered up the house in a reasonable state of repair to the defendant, the incoming tenant, who was required by the terms of the agreement for the lease to enter into a covenant to maintain and deliver up the same in a proper state of repair.

In every case of such a description there is an implied contract on the part of the lessor to finish and deliver up the house to the incoming tenant in a complete tenantable state of repair, proper for a house of the character agreed to be demised.

V. C. K. PLOWES V. BOSSEY.

Legitimacy—Access—Presumption of parentage—Lunacy.

Where a husband was confined in a lunatic asylum, the wife being resident 25 miles off, and there was a special interdiction on their being left alone together when she visited him; yet it appearing on the evidence that there was a possibility of sexual intercourse, a child which was born under these circumstances held legitimate.

The child of a married woman is presumed to be legitimate, and the evidence to repel such presumption must be clear and conclusive, the *onus probandi* being on the party alleging the illigitimacy. In considering an allegation of illigitimacy the court will look at

the balance of probability, even strong doubts not being sufficient to prove such illigitimacy.

Family likeness may be a special circumstance, but, ordinarily speaking, the least possible weight is given to it.

L. J. DOUGLASS v. CULVERWELL.

Mortgage—Conditional sale—Fraud or pressure—Undervalue.

Where a person in pecuniary difficulties executed a conveyance of land at an undervalue, under circumstances which tended to show a belief on his part that the transaction was intended to be a mortgage transaction and not an absolute sale—the same solicitor acting for both parties—the court set aside the instrument as an absolute sale.

M. R. BURRELL v. DELEVANTE.

Administration of assets—Suit by annuitant to have annuity secured —No arrears due—Costs.

In a suit to secure an annuity which was charged upon the whole of the testator's estate, but in such a manner that it was not incumbent on the testator to sell any part thereof to raise and pay the annuity, it appeared that, before suit, the representatives of the testator had made the plaintiff a beneficial offer to secure the annuity, which had been refused, also that the annuity had never been in arrear.

Held, that the plaintiff was entitled to a declaration that the annuity proved a charge on the estate; and that when any portion of such estate was sold, a sufficient portion was to be apportioned to secure the annuity, but that the plaintiff must pay the costs of the suit up to and including the hearing. Liberty to apply in case the annuity should fall in arrear.

V. C. K. DANIEL v. ANDERSON.

Injunction—Right of way—Common landlord.

Whatever right may be acquired or liability incurred by tenants *inter se*, that cannot confer such right, or liability on the common owner of both properties, inasmuch as a man cannot have a right or easement against himself; and, therefore, when the parties purchase of a common vendor, whatever rights or liabilities exist as between themselves, there are none with regard to him, and a purchaser can only purchase subject to the same rights and liabilities as his vendor has or is subject to.

V. C. W. WILDE v. WILDE.

Practice—Staying Proceedings—Costs.

A plaintiff who has obtained from the defendant all the objects of the suit pending the litigation, is entitled to move to stay all further proceedings, and to recover the costs of the suit from the defendant.

V. C. S. THE LEATHER CLOTH COMPANY v. BRESSEY.

Injunction — Lessee's covenant to insure — Exorbitant premium— Liability of sub-lessee— Unsupported allegation as to character— Costs.

A lessee covenanted to insure the demised premises in such office as his lessor should appoint. He sub-let the premises, and his sub-lessee covenanted to pay what he should pay for insurance. He insured the premises, at an exhorbitant premium, in an office not appointed by the lessors. The court granted an injunction to restrain him from proceeding with an action to recover the premium from the assignees of his sub-lessees.

The bill contained an allegation that the lessee was agent of the company in which he had insured the premises. This was proved to be incorrect, and the bill was amended by striking out the allegation. Plaintiffs were ordered to pay the costs consequent on the allegation.

V. C. K. FAULKNER v. LLEWELLIN.

Specific performance—Agreement for lease—Motion to pay rent into Court

F agrees with L to grant him a lease for 21 years of a certain house to be built, the term to be computed from the time when it shall be completed and fit for habitation. L takes possession before the house is furnished, and refusing to execute the lease or pay rent, F files a bill for specific performance and payment of the rent, and moves for the payment of a year's rent into court. Motion refused with costs.

V. C. W. RE THE PHŒNIX LIFE ASSURANCE SOCIETY, HOARE'S CASE.

Winding up—Contributory.

A, a shareholder in a joint stock company, gave notice to the directors of a trust deed, by which he had assigned his shares to B and C upon certain trusts.

B and C did not execute the deed of settlement, but their names were entered upon the share register as trustees, and from time to time they received in that capacity the dividends upon the shares, as trustees for the persons named in the deed of trust.

Held, that B and C were liable as contributories without qualification.

V. C. W. HOWITT v. HALL.

Copyright—Sale for limited period—Unsold stock.

Under a purchase by a publisher of the copyright of a work for four years, the expiration of the period does not determine his right to sell the remaining stock printed by him during the period.

V. C. W. DALTON v. HILL.

Will—Construction—Gift to grandchildren—Restrictive words enlarged by considering context and scope of will.

Gift by will to "all and every the child and children of the testator's daughter who should be living at the time of her decease" to be paid to and become vested in "such child or children" in the case of sons at twenty-one, and in the case of daughters at twenty-one or marriage; but if such times for payment should happen in the lifetime of the testator's daughter and her husband or the survivor, then after the decease of such survivor; but nevertheless the shares of "all and every such child or children" to be vested and transmissible on their attaining 21 or marriage, although such respective times should happen before the decease of the survivor of his said daughter and her husband.

Held, that a child who attained twenty-one and died in the lifetime of its mother took a vested interest.

COMMON LAW.

EX. MOSTYN v. COLES.

Negligence—Bailment—Damage—Evidence of—Verdict for—Nominal damages—New Trial.

In an action on a bailment for negligence, the evidence as to damage being slight or doubtful, a verdict for the Plaintiff for nominal damages will not be set aside as necessarily absurd, unreasonable, or inconsistent.

EX. C. ATKINSON v. DENBY.

Illegal contract—Money paid under compulsion—Par delictum— Payment to induce creditor to enter into composition deed.

The plaintiff, being in insolvent circumstances, entered into a composition deed with his creditors. The defendant, one of his creditors refused to sign unless he were paid a sum of money. By a secret arrangement the plaintiff paid to the defendant £50 to induce him to sign the composition deed, which the defendant accordingly did.

Held, that the plaintiff was entitled to recover back the money in an action for money had and received.

EX. BOLCH v. SMITH.

Negligence—Right of Way—Nuisance.

The proprietor of a dangerous machine lawfully erecting it on and over which persons are allowed to pass is not liable for injury sustained by any one who, in so passing along near to it stumbles accidentally, and so falls against the machine in motion, it being visible and avoidable, although not so fenced as to prevent injury to any one striking against it.

REVIEW.

AN ENGLISH DICTIONARY OF ALL EXCEPT FAMILIAR WORDS, INCLUDING THE PRINCIPAL SCIENTIFIC AND TECHNICAL TERMS IN USE: compiled by JABEZ JENKINS. Published by J. B. Lippincott & Co., Philadelphia.

We seldom notice new books except written on some branch of the law or on kindred subjects, but an esteemed friend has called our attention to this work, which is a little gem in its way, and which the author has properly enough termed a "vest pocket lexicon." It is published at the small sum of 50 cents. It is "an English Dictionary of all *except familiar words*, including the principal scientific and technical terms" in use. By excluding all words the meaning of which is supposed to be known to every one who speaks the English language, the compiler has succeeded in producing a most diminutive volume, capable of being carried in the vest pocket, but still containing every word, technical, or scientific, or otherwise, which is in general use. In fact it omits only what everybody knows, and contains what everybody wants to know and cannot readily find.

THE UNITED STATES INSURANCE GAZETTE, New York. Notwithstanding the protracted war now being waged in the United States and consequent depression of business, the course of the United States *Insurance Gazette* appears to be steadily progressive. Its circulation is a wide one. It cannot be wider than we wish it. It abounds with information on the subject to which the Magazine relates (Insurance) of immense value.

THE LAW MAGAZINE AND LAW REVIEW for November, 1862 (London: Butterworth's, 7 Fleet-street), is received. The entertaining dissertation on the "Rights, Disabilities and Usages of the Ancient English Peasantry," is continued in this number. In addition there is in the number an article on the question of the hour—Prison Discipline. It is, however, more a historical resume of the question, than an argumentative dissertation either on one side or the other of it. The Extract from Lord Brougham's Letter to the Earl of Radnor is copied in this number of the *Law Journal*. It will be read with interest by the many admirers, both in the new and the old world, of the veteran law reformer. The remaining articles—such as "General Average," "Glasgow Murder," and "The Patent Law"—are all of interest, but we can do no more than mention them. We know of no periodical better deserving of the support of lawyers and legislators than the *Law Magazine and Law Review*. It is only £1 sterling per annum.

THE EDINBURGH REVIEW, for October (New York: Leonard Scott & Co.), is also received. Contents—"Solar Chemistry," "The Herculanean Papyri," "The Musselmans in Sicily," "The Supernatural," "The English in the Eastern Seas," "The Legend of St. Swinthen," "Mrs. Oliphant's Life of Edward Irving," "The Mausoleum at Nalicarnassus," "Hops at home and abroad," "Prince Eugene of Savoy," "The American Revolution"—are of varied interest. The bare mention of the many and miscellaneous topics is sufficient for our purpose. That purpose is, to induce such men of education as have not already subscribed for the American reprints of the standard Reviews, to do so without delay. The annual subscription for any of the four Reviews is *only* $3. Blackwood and any one of the four Reviews may be had for $5; The four Reviews and Blackwood may be had for $10 per annum.

THE ECLECTIC MAGAZINE, for December (New York: W. H. Bidwell), is received. It is embellished with a fine portrait of the well known Bible commentator Albert Barnes, of Philadelphia. We observe that the present number closes the 57th volume of the *Eclectic;* and of them it is well said, they comprise an amount of literary treasure more choice, more varied and valuable, than can be found in any other series in the language. "Treatment of the Insane," in the present number, will be found a most useful paper at the present time. "The Theory of Cromwell's Life" will be read with interest, as having a tendency to throw additional light on the life and character of this remarkable man. We have not time to particularize the remaining articles, no less than eighteen in number.

The *Eclectic* is a magazine of some peculiarity. It is so named because it contains selections from the leading magazines of the world, such as the Edinburgh Review, the Quarterly, Blackwood, Fraser and the Dublin University Magazines. The price is moderate, considering the vast amount of reading matter that is furnished to subscribers. It is only necessary for the *Eclectic* to be known, to be appreciated.

APPOINTMENTS TO OFFICE, &c.

HEIR AND DEVISEE COMMISSIONERS.

The Hon. Sir JOHN BEVERLEY ROBINSON, Bart.; The Hon. ARCHIBALD McLEAN; The Hon. PHILIP MICHAEL MATHEW SCOTT VANKOUGHNET; The Hon. WILLIAM HENRY DRAPER, C.B.; The Hon. JAMES CHRISTIE PALMER ESTEN; The Hon. ROBERT EASTON BURNS; The Hon. JOHN GODFREY SPRAGGE; The Hon. WILLIAM BUELL RICHARDS; The Hon. JOHN HAWKINS HAGARTY, and The Hon. JOSEPH CURRAN MORRISON, to be Commissioners under the provisions of chap. 80 of the Con. Stat. of Upper Canada, intituled An Act respecting claims to lands in Upper Canada for which no patents have issued.—(Gazetted. December 20, 1862.)

COUNTY JUDGES.

ROBERT LYON, of the City of Ottawa, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of the County of Carleton.—(Gazetted, Dec. 20, 1862.)

NOTARIES PUBLIC.

EDWARD HEATHCOTE, of Campbellford, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, December 6, 1862.)

FREDERICK PROUDFOOT, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, December 13, 1862.)

THOMAS HOLDEN, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Publi: in Upper Canada.—(Gazetted, December 13, 1862.)

CHARLES GAMON, of Collingwood, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, December 13, 1862.)

DEPUTY CLERKS OF THE CROWN.

PIERRE HECTOR MORIN, Deputy Clerk of the Crown and Pleas in and for the County of Essex, discharged from office.—(Gazetted, December 6, 1862.)

CLERKS OF COUNTY COURTS.

RODERICK McDONALD, of the Town of Cornwall, Esquire, to be Clerk of the County Court of the United Counties of Stormont, Dundas and Glengarry, in the room and stead of Robertson McDonell, Esquire, deceased.—(Gazetted, December 6, 1862.)

CORONERS.

EDWARD McKENZIE, Esquire, M.D., to be an Associate Coroner for the United Counties of Lanark and Renfrew.—(Gazetted, December 6, 1862.)

GEORGE H. CORBETT, Esquire, M.D., to be an Associate Coroner for the County of Simcoe.—(Gazetted, December 6, 1862.)

JAMES G. FREEL, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel.—(Gazetted, December 13, 1862.)

JAMES G. FREEL, Esquire, M.D., to be an Associate Coroner for the County of Ontario.—(Gazetted, December 13, 1862.)

TO CORRESPONDENTS.

"MANVERS"—Under "Division Courts."

"WILLIAM SKELTON"—Under "General Correspondence."

DIARY FOR FEBRUARY.

1. SUNDAY..... *Septuagesima.*
2. Monday ..... HILARY TERM commences.
3. Tuesday..... Last day for notice Ch. Ex. Hamilton and Sandwich.
4. Wednesday... Grammar School Trustees to meet.
6. Friday ..... Paper Day, Q. B.
7. Saturday..... Paper Day, C. P.
8. SUNDAY..... *Sexagesima.*
9. Monday..... Paper Day, Q. B. [Last day for notice for Chatham.
10. Tuesday ..... Paper Day, C. P. Chancery Sittings, Exam. and Hg. Toronto.
11. Wednesday .. Paper Day, Q. B. Last day for service for County Court.
12. Thursday..... Paper Day, C. P.
14. Saturday..... HILARY TERM ends.
15. SUNDAY..... *Quinquagesima.*
17. Tuesday..... *Shrove Tuesday.* Chan. Ex. Term Sandwich and Whitby com
18. Wednesday .. *Ash Wednesday.* [Last day for notice for London & Belleville
21. Saturday..... Declare for County Court.
22. SUNDAY..... *1st Sunday in Lent.*
24. Tuesday ..... Chan. Ex. Term Chatham and Cobourg commences.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

FEBRUARY, 1863.

NOTICE.

Subscribers will receive with this number the Index of Subjects and Index to Cases contained in the eighth volume of the LAW JOURNAL, *together with the Title-page for that volume.*

OUR CALENDAR.

Our desire is to make the *Law Journal Calendar* as complete as possible.

With this object in view we have endeavored to embrace dates of interest as well to practitioners in courts of equity as courts of law, besides other dates of interest to municipal councils, school trustees, &c. The chancery hearing and examination terms were fixed by an order of that court, made on 26th December, 1859. In the compilation of the calendar for the present year, we followed the provisions of that order. The calendar was issued early in January. On 10th January the Court of Chancery re-cast the terms for examination of witnesses and hearing of causes for the first six months of the present year.

In order that the calendar may not only be complete but reliable, we have decided upon the issue of a second edition corrected to meet the requirements of the chancery order of 10th January. The calendar, corrected, is sent herewith to subscribers.

The court has not, as yet, made any alterations in the hearing and examination terms for the last six months of the year, but as we presume it intends to do so, we have omitted all reference to the chancery dates for that portion of the year rather than give dates which, though correct at present, will, in all probability, be rendered incorrect by the action of the court several months hence.

In other respects the calendar now issued is the same as that issued during last month.

THE LATE ROBERT EASTON BURNS.

Death is no respecter of persons. He visits all alike. The rich and the poor, the prince and the peasant, the wit and the dullard, the learned and the unlearned, the honest and the dishonest, the good and the bad, all obey his summons. Those in humble positions silently leave us in obedience to the mandate. The blank thus made is scarce observed; the void is soon filled up. But when a man of eminent position yields to the unconquerable conqueror, men begin to reflect upon the uncertainty of life.

Such a man has recently been removed from among us. Robert Eastern Burns is no more. His life was one of patient industry. His death was one of profound peace. He is now relieved from the troubles to which flesh is heir. His being is that of endless eternity.

Mr. Burns was born on 26th December, 1805. His father was a Presbyterian minister. The son received his early training under the father, who for several years was master of the Grammar School in Niagara. Subsequently he became the pupil of the Rev. Mr. Creen, who succeeded the father as master of the Grammar School. He, it is said, was diligent in study, and at an early age exhibited many of the traits of good sense which in after life characterized him as a man.

Law was the profession of which he made choice. He left the Grammar School in 1822, and during Easter Term of that year, at the age of 16, was enrolled as a student of the laws in Upper Canada. He for five years studied in the office of Mr. John Breakenridge, then a well known legal practitioner in Niagara. His studies were completed in 1827. During Easter Term of that year he was called to the bar, and selected St. Catharines for the practice of his profession. As a lawyer he was popular. His popularity, combined with sound judgment, in September, 1837, lead to his appointment to the office of District Judge in the district in which he lived.

He did not long hold this judicial appointment. It did not satisfy his ambition. In the spring of 1838, having resigned the office of Judge of the Niagara District, he removed to Toronto and formed a partnership with Mr. Hagerman, then a leading member of the bar, afterwards a Judge of the Queen's Bench. Mr. Burns applied his

mind to the study and practice of equity. When the Court of Chancery was removed to Kingston, the then seat of government, he also removed to Kingston. He continued to reside there so long as the government remained in that city. When Montreal became the seat of government, Mr. Burns returned to Toronto. He successively formed partnerships with Mr. Oliver Mowat and the present Chancellor of Upper Canada. These partnerships were not of long duration. He soon afterwards accepted the office of Judge of the Home District, which office he held till 1848. His urbanity as judge of that court, and *ex officio* judge of the Division Courts, will long be remembered by the many inhabitants of the present counties York, Ontario and Peel (the old Home District), with whom he in the discharge of his judicial duties came in contact.

This office he resigned in 1848, and formed a partnership with Mr. John Duggan. Mr. Burns, as before applied his mind to practice in Chancery, and was known as an able and reliable practitioner in that court. His connection with Mr. Duggan, however, was of short duration, for in 1850, upon the death of Mr. Justice Hagerman, Mr. Burns became a puisne judge of the Court of Queen's Bench, a position which he held till the day of his death.

He was twice married. On 10th February, 1835, he married Miss Anne Flora Taylor, by whom he had four sons—three of whom survive him. His first wife died in September, 1850, and for six years he remained a widower. In 1856, he married Miss Britannia Nanton. She died in 1858. He never afterwards married.

He had one brother and three sisters. The brother, who lives in St. Catharines. still survives him. One sister married the late Judge Campbell, of Niagara, and was living with Judge Burns at the time of his death. The second sister married Mr. Thomas Taylor of St. Catharines, and is still alive. The third, who also is alive, is unmarried.

Until lately, Judge Burns enjoyed good health. His habits, however, were too sedentary, and, as often happens with persons of sedentary habits, his death was sudden. He presided at the last assizes in Hamilton, and towards the end of the court was heard to complain of being unwell. He finished the business of the assizes, and returned to his house in Yorkville, near Toronto, where he remained till he died. His real complaint was dropsy, but the proximate cause of death was what is commonly termed "a breaking up of the system." His energies failed him. His health forsook him. He sank from week to week and day to day, till the near approach of death became a matter of certainty.

His death, which happened on Monday the twelfth day of last month, was on the following day announced through the columns of the Toronto daily press, to a large circle of sorrowing friends. For several days previously rumours were prevalent to the effect that he could not live, but it was hoped, in spite of adverse symptoms, that he might be spared for years to his country and his family. The hope was vain. He humbly bowed to the will of God, and surrendered up his spirit to the Author of his being. His memory will long remain fresh in the minds of the people of Upper Canada. His usefulness as a judge was as great as his popularity as a man. All respected him, and all will continue to respect his memory.

Mr. Justice Burns was a man of strong emotions. More than once have we seen him drop a tear when sitting in judgment on some fallen son or daughter of Adam. On such occasions his heart was full; his lips scarce could find utterance for the thoughts of sympathy that crowded upon him for expression. He felt what he said, and indeed felt much more than he said. We remember well when he last presided as Judge of Assize for the United Counties of York and Peel. A few days before the opening of the court, the news reached Canada of the death of the husband of our beloved Queen. The occasion was one which Mr. Burns seized as affording a subject for some remarks to the grand jury on the uncertainty of life. He spoke in manly terms about the many virtues of the deceased. He pointed out his many good qualities as a Prince, and a father of the first family in the world. He showed how much the nation was indebted to him for the virtuous manner in which he had nurtured his family. He, in heart-melting words, pointed out the bereavement which that family had sustained. When he tried to express his feelings of sympathy for our widowed Queen, his utterance was choked, and only relieved by a flood of tears, which unmistakeably testified alike his loyalty to the Queen and his loyalty to our common humanity. Little did he then think that ere long he would himself be removed from this world, and his own death cause tears to gush down the cheeks of many sorrowing friends.

Judge Burns was too good natured in his dealings with his fellow men. He never could say "no" to an appeal for a favor. His beneficence exceeded his discretion. The consequence was, that in the declining years of life he was harassed with debts contracted on behalf of others. To pay them off he was economizing in every possible form, and had his life been spared a few years longer would have been free from debt and able to afford many comforts which of late he denied himself.

More than once have we had occasion to advert to the well defined veins of common sense which are to be found

in his published decisions. No decisions commanded more respect. No judge commanded more confidence. His intellect was a sound one. It was not what the world calls brilliant. It did not shine with the lustre of the polished diamond. It was not a polished, but a rough diamond, though none the less valuable on that account. He had not, owing to the circumstances of this country at the time he was educated, the advantages of a university education. His intellect, strong by nature, did not receive that polish which the higher branches of education imparts. He, however, at all times acquitted himself with singular success. No flights of oratory characterized his addresses to the jury; but steady plain spoken practical sense predominated in all that he said. His intellect certainly was not acute. He was at times a little slow to apprehend, but for this, compensation was afforded in the fact that his decisions were at all times well considered and well delivered. The moment he made himself master of an argumant, his mind saw its way to a logical conclusion. His conclusions were more than once upheld in appeal, even in cases where he had the misfortune to differ from the rest of the Court. He has left behind him, in the published series of our Queen's Bench reports, judgments that will so long as law is administered in Upper Canada be regarded as masterpieces of learning.

He was at all times courteous to the bar. He never forgot the gentleman in the exercise of his high functions as a judge. He seemed to know and to feel that judicial success in a great measure depends upon mutual respect between the bench and the bar. He in consequence at all times received the cheerful support of the bar. Exalted as was his position, he did not hesitate to mingle with the law students, to preside at their debates, to read essays to them, and do all in his power to stimulate them to exertion in the pursuit of their profession. His condescension in this respect was very remarkable. The students appreciated it. Year after year he was elected president of the Osgoode Club. This was the only acknowledgment which the students could offer for his acceptance, and that acknowledgment was heartily made and as heartily received.

He is no more. His memory, however, will ever be cherished with feelings of endearment. His life was an example worthy of imitation—an example of industry to the student, of learning to the barrister, of integrity to the judge, of simplicity and honesty to all men. His family has lost a kind and affectionate father. His court has lost an able and experienced judge. His country has lost a sincerely good and upright man, who adorned every station of life in which he was called upon to act. In a word, he was an honest man—an able man—an upright judge.

TRIAL BY JURY.

It is in the interest of the administration of justice both criminal and civil, that juries should, if possible, agree. But it is not necessary that the agreement should be forced upon them contrary to the free exercise of reason—it is not necessary that mind should be so far subjected to matter that physical endurance should usurp the place of mental exercise. The right of the judge to discharge the jury without consent of parties is at all times a subject of doubt. The right in some cases does exist, but even in those cases the propriety of exercising the right may be open to grave doubts. The law on this subject has recently undergone much discussion in *Reg.* v. *Charlesworth*, decided by the English Court of Queen's Bench at the sittings after Trinity Term last. The case is one of great interest and is a display of great learning. For this reason we have given it entire in other columns. We make no apology for its insertion. It will well repay a perusal, and be found at all times a most useful repository of learning on a recondite branch of law.

NEW CHANCERY ORDERS.

10th January, 1863.

RE-HEARINGS.

I. From and after the first day of April next, all re-hearings of causes are to be within six months after the decree or decretal order shall have been passed and entered; and applications in the nature of re-hearings to discharge or vary orders made in Court, not being decretal orders, are to be within four months of the passing and entering of the same; or within such further time as the Court or any Judge thereof may allow upon special grounds therefor, shown to the satisfaction of the Court or Judge.

HEARINGS.

II. Causes are to be heard at the same time that the witnesses are examined upon the close of such examination. No evidence to be used on the hearing of a cause is to be taken before any examiner or officer of the Court, unless by the order first had of the Court or a Judge thereof, upon special grounds adduced for that purpose.

III. When the examination of witnesses before a Judge is to be had in any town or place, other than that in which the pleadings in the cause are filed, it shall be the duty of the party setting down the cause for such examination, to deliver to the Registrar or Deputy Registrar with whom the pleadings are filed, a sufficient time before the day fixed for such examination, a præcipe requiring him to transmit to the Registrar or Deputy Registrar, at the place where such examination of witnesses is to be had, the pleadings in the cause; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting or re-transmitting such pleadings; and thereupon it shall be the duty of such Registrar or Deputy Registrar forthwith to transmit the pleadings accordingly.

The fee payable to the Deputy Registrar for setting down causes under the foregoing order is to be two pounds.

DECREES FOR REDEMPTION OR FORECLOSURE OF MORTGAGES, OR FOR SALE.

IV. When the time for answering in either of the above classes of cases has lapsed, on production to the Registrar of the Court of the affidavit of the service of the bill, and upon præcipe, the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the Court, upon a hearing of a cause *pro confesso*, under an order obtained for that purpose; and on every such bill is to be endorsed the following notice: "Your answer is to be filed at the office of the Registrar, at Osgoode Hall, in the city of Toronto, or (when the bill is filed in an outer county) at the office of the Deputy Registrar at ———. You are to answer or demur within four weeks from the service hereof, or (when the defendant is served out of the jurisdiction) within the time limited by the order authorizing the service. If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made against you forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause. *Note.*— This bill is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named plaintiff; and when the party who files the bill is agent, and agents of Messrs. E. F. and G. H., of ———, solicitors for the above plaintiff. And upon bills for foreclosure or sale is to be added to such notice the following: 'And take notice, that the plaintiff claims that there is now due by you for principal money and interest the sum of ——, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed (or sold) unless before the time allowed you, as by this notice for answering, you file in the office above named a memorandum in writing signed by yourself or your solicitor, to the following effect: '*I dispute the amount claimed by the plaintiff in the cause,*' in which case you will be notified of the time fixed for settling the amount due by you at least four days before the time to be so fixed.'"

This order is not to affect any suit now pending.

V. After the first day of February next, all bills of complaint and petitions are to be addressed, "To the Honourable the Judges of the Court of Chancery."

VI. The signature of a Judge shall not be necessary to the authentication of any writ.

SERVICE OUT OF JURISDICTION.

VII. The time within which any defendant served out of the jurisdiction of the Court with an office copy of a bill of complaint shall be required to answer the same, or to demur thereto, to be as follows:

1. If the defendant be served in the United States of America, in any city, town or village within ten miles of Lake Huron, the River St. Clair, Lake St. Clair, the River Detroit, Lake Erie, the River Niagara, Lake Ontario, or the River St. Lawrence, or in any part of Lower Canada not below Quebec, he is to answer or demur within six weeks of such service.

2. If served within any state of the United States, not within the limits above described, other than Florida, Texas or California, he is to answer or demur within eight weeks after such service.

3. If served within any part of Lower Canada below Quebec, or in Nova Scotia, New Brunswick or Prince Edward Island, he is to answer or demur within eight weeks after such service.

4. If served within any part of the United Kingdom, or of the Island of Newfoundland, he is to answer or demur within ten weeks from such service.

5. If served elsewhere than within the limits above designated, he is to answer or demur within six calendar months after such service.

6. The time within which any party served with any petition, notice or other proceeding, other than a bill of complaint, is to answer or appear to the same, is to be the same time as prescribed for answering or demurring to a bill of complaint, according to the locality of service.

7. Any party may apply to the court to prescribe a shorter time than is hereinbefore provided for any other party to answer or demur to any bill of complaint, or to answer or appear to any petition, notice or other proceeding.

8. Any party may apply for leave to serve any other party out of the jurisdiction, under the General Orders of the Court, of June, 1853.

9. Affidavits of service under this Order, and of the identity of the party served, may be sworn as follows: If such service be effected in any place not within the dominions of the Crown, before the mayor or other chief magistrate of any city, town or borough, in or near which such service may be effected, or before any British consul or vice-consul, or the judge of any court of superior jurisdiction. And if such service be effected in any place within the dominions of the Crown, not within the jurisdiction of this Court, such affidavit may be sworn before any the like officer, or any notary public, and in Lower Canada, before any commissioner for taking affidavits appointed under any statute of this province. And such affidavit shall be deemed sufficient proof of such service and identity, without proof of the official character, or of the handwriting of the person administering the oath upon such affidavit.

P. M. VANKOUGHNET, C.
J. C. P. ESTEN, V. C.
J. G. SPRAGGE, V. C.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 10.)

DEPUTY CLERK.

The clerk may have as many assistants as he thinks necessary in doing the work of his office—receiving papers, filling in process, copying papers, receiving monies, or the like—under his direction; but they are not recognized as deputy clerks in the proper signification of the word, though they would be held in law to be the principal's deputy when doing any particular act under his direction. In signing process, administering affidavits, approving instruments, taking confessions, recording judgments, or doing such matters as the legislature evidently trusted to be done by the clerk personally, it is doubtful if assistants would have power to act; but in carrying out the mere

manual work of the office under the clerk's direction, there seems to be no objection to their employment.*

The term deputy applies only to one who has all the authority which the principal has by virtue of his office. A deputy, then, is one who acts by the right, in the name of, and for the benefit of some one else: he is a mere servant of his principal, though he has the power, by operation of law, to do any act which his principal might do (1 Salk. 95); and by making a deputy the whole power of the principal passes to him (2 Salk. 468; and see 1 Salk. 96; *R.* v. *Smith*, Farr. 78).

Ministerial officers can, by common law, make a deputy (4 Bulstr. 78; 3 Mod. 150.) Whether division court clerks come within the general rule is not material to be considered, for the statute has expressly provided for the appointment of deputies, thus rather diminishing than enlarging any common law power; for the express provision would appear by implication to exclude the power of appointment except as provided for. Section 33 enacts that—

"The clerk may (with the approval of the judge) from time to time, when prevented from acting by illness or unavoidable accident, appoint a deputy to act for him, with all the powers and privileges, and subject to like duties, and may remove such deputy at his pleasure, and the clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy."

As it is with the approval of the judge that the appointment must be made, such approval is in the nature of a condition precedent; and an appointment made without the judge's approval would be invalid, at least so far as the clerk and deputy clerk were concerned, though the act of the deputy would be as good as clerk *de facto* quoad third persons: (2 Inst. 381; Cro. Eliz. 534; Kebl. 357; Moore 112; Ld. Raym. 661.)

Any person who has the requisite skill may be a deputy, and of the sufficiency of skill the judge will determine.

The manner and form in which the appointment is to be made is not prescribed by the statute; and there is some doubt whether an appointment by parol would be sufficient. At all events the best and safest mode is to appoint the deputy by an instrument in writing, more particularly as the statute requires the appoval of the judge.

FORM OF APPOINTMENT OF A DEPUTY CLERK.

I, ———, Clerk of the ——— Division Court, in the County of ———, being prevented by *illness* (*or as the case may be*) from acting in my said office of Clerk, do hereby, in accordance with the provisions of the Division Court Act, and with the approval of the Judge of the County Court of the said County, appoint ——— of the ———, in the County of ———, my deputy to act for me, in the said office, during my pleasure.

Given under my hand this ——— day of ———, 186

———,

Clerk of the said Division Court.

Approved by me ———,

Judge of the said Co. Court.

The authority of the deputy clerk is determinable at the will of the clerk under the express power in the statute—to remove such deputy at his pleasure. It is the same at common law: the deputy holds at the pleasure of his principal.

A deputy ought regularly to act in his office in the name of his principal. Still an act by deputy in his own name in general will be good (1 Salk. 96; 3 Bulstr. 78); and he has power to do any act which his principal might do; (1 Salk. 95; 2 Salk. 468; *R.* v. *Smith*, Farr. 73). Thus, in signing process, it would seem proper to sign in the name of the clerk, adding "by ———, deputy clerk;" while in taking confessions, and certifying or approving documents, the deputy would sign in his own name, adding the words, "deputy clerk." It is said that a deputy, being in the place of his principal, may maintain an action for fees, but has no right to the same for his own use: (*Godolphin* v. *Tudor*, 2 Salk. 468). The remuneration of the deputy is a matter of arrangement between him and the clerk, but if no arrangement be made, he will only be entitled to a *quantum meruit* against his principal: (6 Mod. 235).

As to the liabilities in respect to acts by deputies, the generel rule of law is, that a principal is liable for the fault or negligence of his servant, though not for his wilful wrong (*Jones* v. *Hare*, 2 Salk. 440; *Habberstey* v. *Ward*, 8 Ex. 330; *McManus* v. *Cricket*, 1 East. 106); but the statute has expressly provided in sec. 33 that the clerk and his sureties shall be jointly and severally responsible for *all the acts and omissions of the deputy.* Being a mere servant, the deputy would not be personally liable for any bare neglect of duty to any party injured thereby, though he would for a misfeasance, for no wrong doer can justify as a servant (*Lane* v. *Cotton*, 12 Mod. 488); but the action would be against the deputy as a misfeasor, not as a servant or deputy, but as a wrong doer (*Ib.*)

It may be added that misconduct by a deputy sufficiently grave to incur forfeiture, if committed by the principal, may work a forfeiture of office by the clerk: (2 Roll Ab. 155.)

* Such assistant clerks are employed in the offices of the superior courts and county courts; but any writs or documents they issue are previously signed by the principal officer, whose agents they are for the particular act.

"CLERK 6TH DIVISION COURT, COUNTY NORFOLK."—Your letter received, but too late for attention in this number. Had it been addressed to Barrie instead of Toronto, it might have appeared in this issue. All communications on the subject of Division Court law should be addressed to Barrie.

UPPER CANADA REPORTS.

IN APPEAL.

[Before The Hon. Sir J. B. ROBINSON, Bart., President; The Hon. ARCHIBALD MCLEAN, Chief Justice of Upper Canada;* The Hon. WILLIAM H. DRAPER, C.B., Chief Justice of the Court of Common Pleas; The Hon. Vice-Chancellor ESTON; The Hon. Mr. Justice BURNS;* The Hon Vice SPRAGGE; The Hon. Mr. Justice HAGARTY; and The Hon. Mr. Justice MORRISON.]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

BERNARD V. WALKER.

Mortgage—Created by an absolute deed—Joint tenant—Tenant in common.

The principle upon which parol evidence will be received to cut down a deed absolute on its face to a mere security considered and acted on.

Le Turge v. *DeTuyll*, 1 Grant 277, commented on and approved of.

T. and B. bring sureties for W. for the due payment of certain moneys to the City of Toronto, obtained from him a mortgage with a power of sale by way of indemnity; afterwards having been obliged to pay certain moneys to the city, and being also liable to pay other sums on his account, they obtained from him an absolute deed for the nominal consideration of £1000; in fact no money was paid, nor did any accounting between the parties take place. Subsequently the holder of a prior mortgage instituted proceedings to foreclose, and on an application to extend the time for payment, T. made affidavit that the application was made as well on behalf of the mortgagor as on behalf of himself and B., and it was also shown that when the deed was signed T. stated that W. would retain his right to redeem, the object of the conveyance being merely to enable T. and B. to raise money to pay off the mortgagee, who was pressing, and other demands. On a bill filed by W. against B. and the representatives of T. (who had died in the meantime), alleging the transaction to have been by way of security only, and praying to be allowed to redeem; a decree was made as prayed, which on appeal to this court was affirmed, notwithstanding the surviving grantee in the deed (B.), swore that the conveyance had been made by W. for the purpose of absolutely releasing his interest in the lands conveyed.—[DRAPER, C.J., dissenting.]

Whether the admission of one joint-tenant or tenant-in-common, as to the extent of the interest held by him and his co-tenants are admissible as evidence against his co-tenants, *Quære.*

The bill in the court below was filed by Joseph Walker against Hiram Goodwin Bernard and George P. Dickson, and John C. Griffith, executors and devisees of Charles Thompson, deceased, setting forth, among other things, that a certain deed made by the plaintiff to the defendants Bernard and Thompson, at the Island of St. Joseph, in Nov., 1851 (and bearing date 28th Oct. 1851,) though professing to be an absolute conveyance in fee by the plaintiff to them of lot 54, on the west side of Yonge Street, in the township of Vaughan (210 acres), for the consideration of £1000, was in fact taken as a mere security for whatever balance might be due to them on taking an account between them and the plaintiff; that Thompson died in February, 1858, leaving Griffith & Dickson his executors; that Thompson, in his lifetime, always admitted, and that his said executors now admit, that this deed was in fact a mortgage and that plaintiff had a redeemable interest in the premises, but insist that the plaintiff is still largely indebted to the estate of Thompson upon the transactions between plaintiff and Bernard and Thompson.

That Bernard, on the other hand, insisted that he had acquired an absolute interest in the said estate, under the deed referred to, and denied the plaintiff's right to redeem; and plaintiff prayed that accounts might be taken, and that he might be allowed to redeem, &c.

The defendant Bernard, in his answer, stated what the plaintiff had also set forth in his bill, that the plaintiff had previously given to him and Thompson a mortgage on these same lands, to secure them against any loss or liability which they might incur as sureties for the plaintiff to the city of Toronto, for the due performance of certain obligations incurred by the plaintiff, as collector of market fees in the said city. [This mortgage contained a power of sale to be exercised by Bernard and Thompson for the purpose of indemnifying them in the event of Walker failing to save them harmless.]

That they, Bernard and Thompson, had been compelled to pay large sums to the city on account of Walker, and, being still liable for larger sums, they went to the plaintiff at St. Joseph's Island, and agreed with him in November, 1851, that the plaintiff should convey to Bernard and Thompson, absolutely in fee simple, his equity of redemption in the said land, in satisfaction of what they had already paid for the plaintiff as his sureties to the city, and in consideration of their undertaking to pay, as they then did for the plaintiff, all further sums which he might be liable to pay to the city of Toronto in respect of market fees.

That they did afterwards fully pay to the city all further sums for which the plaintiff was so liable, such payments for the plaintiff amounting in the whole to £900 and upwards.

He denied that the deed of October, 1851, was intended to be by way of security merely, and insisted that it was designed as an absolute purchase, as the deed on its face purported to be. "I deny it to be true that either the said Thompson or myself, on the occasion of our being at St. Joseph's Island, as aforesaid, or before or at or about the time of the execution of the said deed, ever stated to the plaintiff that the said deed should be considered or taken as a mere security for the balance that might be due us on taking the accounts between us; and I deny further that it was ever stated, agreed or understood by me, either to or with the said plaintiff, or any person on his behalf, that the said indenture should be a security for any purpose, or that the same should be considered otherwise than an absolute purchase deed: and I say that, to the best of my knowledge, information and belief, the said Thompson in like manner took the said deed as an absolute deed; and did not, before or at the time of the execution of the said deed, state to the said plaintiff, or in any manner agree with the plaintiff, that the said deed should be considered as a security merely, but I believe the said Thompson, like myself, regarded and treated the transaction as an absolute purchase of the plaintiff's estate in the said lands, for the consideration before mentioned."

Bernard further stated, in his answer, that he afterwards went into possession of the lands, upon an agreement between him and Thompson, and had expended large sums of money in improvements. [This statement as to improvements was not borne out by the evidence.]

That Walker having given a mortgage on the land to secure the purchase money to the person from whom he had bought the estate, and the holder of that mortgage having pressed for payment and obtained a decree of foreclosure, the said defendant did, on 28th December, 1853, pay to her solicitor £1200 12s. 4d., for principal, interest and costs, and "that thereupon the said solicitor delivered over to him the mortgage deed, and signed an undertaking to transfer the same as he should require;" and that he did not believe it to be true that Thompson ever admitted that the deed so made at St. Joseph's was intended by way of security merely; and that if he ever did make such admission, it was without his, the said defendant's, privity, consent or acquiescence.

The defendants Griffith and Dickson, executors of Thompson, denied all knowledge of what conversation took place with the plaintiff at St. Joseph's, at the time of executing the deed to Bernard and Thompson, or that they had ever stated that that deed, though absolute in its terms, was intended to be a security merely, or that they had ever heard Thompson say so; but they admitted that Thompson had told them that if, when he and Bernard should sell the estate, his proportion of the price obtained for it should exceed the amount of the claim which they had against the plaintiff by as much as would satisfy the debt which the plaintiff owed to Thompson individually, he, Thompson, would be willing to give the excess to the plaintiff as a free and voluntary gift; that knowing such to have been Thompson's intention, they had admitted it to be the fact, and intended, if it could have been legally done by them as executors, to have carried Thompson's intention into effect.

The deed in question was an ordinary deed of bargain and sale, by which the property was conveyed to Bernard and Thompson in fee, for a consideration, as the deed states, of £1000, acknowledged in the deed to have been paid.

The plaintiff having mortgaged the land, in 1845, to the person from whom he bought it, to secure £900, an unpaid portion of the purchase money, Mrs. Washburn, the holder of that mortgage, proceeded to foreclose it in a suit instituted before the deed was executed at St. Joseph's Island, and while that suit was pending, and after the execution of the deed, Walker, Bernard and Thompson, joined in instructing a solicitor, for their common

* McLean, C. J., and Burns, J., were absent when judgment was delivered.

benefit, to endeavour to reduce the claim under the mortgage; and both Bernard and Thompson instructed him also to make an application to extend the time for paying the mortgage debt to Mrs. Washburn, which application was successful. In support of it, two affidavits were made by Thompson, on the 10th and 19th December, 1858, respectively. In the first of these he swore, "that the mortgaged premises in this cause are, to the best of my knowledge and belief, worth more than double the sum found due and payable to the plaintiff, under the master's report in this cause; and I do further say that the said defendant is now resident on the Island of St. Joseph, in Lake Huron; and that I am making exertions on his behalf to raise the money payable to the plaintiff for principal money, interest and costs, under the said report; and I further say that I do verily believe, that if the time be extended by this honourable court, for the redemption of the said premises, for a period of six months, the said defendant will be enabled to redeem the same."

In the other affidavit, he swore "that I, this deponent, and one Hiram Goodwin Bernard, of &c., being responsible as sureties for the above named defendant in a large sum, and having paid considerable sums of money on account of such suretyship, the said defendant (Walker) some time, and about two years since, conveyed to me, this deponent, and the said Hiram Goodwin Bernard, his equity of redemption of and in the mortgaged premises mentioned in the pleadings in this cause, upon trust or under the agreement and understanding that they should sell the same and pay off and discharge the mortgage security held by the said plaintiff, and the moneys due and to become due and owing to this deponent and the said Hiram Goodwin Bernard under or in relation to the said suretyship, together with all costs, charges, and expenses incurred by them in relation thereto, and then to pay the surplus of such purchase moneys to the said defendant; and I do further say, that during the course of the past summer I have been in continual communication with the said defendant, on the Island of St. Joseph, in Lake Huron, and have had many conversations with him in relation to the said mortgaged premises, and have been fully empowered by him to act in the said matter, and to proceed in the matter of the redemption of the said premises for his interest, and as agent for him, as well as on the behalf of myself and the said Hiram Goodwin Bernard."

The solicitor, who prepared these affidavits, swore that he was instructed by and was acting in the interest of Bernard and Thompson, as well as of the mortgagor, Walker, in using them for the purposes mentioned; that there was an appeal from the master's report, and that he received instructions for the appeal from Bernard and Thompson; that he examined the witnesses in the master's office, and that there was no contention between Thompson, Bernard and Walker; that Thompson first mentioned the matter to him, and was the one who principally came to him. He charged his costs against Thompson, because told by him that he would see them paid, and would pay them when the estate was sold; that he supposed Bernard knew nothing about the payments by Walker (on account of Mrs. Washburn's mortgage), and did not therefore apply to him to make affidavits. He further swore, "I cannot say of my own knowledge that Bernard was privy to the contents of the two affidavits. I never read them to him."

Mr. Crew, son of an auctioneer now deceased, was also examined for the plaintiff in this cause, and swore that he recollected this farm being offered for sale in March, 1857. It was advertised in Thompson's name alone. Bernard objected to his own name being omitted, and, with Thompson's assent, the sale was deferred a few days and new handbills printed with a fresh heading, Bernard's name being inserted with Thompson's, as joint proprietors. He says that he heard Thompson (speaking only of himself, and not mentioning Bernard) state, over and over again, that all he wanted when the property was sold was his money and six per cent. interest, and that the balance should go to Walker.

The printed advertisements of the sale were headed "To close the settlement of an estate"—"Farm for sale." The names "Charles Thompson & H. G. Bernard, Proprietors," are printed at the foot. The handbill being signed by W. B. Crew, as auctioneer.

In the printed conditions of sale, the terms of payment are stated to be 10 per cent. down; a further sum, to make up £2000, in one month from the date; at which time the purchaser "shall receive an assignment of his purchased rights, free from incumbrance;" and the balance of the purchase money to be paid in four equal annual instalments, with interest at the rate of six per cent. per annum, to be secured by mortgage on the property.

Marsh, a farmer, who had lived 37 years near the property, swore that, in 1851, the lot in question was then worth rather over £2000, at one or two years' credit; or £2500 at six years' credit, by annual instalments, with interest; or £3000 at 12 years' credit, payable in the same manner.

When it was put up for sale in 1857, it was offered at an upset price of £20 per acre, and Marsh swore that the land was in his opinion worth that at the time, at six years credit, and that it is now worth that; that there were 200 acres of wood land, worth 40 dollars an acre; and that a farm in the neighbourhood, not more valuable than this, was sold in 1856 or 1857, for £25 an acre; that he (Marsh) thought of buying the farm now in question in 1857, as Thompson was indebted to him; but the debt not being sufficient to cover the price, he did not purchase, though Thompson, he swore, told him he need be under no apprehension about the balance (that is, about being pushed inconveniently for the balance), "for that, after settling certain claims that they had against Walker, the balance was going to Walker, and he wished it to remain invested, so that he (Marsh) would have time enough to pay." He also swore that he had several conversations with Thompson, and "that it was always understood the balance was going to Walker, after paying their claims," which Thompson said were on account of moneys paid by them (that is, by him and Bernard) to the corporation of Toronto for Walker. "I never had any negotiations," he added, with "Mr. Bernard about the farm. I understood Thompson to be speaking both for himself and Bernard, but I cannot say what he meant; however, he always spoke in the plural number."

Other witnesses placed the valuation of the property much lower than this witness; and at the auction no one was found willing to give the upset price of £20 an acre, in consequence of which no sale took place.

Another witness (Watson), also called for the plaintiff, swore that he was intimate with Thompson and a connexion of his, "he frequently told me, in conversation, to the effect that a deed of sale had been made of the property in question, as a means to relieve it of existing liabilities, and to protect Mr. Walker and his family, and that the balance would accrue to Mr. Walker for the benefit of his family, and that he expected there would be a handsome surplus." "Thompson," he adds, "told me what I have stated about the surplus, on different occasions during 1854, 1855 and 1856, when I was doing business along the coast of the lake, as far as Sault Ste. Marie. Walker and Thompson were intimate friends; Walker, I think, reposed great confidence in Thompson."

The defendant Griffith was called by the plaintiff as a witness. He swore that he had heard Thompson say that he was sorry he had put the upset price so high. "I knew nothing," he said, "of Walker having any claim to the property until after Thompson's death. Thompson frequently told me that when the property should be sold, and he and Mr. Bernard should be paid, he intended to give Walker the balance."

It was proved that on the 28th December, 1858, a day or two before the time appointed in the foreclosure suit of Mrs. Washburn against Walker for paying up the amount due, Bernard paid to Mrs. Washburn's solicitor, from his own money as it appeared, £1,200 12s. 6d., being the amount then due with interest.

He desired to have that mortgage assigned *to him*, which was declined, for want of a proper order from Walker directing such assignment. The objection made was, that no authority was given by Walker for assigning to Bernard alone without Thompson. Mr. Bacon, the solicitor who attended with Bernard to see the money paid by him, swore that Thompson told him that when the property should be sold, after he was paid principal and interest, he intended the balance should go to Walker. So far as he was concerned, he said, he had always intended so. He said, at the same time, that he did not consider Mr. Walker was entitled to redeem.

The deed of 28th October, 1851, was executed at St. Joseph's, in the presence of one John C. Spragg, who alone signed it as a subscribing witness, and he gave this account of what passed within his observation:—"The deed was executed in my presence by Walker and wife, Bernard and Thompson. I made the interlineations which made Charles Thompson a party to the deed throughout; they are in my handwriting; they were made at Mr. Walker's house at St. Joseph's. I met Thompson and Bernard on board of the steamboat. As soon as we arrived, Mr. Thompson asked me to go with him and Bernard to Walker's house, to witness a document; I did not know what. I went with them to Walker's house. We met Walker at the wharf; he did not accompany us to the house; Walker staid on the wharf. When we reached the house we passed through two rooms into an inner or third room. Walker joined us in about fifteen or twenty minutes. When he came, Thompson produced a document, and laid it on the table, and said, 'Mr. Walker, I want Mrs. Walker and yourself to sign this document.' Walker went and fetched Mrs. Walker into the room. Mrs. Walker objected to sign the document; she said she had already signed, and she did not think it necessary she should sign any more. Walker then examined the document, and found it was made to Bernard alone, and he objected; and then, and for that reason, the interlineations were made, to remove that objection. Walker required Thompson to be a party. Thompson replied to Mrs. Walker's objection, that the deed would not affect Walker's right of redemption; that he still would have a right to redeem, otherwise the property would have been sold to meet liabilities that had been incurred—that it would have been sacrificed; and he urged this mode of settlement as preferable. I understood it was to raise money to pay off what was due on the place, and other liabilities that were pressing. After this conversation the deed was executed. Bernard was present during part of the conversation. When Walker and his wife entered the room, Bernard stepped into the adjoining room. The door was open between the two rooms, and remained open during the conversation. It was an ordinary board partition between the two rooms; a single row of boards set edge to edge; it was not tongued and grooved; it was not tight. The room we were in was a small one. I have no doubt whatever that a person in the adjoining room would hear all that passed in the room where we were. No accounts were gone into; no statement of figures made; no money passed; nothing more was said that I know of, and upon the statement I have mentioned the deed was executed. I went up in the steamer with Thompson and Bernard. I did not know what they were going for until a few minutes before we arrived; they did not show me the deed till we got into the house; I had no conversation with Thompson and Bernard about the deed. I did not read the deed; Walker read the deed himself. All he said was that he wanted Thompson's name inserted as well as Bernard's. Thompson, when he produced the deed, said it was for the purpose of raising money to meet liabilities. It was not said that Thompson and Bernard were to sell the property, but to raise money on the property. I am not sure that Bernard was in the room when this was said; I concluded that he was in the adjoining room, but do not know; I saw him leave the room where we were, and go into the adjoining room, but do not know whether he remained there. I did not call the attention of Walker and his wife to the fact that this was an absolute deed; I made no remarks myself about it. * * * I think the time occupied was about twenty minutes or half-an-hour. Thompson took the deed when it was executed. I left almost immediately after the business was finished, and went to Sault St. Marie. I do not know whether Bernard was absent all the time of the conversation; I think I missed him just before he was required to execute the document; I think he was not present when the discussion took place. * * * Bernard signed the deed in my presence; he signed it at St. Joseph's, at Walker's house; they all signed it at the same time. I cannot say whether Bernard entered the room after he first left it until he was wanted to sign the deed."

The defendant, Bernard, was examined in this cause, on behalf of the plaintiff. His statements, bearing upon the taking of the deed, and the object and intention of it, were as follows:

"I remember going to St. Joseph's Island; I was there, at Walker's, about an hour; I stayed while the boat stopped to wood and land passengers. I believe Mr. Thompson was with me; he took the deed with him. I don't know who wrote it. I can't recollect when the interlineations were inserted. No accounts were produced, that I recollect. Mr. Spragg went up with us. I heard no talk about accounts. The amount was spoken of that we had paid, and what we had to pay, to the Corporation. I don't recollect any figures being mentioned. No money was paid. I did not think there was so much due on the Washburn mortgage; I thought not more than half was due that was found due afterwards; I thought only about £350 was due at the time; it was so said. I don't remember giving evidence in the master's office, but I might have done so. I don't recollect any negotiations to reduce the amount. I don't recollect stating in the master's office my reasons for interesting myself. I don't recollect saying that I and Thompson were the absolute owners of the land; nor can I account for not doing so, except that I did not know much about the matter. I don't recollect about my evidence; it is ten years ago; my memory is not very good; I have frequently forgotten matters. I was in possession of the property when I went to St. Joseph's Island. I think I recollect telling Walker that Mrs. Washburn was pressing. When first asked I thought not, but on reflection I think I did; but nothing has occurred to alter my view. I went up to get the deed. I cannot say why I told him that the mortgagee was pressing. The suit had been commenced. I had ascertained that it was true. I did not know when the debt would have to be paid. * * * Thompson, I think, was not looking after the land more than myself. He was, however, backwards and forwards to St. Joseph's Island. He wished me to go to St. Joseph's. I had no communication with Walker about giving the deed before I went. I think Walker knew we were coming. I don't know who told him; likely it was Thompson. I don't know by whom it was arranged that we should go up; I did not arrange it. I believe that Thompson had been speaking to Walker with reference to our going up. Thompson proposed to me to take the deed in my own name some time before we went up. I objected to it at the time, because I wanted my money back, and wanted Thompson to pay his share of what had been paid by me, and was to be paid; and then Thompson agreed to go shares, and take a joint deed. I have been in possession of the land ever since. I have received very little money from it. The property has always been for sale, and it has been let from crop to crop; for the last two or three years it has been leased. I don't recollect what had been paid when we went up to St. Joseph's Island. I think I have paid the Corporation about £900. I have got receipts for all I paid, I think. The property was then supposed to be worth £1,500; but it was offered for sale by auction afterwards, and £1,350 only offered. * * * The property was offered for sale twice by me and Thompson; the last time in March, 1857. We instructed Crew to offer it for sale. Thompson fixed an upset price, and it was offered for that; I think seventy or eighty dollars the acre. Thompson prepared an advertisement."

On his cross-examination he said, "I went to St. Joseph's with Thompson to get an absolute deed of the property, and Thompson and I were thenceforth to be the owners of it. Walker understood the transaction to be so. * * * Thompson was a party to offering the property for sale both times."

Re-examined.—* * * "I did not read the answer over before I swore to it. Nothing particular was said when the deed was executed; the deed was merely signed; nothing was said about the bargain; it was all arranged before we went up, and nothing was said at the time."

In the foreclosure suit of *Washburn* v. *Walker*, Bernard was examined on the part of Walker, and made a deposition, in which, among other things, he stated that he "went several times with Walker to Mr. Morrison's office (the solicitor for Mrs. Washburn) about Mrs. Washburn's mortgage. * * * The reason that I took an interest in effecting a settlement between Morrison and Walker respecting the mortgage was, that I and Mr. Thompson were security to the Corporation of the city for Walker. There is a mortgage registered upon the lands in question, in favor of myself and Thompson, as a security for our liability to the Corporation. The mortgage is conditioned to hold us harmless."

It was proved that soon after the execution of the deed of 28th October, 1851, Bernard went into possession of the farm, and

retained possession afterwards by himself or his tenants; and he himself stated that this was upon an understanding with Thompson that he was to pay a rent to him proportionate to Thompson's interest in the premises, which was to be governed by the proportion that Thompson should be found to have paid of the liabilities which they two had assumed to the City of Toronto on Walker's account.

The cause came on to be heard upon the pleadings and evidence in May, 1861, before his Honor Vice-Chancellor Esten, when a decree was pronounced in favor of the plaintiff, declaring him entitled to redeem, and directing the usual accounts to be taken. From this decree Bernard appealed, assigning as reasons therefor, first, that the conveyance in the pleadings mentioned of the 28th day of October, 1851, was absolute in fact as well as in form, and was not intended to be conditional or by way of security; second, that the evidence produced to the Court of Chancery by the respondent James Walker to prove that the assignment was conditional or by way of security, was inadmissible as contravening the Statute of Frauds, and ought also on other grounds to have been rejected.

In support of the decree, the respondent Walker assigned the following reasons: first, that it sufficiently appeared by admissible evidence that the conveyance in question was not agreed, or intended to be, and was not in fact, though it may have been in form, absolute, but was agreed, and intended to be, and was in fact, though not in form, conditional or by way of security, as the same is by the said decree declared to be; second, that the said decree must at any rate be sustained as far as respects the interests of the other defendants in Chancery, and the equities between the parties cannot be adjusted, or the said decree varied or reversed, in the absence of the said other defendants in Chancery, who are necessarily parties to this appeal.

Strong and *Crombie* for the appellant.

Blake and *J. McNab* for the respondent (Walker).

The authorities principally relied on by counsel appear in the judgment.

Robinson, Sir J. B., Bart.—As to the deed of the 28th October, 1851, which the plaintiff affirms was given by him, and was accepted by the grantees, Bernard and Thompson, upon the intention and with the understanding that it was not to operate as an absolute conveyance, but only as security for whatever amount he should be found to owe to them in consequence of their having become security for him to the City of Toronto, two things are quite plain—first, that the deed is on the face of it an absolute conveyance as from a vendor to a purchaser, and contains not the slightest intimation that it was given as a security for any pre-existing debt, or that the land was conveyed upon trust or special understanding or agreement of any kind; and secondly, it seems equally clear that if we admit that a sale was intended, this was not a case in which the evidence affords ground for supposing that it was agreed, as it sometimes is between a vendor and vendee, that the vendor should be allowed the privilege of repurchasing upon returning the price that he had been paid with interest, or on any special condition of that kind.

The consideration expressed was £1000; but it is plain on the evidence that that was a sum named without any reference to the value of the land, either in fact or as agreed upon by the parties. The defendant Bernard, in his own account of what passed at St. Joseph's, makes that clear: "No sum," he says, "was spoken of as the price that was to be paid for the land; no accounts were gone into, and no sum was mentioned." He had advanced, he said, large sums, and expected to have to pay more, on the plaintiff's account; and without anything more definite than that as to the amount that the plaintiff did owe or was likely to owe to him and Thompson, in consequence of their having become sureties for him, it was agreed at St. Joseph's that he should make this absolute deed to them, in satisfaction of the indemnity they were or might be entitled to claim.

It would be difficult to credit this statement, even if there were nothing express in the evidence to contradict it. Among men of business, it could scarcely happen that such a transaction would be conducted so loosely; for the plaintiff could not have known at the time what he was getting for his land, a valuable improved farm, in a highly favorable situation; and for all that appears either in the deed or otherwise in the case, he got nothing, and asked for nothing, in the shape of a discharge from his liability to indemnify, which the defendant says was the real object of the transaction. No doubt the plaintiff might have agreed to give up his equity of redemption, in satisfaction of the debt, to his sureties, and that would have been as much a sale as if it had been made upon a new consideration, paid to him in money; but we can hardly believe that such a transaction would have taken place without any attempt to ascertain the true amount of the debt, and without something being given that would show the plaintiff discharged.

The defendant Bernard states now that he has paid in all about £900 to the City. It does not appear that Thompson made any payments. But Thompson had had various dealings with the plaintiff unconnected with this matter of the suretyship; and it appears to have been agreed between the plaintiff and the other two, that if Thompson should be found indebted in any sum to the plaintiff upon these private dealings, that should be allowed to stand against the advances made by the two on his account; and Thompson and Bernard were to adjust the account between themselves on that understanding.

Whether a large portion of the sums advanced for the plaintiff might not have been covered by an amount of debt due to him by Thompson, is uncertain on the evidence. There are conflicting statements on that point, and no account has yet been taken.

The plaintiff had bought the farm in 1845, for £1,150, paying £250 down, and giving a mortgage on the land for the residue. Whether he got it for less than its value at the time, does not appear. If the place was not then worth more, it is proved that it had become of much more value in 1851; but as £900 of the purchase money had not been paid by the plaintiff, and formed an incumbrance on the property, we must suppose that the plaintiff, before he made over his land in satisfaction, would have taken care to see that he got such a sum above that incumbrance, and the interest upon it, as would make up about the value of the land in 1851. According to the evidence given by Mr. Marsh and others, that would hardly have been accomplished by his giving up the land by way of indemnity to his sureties, even if he had really no debt due by Thompson that would have covered any considerable part of what had been paid out for the plaintiff.

It is not pretended that the plaintiff got any other consideration for his interest in the land, if he really did part with it absolutely. His letting it go upon too easy terms, however, would give him no claim to have the transaction looked upon as a security rather than a sale, if for all that appeared it was a sale that was intended; but when we have conflicting accounts of the real intention of the parties, apparent inadequacy of consideration does form a fair ground of argument.

Looking only at so much of the evidence as I have yet remarked upon, the effect of it, I think, would be such as to produce a strong moral conviction that the parties could not have agreed and intended that the land was to be given up to the grantees as a full indemnity for all that they had paid or would have to pay for the plaintiff as his sureties, and that, without any further accounting, or anything more to be done, the land was to be considered as theirs, and the matter of the suretyship thus finally closed.

But, granting that that would seem improbable, we are yet to consider, on the other hand, that no fraud or mistake in obtaining or giving that deed is proved or alleged, and that the deed must therefore have effect according to its language, unless we find ourselves warranted, by evidence admissible in such cases in courts of equity, in directing that the transaction should be regarded in a different light.

It has been urged by the counsel for the defendant Bernard, that there is no such evidence as can be relied upon, or can even be received in equity, for cutting down the absolute estate which the deed by its language has given to the grantees.

This brings up several questions, which have been already so much discussed in this court, in several cases we have had before us, that we may assume them to be settled by decisions which are binding upon us, leaving only that occasion for doubt that it is difficult in most cases to exclude, as to the correct application of the principles to the facts of the particular case.

The cases in this court which I refer to are, *Greenshields* v. *Barnhart*, 3 Grant, 1; *Howland* v. *Stewart*, 2 Grant, 61; *Matthews* v. *Holmes*, 5 Grant, 1; *Arkell* v. *Wilson*, 7 Grant, 270; *Wragg* v. *Beckett*, 7 Grant, 220; *Monro* v. *Watson*, 8 Grant, 60.

Two of these cases—*Greenshields* v. *Barnhart*, and *Matthews* v. *Holmes*—having been carried to England by appeal, the judgments given by the Judicial Committee of the Privy Council are reported in 5 Grant 99, and 5 Grant 1. And besides these cases, the Court of Chancery had occasion, in the case of *LeTarge* v. *DeTuyll*, 1 Grant, 227, to consider the nature of the evidence on which courts of equity can act, in holding a conveyance to be a mortgage which upon the face of it purported to be an absolute conveyance. We have expressed our concurrence in the conclusion come to in that case, though in some later cases, in which it was cited, we thought the principle on which it was determined was desired to be pushed to a length which the decision in the case itself did not warrant.

Upon a review of the cases I have mentioned, and the many English decisions which are cited in them, we must hold, I think, that the plaintiff in this case should not be allowed to redeem, if he had nothing to rely upon but the verbal evidence of witnesses that the defendant Bernard had, either at the time of the deed of the 28th October, 1851, being executed, or afterwards, admitted that that deed was only taken as a security, and was not intended to operate as an absolute conveyance. Still less could any evidence avail, of conversations had with him before the deed was made. That there may be facts shown, either by written or verbal evidence, which, when established to the satisfaction of the court, may lead to the conviction that a deed on the face of it absolute could not have been intended so to operate between the parties, and that this will lay a proper foundation for receiving parol testimony to explain what was the real nature of the transaction, is clear on numerous authorities, and is explained in the cases of *LeTarge* v. *DeTuyll* and *Matthews* v. *Holmes*, and in the well considered judgment given by Mr. Justice Burns in *Howland* v. *Stewart*. Whether, without such evidence, the proof of mere verbal declarations of the defendant Bernard in the case before us could have been admitted to contradict the deed, need not be for a moment considered; for there is no proof whatever of any declarations or admissions of that kind by Bernard—none in his answer, and none independently of it. On the contrary, the defendant distinctly denies what the plaintiff affirms in that respect.

But the plaintiff relies on the following circumstances, of which there is evidence: first, that, according to the defendant's own deposition in this case, and from the other evidence, no certain sum was paid or agreed to be paid as the price of the land, nor anything said or considered between the parties in regard to its value, nor any reckoning of the amount which the grantees in the deed had already paid to the city on the plaintiff's account, or of the amount which they would be called upon to pay thereafter, nor any amount brought forward or spoken of as being due by Thompson to the plaintiff on their mutual transactions; though it had been understood that any debt due by Thompson should be allowed to be set against the monies advanced or to be advanced by the grantees in the deed, to the city, on account of the plaintiff.

If the transaction was really such as Bernard represents—simply a sale of the land in consideration of whatever claim Thompson and Bernard might have upon the plaintiff for indemnity—it would certainly seem strange that the parties should have entered into no calculations to ascertain how far the land would or would not be a just satisfaction of the indemnity which the sureties would have had a right to claim. If the plaintiff had certainly no other property than this land, and if there was no likelihood of his ever owning anything else afterwards, and if it was quite clear that the plaintiff's equity of redemption in this lot, in addition to the amount of any debt that Thompson then owed him, could not be worth so much at that time, then it might well be that they would agree to take the land in full satisfaction, and that the plaintiff might be willing to let it go absolutely and without any stipulation for redemption. But even then it would be strange, among men of business, that nothing should be done or said, either then or, for all that appears, at any other time, with a view to ascertain how the parties stood—how much the sureties had paid, and how much they would probably have still to pay; that there should be no sum spoken of as the reasonable value of the land that the plaintiff was making over finally, as the deed imports; no attempt made to ascertain how the plaintiff and Thompson then stood, upon their mutual dealings, which would be necessary to be known before the relative interests of Thompson and Bernard in the land could be adjusted as between themselves, as it was to be, according to Bernard's own account of the matter; and strange too that there should be nothing in writing given on the one side, or asked on the other, for securing the plaintiff against any after claim upon him that Thompson and Bernard might make. It stands admitted that the £1000 mentioned in the deed was an imaginary sum, put in without any regard to the price or value of the land; and the deed contains not a word of explanation that would show any connection between it and the suretyship which Thompson and Bernard had undertaken.

If it was necessary to form an opinion upon the question of fact, whether the plaintiff's interest in the land was or was not at that time worth much more or anything more than the claim which the plaintiff's sureties would have had upon him after they should have paid all that they were liable for, we should be unable to satisfy ourselves upon the point. We know that the plaintiff's mortgage of the land for £900 of the purchase money was yet unpaid, and perhaps some interest on that debt. Whether that incumbrance, added to all the claim which Thompson and Bernard had or might afterwards have upon the plaintiff as his sureties, would equal or exceed what the land was worth in 1851, we cannot tell, without knowing whether Thompson owed him a debt, and of what amount, and without some precise evidence of the value of the land, and the amount which the sureties have paid in all.

I have no doubt that neither the want of a due proportion between the benefit which the plaintiff received from making the conveyance, nor the want of such steps as are ordinarily taken among men of business in conducting similar transactions, could be relied on as sufficient for showing that the deed absolute in its terms must have been intended only as a security, and should be so treated; but this part of the case is nevertheless material as being in accordance with and tending to confirm what may be inferred from other facts which have the same tendency.

Then another fact proved in the case is, that when, on the 4th November, 1857, Thompson and Bernard offered the land for sale by public auction, through Mr. Crew, their auctioneer, they did, by a printed handbill, signed by Crew, their agent, and to which their names are added in print as proprietors, advertise the sale as about to be made, "to close the settlement of an estate." Now, all three were then living; there was no estate of a deceased party that could have been meant. But if, as the plaintiff asserts, the deed was only given as a security, and if it was intended that Thompson and Bernard should indemnify themselves by selling the estate, and should pay over to the plaintiff any surplus above their claim, then there would be a settlement to be made, which might naturally enough account for the sale being spoken of as a sale to be made "to close the settlement of an estate;" for until the estate was sold, the ultimate rights of the parties respectively to its value or proceeds could not be settled. This does seem, therefore, to point to a sale about to be made for some other purpose than simply to turn the land into money, at the will and for the benefit of the vendors as owners. It is proved that Thompson drew up this notice, and that both he and Bernard concurred in the terms of the sale, and were both present at the auction. I refer to this not as a circumstance by any means important, if it stood alone, but material as strengthening the other evidence in the cause—I mean the circumstance that he was recognizing the attempt to sell, and acting, or endeavoring to act through his agent, in selling the estate, under an advertisement such as I have described.

There is next the further fact, that when the foreclosure suit was brought by Mrs. Washburn against the plaintiff, after Thompson and Bernard had taken their conveyance of 28th October, 1851, and while that suit was pending, both Thompson and Bernard are shown to have taken an active part in assisting the plaintiff Walker, as owner of the equity of redemption, not only to reduce the amount claimed to be due on the mortgage, but also to have the time extended for payment, and to have joined in instructing counsel for these purposes; though if the deed he had taken from the plaintiff in 1851 was not taken as a security, but upon an

absolute sale, the plaintiff could have had no interest afterwards in the equity of redemption, and would have had no right to redeem, and would not have been the proper person to be made defendant in the foreclosure suit.

But what the plaintiff relies upon as most material in his favor, and seems indeed to insist upon as decisive, are the two affidavits of Charles Thompson, sworn to respectively on the 10th and 19th December, 1853, and filed in the foreclosure suit of *Washburn* v. *Walker*. We have to consider what those affidavits fairly import, and what effect they can have as evidence that can affect Bernard's rights in this suit.

The first of the two affidavits, it will be remembered, contains no statement respecting the deed of October, 1851; but it is fairly to be implied by it that Thompson recognized the plaintiff to be then (in December, 1853) the person entitled to redeem the property, and the person interested in redeeming; and it was made for the express purpose of serving and protecting his interests in that capacity, by procuring for him a longer day than had been set for redeeming by the order made in that cause. It states that the mortgaged premises were worth more than double the sum found due and payable to the plaintiff, Mrs. Washburn. "I am making exertions on his behalf," Mr. Thompson states in that affidavit, "to raise the money." * * * "And I further say that I do verily believe that if the time be extended for the redemption of the premises for a period of six months, the said defendant Walker will be enabled to redeem the same." Now, if the deed made more than two years before by Walker to Bernard and Thompson, were really intended to operate as an absolute sale to them of all Walker's interest, which is what it purports to be, then it would be altogether inconsistent with that state of things, that Thompson should, in December, 1853, be representing himself as making exertions on Walker's behalf to raise the money for Mrs. Washburn, in order to enable him to redeem the property. Walker might indeed be liable under a covenant or bond for the mortgage money after he had parted with his equitable interest, but he still would not be the person entitled to redeem the property; and Thompson and Bernard would have been the proper parties to the foreclosure suit, instead of being content to appear as witnesses or friendly agents merely intervening for the protection of Walker's estate in the land.

But the other affidavit, made in the same suit by Thompson a few days afterwards, is more clearly and expressly applicable to the deed of October, 1851; for in it Thompson states on oath, clearly in reference to that deed, that by it Walker conveyed to them (Thompson and Bernard) his equity of redemption of and in the mortgaged premises, "upon trust, or under the agreement or understanding that they should sell the same, and pay off and discharge the mortgage security held by the plaintiff (in that suit Mrs. Washburn), and the moneys due or to become due to him and Bernard under and in relation to their suretyship to the City of Toronto, together with all costs, &c.," and then to pay the surplus of such purchase moneys to the said defendant Walker. And Thompson further states in this affidavit: "During the course of last summer, I have been in continual communication with the said defendant (that is Walker), on the Island of St. Joseph, in Lake Huron, and have had many conversations with relation to the said mortgaged premises, and have been fully authorized by him to act in the said matter, and to proceed in the matter of the redemption of the said premises for his interest, and as agent for him, as well as on the behalf of myself and the said Hiram Goodwin Bernard."

This is a very plain recognition by Thompson that he and Bernard held the land, not as purchasers on an absolute sale, but upon the trust or understanding that they should sell it for the purposes mentioned, and pay over the surplus to Walker. And it is an express admission that Walker, standing in that relation, had a right to redeem by paying the charges referred to, which of course would render a sale by him unnecessary. It is not inconsistent with that, that he should state, as he did in this affidavit, that he was acting in the matter of the redemption of the premises for Walker's interest, and as agent for him, as well as on the behalf of himself and Bernard; for he and Bernard were indirectly interested in staying the foreclosure, either that a sacrifice of the property might be prevented by giving them more time to sell, or that they might have more time to pay off Mrs. Washburn's mortgage themselves, if that should turn out to be necessary.

There can be no doubt that this affidavit of Thompson would be sufficient to establish as against him—if he were living, and a defendant in this suit—that the transaction of October, 1851, was not in fact an absolute conveyance upon a sale, or a final relinquishment of all right in consideration of the debt still due, but was intended to be used as a security by enabling the grantees in the deed to sell the property, and, after retaining the amount of their demand, to pay over the surplus to the grantor; and it is sufficient now to establish the fact in a suit against his devisees in trust representing the estate, who alone have been made defendants in regard to the interest that can be derived under him.

But it is denied that this affidavit of Thompson is evidence that can be made any use of to affect Bernard, the other grantee in the deed. If, on the face of the deed of October, 1851, the grantees could or rather should be regarded as joint tenants, then there are many authorities to establish that the admissions of one would be binding upon the other in regard to the property and rights held by them jointly. I refer to Taylor on Evidence, secs. 674, 680, 681, 683, 686, 691, 712; *Lucas* v. *De la Cour*, 1 M. & Sel. 249; *Cross* v. *Bedingfield*, 12 Simons, 35; *Kemble* v. *Farren*, 3 Car. & P. 623.—Per Tindal, J. In this case, even on the face of the deed, the grantees would not be joint tenants by our law, but tenants in common only, because there is nothing expressed in the deed which indicates an intention to make a joint tenancy (Con. Stat. U. C. cap. 82, sec. 10). Then, holding them to be tenants in common, I do not find that the admission of one would on general principles be binding on the other; on the contrary, it has been held that such an admission would not be binding against the co-tenant in common, though both are parties on the same side of the suit. (Taylor on Ev. sec. 681; 4 Cowan, 488, 492, Amm. Ca.) As a general rule, indeed, such an admission of one co-tenant should not be binding on the other; for, admitting in this case the truth to be that the deed was really intended by all parties to be an absolute conveyance, as it imports, it would be hard and unjust that the owner of a several interest held under it should have that interest cut down to a security only, because the owner of the other moiety had chosen for any purpose to deny that the intention was such as the deed expressed.

On the other hand, it would be arriving at a strange result in this suit, if the deed under the same words, applying to both grantees, must be held on any evidence of the intent with which it was made at the time to have conveyed to one grantee an absolute estate and to the other a qualified or conditional estate only. For nothing can be plainer or more certain than that, for whatever purpose the estate was conveyed to one grantee, it was for the same purpose conveyed to the other. And I have not brought myself to the conclusion that we could upon any evidence given in this cause hold this deed to have been a sale as to Bernard, but only a security as regarded Thompson. The common sense view of the point seems to be, that if the court are satisfied of the truth of the statement, that the deed was made as a security only for one purpose and as to one party in the cause, it must for any thing that appears in the case be held to be so for all purposes and as to both parties. That Bernard could have been allowed to disprove the statements made by Thompson, I have little doubt. That however would seem to call for a decision between the opposing testimony, but a decision that of necessity must govern the whole case, since the whole was one transaction, which could not at the same time have been absolute and conditional, or clothed with a trust, but, for all purposes in the cause, must be taken to have been either the one or the other, according to the conviction of the court upon the evidence. On this part of the case I think it material to refer to the case of *Pring* v. *Pring*, 2 Vernon. 99.

Mr. Starkie, in his treatise on evidence, observes "that a community of interest or design will frequently make the declaration of one the declaration of all."

"Thus," he says, "in the case where partners or others possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject matter, is evidence against the rest. The admission of one of several makers of a joint and several promissory note that it

has not been paid, is evidence against all. Such an admission, however, ought to be clear and unequivocal." He cites as authorities for this principle—11 Ea. 589, and 1 M. & Sel. 249, which I have already referred to; and *Whitcomb* v. *Whiting*, Douglas, 652. Unless indeed this principle were acted upon, the judgment of the court must, or at least might, in many cases be contradictory and inconsistent, and beyond question wrong in one part, if it be right in another.

On the other hand, it is laid down in Mr. Taylor's treatise on evidence, sec. 680, that in order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested or one was derivatively interested through the other; and that a mere community of interest will not be sufficient; and he cites a decision of Lord Ellenborough at Nisi Prius, in *Jaggers* v. *Binnings*, 1 Stark. Rep. 64, where an action was brought against two defendants, part owners of a vessel, and an admission made by one as to a matter which was not a subject of copartnership, but only of co-partownership, was held inadmissible against the other.

If it had been explained in that case, which it is not, what was the tendency of the rejected admission, we might have seen that there was an obvious propriety in rejecting it, and that the decision could not be applied as an authority in the case before us.

But whatever difficulty there may be in the way of receiving evidence of Thompson's written admission in his affidavit, as binding *per se* upon Bernard, his co-tenant in common, especially in view of what is required by the Statute of Frauds, I feel the case to be clear, on the ground on which the plaintiff's counsel put it, on the argument, namely, that the defendant Bernard has by his conduct in respect to this transaction given sufficient reason to conclude that the transaction which took place at St. Joseph's Island, in October, 1851, could not have been one of absolute sale of this land, and that there is sufficient foundation laid for the reception of parol testimony in order to explain for what purpose the deed in question was then made by the plaintiff Walker.

If it had been proved in the case that Bernard stated publicly, at the auction sale that was attempted to be made, that they held the land in security for their claims upon the plaintiff, and were selling the land for the purpose of satisfying these claims, and paying over any surplus there might be to the plaintiff; that they had computed their claims at a certain sum, and would therefore put up the land at that price, it order that it might not be sacrificed for a sum less than would satisfy the debt; and if the land, at his desire, had been in fact put up at that upset price, I assume that that would not, in the view of a Court of Equity, have been treated as mere verbal declaration of matter contrary to the purport of the deed. It would have been treated as something actually done on his part inconsistent with the state of things to be inferred from the deed, and would have let in any further parol evidence to show what the real nature of the transaction was. It appears to me that what Bernard actually did and participated in was conduct on his part stronger than I have just supposed. He allowed Thompson to take the principal part in obtaining the deed from the plaintiff, at St. Joseph's; left him to make the previous arrangement about it with the plaintiff; went up with Thompson at his request, and, when he arrived there, left it with Thompson to negotiate the matter with the plaintiff, waiting apparently to abide by what Thompson should procure the plaintiff to do. They held already a mortgage from the plaintiff upon the same property, given to them the year before to secure them against the consequences of the liability which they had incurred on his account; and I cannot see why they should have desired to get this other deed for the mere purpose of security, if that were their only object (which indeed is a difficulty in the way of supposing that the latter deed was meant to operate as a security only), except that the mortgage of 1850 required 90 days' notice of any sale to be made by them for the purpose of indemnifying themselves; and they may have desired to act more promptly. But this result is plain, that Thompson, being allowed by Bernard to put himself forward, as he did in the matter, they came away with this absolute deed in consequence of what passed between the three; and two years afterwards, when Mrs. Washburn was endeavouring to foreclose upon her mortgage of much older date, the proceedings take place which Mr. Turner relates in his evidence. Upon all that is before us in relation to what was done in that suit by Thompson and Bernard and the now plaintiff Walker, for obtaining a longer day before foreclosure, Bernard seems again to have allowed Thompson to be the acting party of the two in whatever was necessary for obtaining their common object.

Whether he did or did not know the exact contents of the affidavits made by Thompson, does not precisely appear; but upon the evidence before us, I think no jury would hesitate a moment in concluding that Bernard was concurring in the statements made by Thompson, so far that he knew and acquiesced in them; that having a common interest, they were acting together in the common object of obtaining further time for the protection of Walker, as holding the equitable estate of a mortgagor, entitled to redeem for his own benefit. The defendant Bernard does not pretend that he gave any intimation while he was being examined in the master's office, that he and Thompson were the absolute owners of the estate. "I do not recollect (he says, in his evidence in this cause) stating in the master's office my reasons for interesting myself; I do not recollect saying that I and Thompson were the absolute owners of the land; nor can I account for not doing so, except that I did not know much about the matter; I do not recollect about my evidence; it is ten years ago; my memory is not very good."

I think we cannot be wrong in looking upon Bernard, on a view of all the evidence, as sanctioning the statements made by Thompson, and in using, as much as he used, the affidavits on which they both assisted in obtaining, as if for the benefit and on behalf of Walker, an enlargement of time which could be of no consequence to Walker if he had absolutely and finally parted, as Bernard now affirms he did, with all his interest, legal and equitable, in the premises.

Mr. Turner swore that all three were acting in this matter in pursuit of their common object.

The principle I now refer to was carried somewhat further in the case of *Drewett* v. *Sheard & Price*, 7 Car. & P. 465, where Littledale, J., said to the jury, "The learned Sergeant says that the defendants are only liable for joint acts, that is, acts done (by Sheard) when the defendant Price was present. Still, as on the first occasion, both defendants were present, and stated that they acted in the assertion of a right, you will consider whether Mr. Price did not sanction and concur in the acts done, when he was not present." The act in that case (the re-opening of a ditch which had been filled up) was done by Sheard alone, in the absence of Price.

It is reasonable upon the evidence of Mr. Turner, and upon other testimony in the cause, and considering the privity between these parties, Thompson and Bernard, through the whole transaction, that we should consider Bernard as concurring with Thompson in putting forward the statements contained in Thompson's affidavit, as the means of obtaining the end which it is proved they both had in view. The cases of *Brickell* v. *Halse* (7 Ad. & Ell. 456), *Gardner et al.* v. *Moult* (10 Ad. & El. 464), *Boileau* v. *Rutlin* (2 Exch. 665), and *Johnson* v. *Ward* (6 Esp. Ca. 47), are strong to shew, not that Thompson's affidavit signed only by him can be held to supply written evidence signed by Bernard of the facts contained in it, but that the putting forward that statement by Bernard, or with his sanction, is an act done by him quite inconsistent with what he now contends, that he and Thompson were to be, under the deed, the absolute owners of the estate as purchasers, without any agreement or understanding that Walker should be allowed to redeem. And indeed his active intervention in the foreclosure suit, for the purposes for which he and Thompson did avowedly interfere, would without the affidavits have been evidence to the same effect, less strong perhaps and certainly less particular, but sufficient to afford ground for receiving parol evidence as to the real object in taking the deed of October, 1851.

It was on that view of the case that the plaintiff's counsel relied in his argument, and I think rightly.

Then parol evidence being thus let in, according to the principle constantly acted upon in such cases, we have the strong testimony of Mr. Spragg, the only subscribing witness to the deed of October, 1851, which may, as it appears to me, be confidently

relied upon; for besides that no attempt has been made to impeach his testimony, he seems to be in no manner mixed up with the transaction. Being casually a fellow passenger with Thompson and Bernard, on board the steamboat, he was requested by Thompson to go with them and see the deed executed; and his attention when they got there seems to have been the more given to the matter, from his being requested to make an alteration in the deed, which he did, by inserting the name of Thompson in addition to Bernard, as a grantee. Walker, he swears, read the deed himself, and finding that Thompson's name was not in the deed as a grantee, but only Bernard's, he objected to it on that account, and, in deference to his objection, Thompson's name was added. Now, if there had been no such intention or understanding in Walker's mind, as that he was only making this deed as a security, and he was about to execute the deed as a final and absolute transfer of all his right in the land, it could not have signified to him whether Thompson's name was in the deed or not. If both had agreed to give up all claim upon him for indemnity, on his executing the deed which Thompson placed before him, he might, as we may suppose, have been content to make the conveyance either to one or both, as they might have agreed between themselves. If he had been led by what had passed between him and Thompson to believe that the deed was only to be made use of as a means of enforcing payment of the debt due by him to the two, it was natural that he should desire Thompson's name in the deed, for he had confidence in him, and would feel more secure that the understanding on which he was about to convey would be more certainly carried out. Then the witness states that, upon Walker's wife hesitating to sign the deed, Thompson remarked to her "that the deed would not affect Walker's right of redemption; that he still would have a right to redeem, otherwise the property would have been sold to meet liabilities that had been incurred; that it would be sacrificed, and urged this mode of settlement as preferable." "I understood," he says, "it was to raise money to pay off what was due on the place, and other liabilities that were pressing. After this conversation, the deed was executed." Again, this witness swears, "Thompson, when he produced the deed, said it was for the purpose of raising money to meet liabilities. It was not said that Thompson and Bernard were to sell the property, but to raise money on the property."

The witness Spragg speaks here of a transaction that had passed in his presence nearly ten years before; and considering that he had no personal interest in the matter, and no previous knowledge of the circumstances which led to the taking of the deed, his testimony supports as nearly as could be expected in substance the plaintiff's statement in the bill, that the understanding at the time of taking the deed was that it should be and was taken as mere security for the balance that might be due to Thompson and Bernard on taking the accounts between them and him; and that it was agreed that the indenture, though absolute in form, should be and was in fact a mere security for the purposes aforesaid.

It supports also substantially the statements in Thompson's affidavit, made 19th December, 1853, that Walker conveyed to him and Bernard his equity of redemption in the mortgaged premises, upon trust, or under the agreement and understanding that they should sell the same and pay off and discharge the mortgage security held by Mrs. Washburn (upon which she was pressing), and the moneys due to Thompson and Bernard under or in relation to their suretyship for Walker, and to pay the surplus of such purchase money to Walker.

It has been objected that the case made out in evidence varies from that stated in the bill, and does not warrant the kind of relief which the decree gives; for that the tendency of the evidence is to establish a trust, rather than a mortgage, that is, a trust to sell the estate and pay over to Walker any surplus above the debt due by him; or a trust to raise money upon the estate, otherwise than by sale, in order to pay off the debt due.

But take it either way, the substance and effect is that the land was conveyed, not absolutely and unconditionally, but by way of security, as the bill asserts; and whether the intention was to give power to sell the land for raising the money, or to mortgage it for the same purpose, Walker in either case would hold an interest in the property, and the grantees would not be suffered to proceed to a sale or mortgage against Walker's will, if he were able and offered to pay them the money he owed.

The substance of the case is, whether the plaintiff has upon the evidence a right to come for redemption; and it was so regarded in *Cripps* v. *Jee* (4 Bro. C. C. 472), where the circumstances were in principle similar; and I doubt not in many other cases, where what might be spoken of properly as a trust pointed only to realizing a debt out of the property, and paying over any proceeds to the plaintiff. The reasons assigned for appealing do not rest the appeal upon any such distinction, but simply on the ground that there was nothing to shew the deed to be conditional or by way of security, or any thing but an absolute sale.

That is quite true as regards the form of the deed, but not true in a larger sense.

It is true that the defendant Bernard does in his answer most distinctly and positively deny that the deed was taken as a security; but the rule of evidence, which requires more than the testimony of a single witness to overcome his unqualified denial, is in my opinion abundantly complied with here by the corroboration which Spragg's evidence receives from the other testimony relied upon. I refer to 2 Maddock's Chancery, 580 (note b).

In my opinion the appeal should be dismissed with costs.

Draper, C. J., said that although he had written out his views on this case he thought it unnecessary, after the very clear exposition of it given by the learned President, that he should delay the Court with my lengthened statement of the facts, or to say more than that, subsequent reflection had failed to change the opinion which he entertained at the conclusion of the very able argument of Mr. Strong, by which he was impressed with the idea that the transaction which took place between these parties, if not an absolute sale was one of trust, the nature of which not having been evidenced by any writing signed by the party is void under the statute, and therefore that the appeal should be allowed, and the bill in the Court below dismissed with costs.

Esten, V. C., thought the decree pronounced in the Court below was right, and that the appeal should be dismissed with costs.

The other members of the Court concurred.

Per cur.—Appeal dismissed with costs.

[Draper, C. J., dissentiente.]

QUEEN'S BENCH.

Reported by C. Robinson, Esq., *Barrister-at-Law, Reporter to the Court.*

Goodwin v. The Ottawa and Prescott Railway Company.

Sheriff's sale of stock—Action by purchaser claiming mandamus to transfer—C. L. P. A., secs. 255, 256, Consol. Stats. C., ch. 70.

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff in their register as a shareholder in respect of such stock: *Held*, that the provisions of Consol. Stat. C., ch. 70, as well as the C. L. P. A., secs. 255, 256, must be obeyed, and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. [Q. B., M. T., 26 Vic.]

This was an action of mandamus. The declaration set out that defendants were an incorporated company, with a joint transferable stock, and that the Municipality of the City of Ottawa held 1500 shares therein: that the Bank of Montreal recovered judgment against the Municipality, and execution issued, and the sheriff seized in execution the said stock, and afterwards in due form of law sold the same to the plaintiff, and thereupon the sheriff gave to the plaintiff a certificate under his hand and seal of office, declaring that he had sold on said execution the said 1500 shares to the plaintiff, and thereupon the plaintiff produced said certificate to the secretary of defendants, being the proper officer in that behalf, and demanded of him to transfer said shares from the name of the municipality to the plaintiff's name in defendant's books, averring that upon production of said certificate it was the defendant's duty to enter the plaintiff upon their books and registry of shareholders as a shareholder in respect of said stock, according to the statute—with the usual averment of the plaintiff's interest in being so entered, and damage sustained by defendants' non-performance of their duty, neglect and refusal of defendants so to do, that all conditions had been fulfilled, and all things happened, and all times elapsed necessary to entitle

the plaintiff to performance of said duty by defendants; and a mandamus was claimed to compel performance.

Pleas.—1. Not guilty. 2. Traversing the duty alleged. 3. No tender of fee for the transfer. 4. That since 1852 all transfers should express whether the stock transferred was old or preferential stock: that the sheriff's sale and certificate were since the company issued preferential stock, and the certificate given by the sheriff did not express whether the stock transferred was old or preferential stock.

The defendants also demurred to the declaration.

The issues were tried before RICHARDS, J., at the last Guelph assizes. The only witness called was the deputy-sheriff of Carleton. He proved the certificate of sale of the stock, dated 25th of August, 1862: that the sale was on the 12th of July: that some time after he went with the plaintiff's brother to the company's office to get the secretary to transfer the stock to the plaintiff: that he declined in fact to do so: that the witness demanded the books to do it himself; and that no tender was made of fees or demand thereof. He said on cross-examination that he had made two sales on the 2nd of July, and he served a notice on the company as well as a certificate on the 3rd of July; and on the 12th of July another sale through the plaintiff's attorney, Ross. The first sale was by James Goodwin's (plaintiff's brother) directions to the plaintiff, who was not present: they asked for a certificate some time before he gave it: he thought he gave it on the second sale, not the first: the secretary and witness and James Goodwin were alone present.

For defendants it was objected that the stock sold was that of the mayor and commonalty of the city, while the stock in the declaration was alleged as the stock of the Municipality of the City of Ottawa; that the certificate put in was not that required by law under the Consol. Stat. C., ch. 70: that no copy of execution was served on the company: that the duty was cast not on the company, but on the officers: that no deed of assignment from the sheriff reciting the transfer and the kind of stock was shewn: that there was no evidence that Ross or James Goodwin had authority to purchase.

Leave was reserved to defendants to move for a nonsuit on any of these grounds. The demurrer to the declaration raised somewhat the same objections, with some others, and was argued at the same time as the rule.

RICHARDS, Q. C., obtained a rule to enter a nonsuit pursuant to the leave.

Cameron, Q. C., shewed cause, and cited Buller and Leake Prec. 210; *Norris* v. *The Irish Land Company*, 8 E. & B. 512.

Richards, Q. C., contra, cited Tapping on Mandamus, 283, 285, 286; *Regina* v. *Sealey*, 8 Jur. 496; *In re School Trustees of Port Hope, and the Town Council of Port Hope*, 4 C. P. 418; *In re School Trustees of Collingwood and the Municipality of Collingwood*, 17 U. C. R. 133; *The Queen* v. *The Bristol and Exeter R. W. Co*, 4 Q. B. 162, 169; *The Queen* v. *The Commissioners of Excise*, 6 Q. B. 981, note; *The King* v. *The Brecknock and Abergavenny Canal Co.*, 3 A. & E. 217; *The King* v *The Wilts and Berks Canal Co.*, Ib. 483.

The statutes referred to are cited in the judgment.

HAGARTY, J., delivered the judgment of the court.

According to the system that seems, to my great regret, to be becoming general, to the vast increase of cost to suitors, and unnecessary labour to all parties concerned in the administration of justice, there is a demurrer to the declaration and also issues in fact.

The chief objection taken on the demurrer and urged at the trial seems to be that the plaintiff has not conformed to the requirements of the Consolidated States of Canada, ch. 70.

It may be as well to consider this firstly, as if the defendants' view be correct the plaintiff cannot succeed.

It is somewhat perplexing to find two Acts of Parliament bearing directly on the same subject, passed during the same session, and coming into force on the same day, and each making no reference to the other, except the figures of the number of the other Act at the end of the clauses, added by the consolidators of our Statute law.

The Common Law Procedure Act, ch. 22, Consol. Stats. U. C., sec. 255, enacts that "the stock held by any person in any bank, or in any corporation or company in Upper Canada, having a joint transferable stock, may be taken and sold in execution in the same manner as other personal property of a debtor."

Section 256. "Upon the production of a certificate under the hand and seal of office of the sheriff, declaring to whom any stock taken upon an execution has been sold by him, the cashier of the bank, or the proper officer of any other such company or corporation, the stock of which has been sold, shall transfer such stock from the name of the original stockholder to the person named in the certificate as the purchaser under the execution," &c. &c.

This statute seems to have been alone in the plaintiff's view, and he has acted on its directions.

Chapter 70, Consol. Stats. C., sec. 1, declares that all shares, &c., of stockholders in incorporated companies shall be held to be personal property, and shall be liable as such to creditors for debts, and may be attached, seized, and sold under writs of execution from the courts of law in like manner as other personal property.

Section 2 enacts that whenever any share has been sold under a writ of execution, the sheriff by whom the writ has been executed shall within ten days after the sale serve upon the company, &c., an attested copy of such writ of execution, with his certificate endorsed thereon, certifying to whom the sale of such share has been by him made, and the person who has purchased the same; and the person so purchasing shall thereafter be a stockholder of said shares, and have the same rights and be under the same obligations as if he had purchased said shares from the proprietor thereof in such form as by law provided for transfer of stock in such company; and the proper officer of the company shall enter such sale as a transfer in the manner by law provided.

Section 3 directs a sheriff, if required, to seize, and to serve a copy of the writ on the company, with notice of seizure, from which time it avoids all transfers as against the execution, &c.

Section 6 declares that nothing in this Act shall be construed to weaken the effect of any remedy which such plaintiff might without this Act have had against any shares of such stock by *saisie arrêt*, attachment, or otherwise, but on the contrary, the three next preceding sections should apply to such remedy in so far as they can be applied thereto. That would refer to sections 3, 4, and 5.

The rule for the construction of statutes passed regarding the same subject matter is, I presume, as laid down in Dwarris on Statutes, page 569: "It is therefore an established rule of law that all acts *in pari materie* are to be taken together, as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view."

The clauses 255, 256 of the Common Law Procedure Act are copied from the 2 Wm. IV., ch. 6, an Upper Canada Act. The Act also cited, ch. 70, Consol. Stats. C., is a reprint of an Act of 1849, 12 Vic., ch. 23. When the latter was passed by the legislature of Canada the Upper Canada Act had been some years in force. The Act of 1849 begins with declaring that "it is expedient to make better provision for the seizure and sale of shares and dividends of the stockholders of all incorporated companies."

We think we must read these two statutes together, and that we are bound to see that the requirements of each of them be obeyed. The earlier Act simply required the transfer to be made on the sheriff's certificate, declaring to whom he had sold. The later enactment requires that within a certain time from sale he must serve on the company an attested copy of the writ of execution, with his certificate certifying to whom the sale has been made by him, and the person who has purchased.

We are of opinion that as this has not been done the rule for nonsuit must be made absolute. Rule absolute.

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

ENGLISH, PLAINTIFF (APPELLANT), v. CLARK, DEFENDANT (RESPONDANT).

Trover—Lien—Division Court.

The plaintiff being the holder of a promissory note made by Francis and endorsed by Thomas Somerville, employed B., his attorney, to collect the same, who sent

it to C., a clerk of a division court, to issue process thereon. B., on the trial obtained judgment against the maker, and failed against the endorser. Another suit was afterwards brought in the name of the same plaintiff, by instructions of B. against Thos. S., (the endorser on the former note), upon an alleged promise to join in a new note with Francis S., the consideration being the discharge of the former judgment against F. S. in the division court. The evidence, although it did not prove English (the plaintiff) to have been a party directly to the new arrangement, still shewed that he was present and cognizant of it.

Upon demand made by the plaintiff upon the clerk of the division court for the note, he refused to give it up unless paid $10, and afterwards sent it to B., the attorney.

An action of trover being brought for the same, *held*, that the plaintiff being present and cognizant of the arrangement between Clark and Thos. S., he was to be considered as in possession of the note, and as there can be no lien without possession, B.'s (the attorney's) claim failed, and the plaintiff was entitled to recover.

[C. P., T. T., 26 Vic.]

Trover for a promissory note, made by Thomas Sommerville, for £18 8s. 5d., or thereabouts, dated in or about December, 1861.

Second count in detinue for a similar note. Pleas to first count, not guilty, and that the note is not the plaintiffs. To the second count *non detinet*, and that the note is not the plaintiff's.

At the trial the plaintiff proved and put in a receipt in the following words: "Received from Alexander English two pounds ten shillings on account, costs against the note I hold, made by Thomas Somerville, December 27th, 1861, signed, Charles Clark." On which was endorsed, "original note £13 10s. Interest to December, 1861, £1 12s. 5d. Deposit by plaintiff, 10s." Thomas Sommerville swore that in December, 1861, he gave a note to secure a debt of his brother's to the plaintiff. That there had been a suit in the division court on the old note, and the note now in question was given to pay the debt and costs in that suit. This arrangement was made with the defendant. There was a talk of six dollars which defendant claimed before he would give up the note. That plaintiff had been nonsuited in the action on the note and another suit had been brought. Thomas Medd swore that he was present when plaintiff demanded a note of defendant, who said he could not have it unless he left $5 for Mr. Brogden. Medd then saw the note in defendant's possession. Plaintiff refused this, but went again soon after, when defendant refused to give it up unless plaintiff paid $10. Plaintiff said he had the money to pay the costs, and afterwards he got the receipt put in. And after this again defendant refused to give up the note unless he was paid $10, and said something about having received the note from Mr. Brogden, that he had sent it back to Brogden, but could get it back on payment of his, Brogden's fees. Plaintiff admitted that in the first suit he had employed Brogden to conduct his case.

On the defence Mr. Brogden was examined; he said the action was defended on account of his lien on the note; that he supposed if he did not make a claim this defence would not have been made but he had no interest in the event of the suit. His testimony was objected to, but was admited. He said he was employed by plaintiff in a division court suit against the two Somervilles, and recovered against the maker, who was not good for it, and failed against the endorser, who was good. He gave the defendant the note now put in for collection, and became responsible to him for the costs. He (Brogden) had authority from plaintiff to make the best settlement for him that he could, and plaintiff never interfered in the matter. Defendant made the arrangement with plaintiff by Brogden's direction. His (B.'s) charge is $5 for each case. He (B.) attended one suit and instituted another, which appears to have been brought in the division court against Thomas Somerville for not making a note to plaintiff, jointly with Francis Somerville for £13 10s., the consideration for which was plaintiff's discharging Francis Somerville from a judgment recovered by plaintiff against him in the division court, and which plaintiff had done. On the 12th of December, 1861, Brogden received from defendant the note for which this action was brought, and gave a receipt for it, describing it therein as the note taken by defendant in settlement of a suit of plaintiff against Thomas Somerville, and a suit of the plaintiff against Thomas and Francis Somerville for £10 8s. 5d. Brogden would have given the note to plaintiff on payment of $10, and he sent it afterwards to defendant with instructions to collect it and authorised him to give it plaintiff on payment of $10. The learned judge told the jury that in his opinion Brogden's evidence established the defence, but if they rejected it, and were satisfied that the note was plaintiff's and that defendant refused on demand to deliver it to him, they should find for plaintiff. They did find for plaintiff. Afterwards a rule *nisi* was granted for a new trial, because the verdict was contrary to evidence or the weight of evidence, and that at all events the verdict should have been for defendant on the second count, which rule was made absolute, costs to abide the event.

The cause was argued by *Richards, Q. C.*, for the appellant, and *Hector Cameron* for the respondant.

Draper, C. J.—I have examined the evidence in this case carefully, because the plaintiff's right of property in this note is incontestable, and the defendant's right in any way to withold it ought to be made very clear before effect is given to the defence. The moral, right of the plaintiff is so strong that if it must be postponed or defeated on any merely legal or technical grounds, they ought to be sustained beyond all doubt. The facts, as well as I can ascertain them on the evidence, appear to be that the plaintiff held a note against Francis and Thomas Somerville, the former being the maker, the latter the endorser. He employed Mr. Brogden, an attorney, to collect it, who sent it to the defendant, the clerk of the division court at Millbrook, that process might issue.

Brogden attended before the judge on behalf of plaintiff, and obtained judgment against the maker, and failed against the endorser, who was the only responsible party.

After this a second suit is brought in the same division court upon the instructions of Brogden against Thomas Somerville, upon a promise alleged to have been made by him to join with his brother Francis in giving a new note to the plaintiff for £13 10s., payable ten months after date, (12th of December, 1859,) with interest. This promise was said to be in consideration of the plaintiff's releasing Francis Somerville from a judgment recovered against him in the division court; I assume, the judgment as maker of the first mentioned promissory note. The evidence is wholly silent as to the agreement thus stated to have been made by Thomas Somerville, who though examined as a witness, has stated nothing about it, nor does Mr. Brogden, in his evidence, refer to his having made it, or being personally cognizant of it. I infer that the plaintiff knew nothing of it nor of the second suit, at least not until the note now in question was given. Mr. Brogden swears "English never interfered in the matter; the arrangement was made by Mr. Clark" (defendant) "with *English*." (meaning Somerville, for there is other proof that it was so), by his Brogden's directions, so that Brogden, not the plaintiff, directed the arrangement which was the foundation of the second suit, and it would seem directed the second suit also, without plaintiff's knowledge or concurrence,

After this second suit was brought, Thomas Somerville went to the defendant and agreed to give the note for which the present action is brought. English came there and was present either during the negotiation or immediately after, and before Thomas Somerville had left the defendant, and signed some receipt in the books. I assume the division court books are meant, and, as I further assume, the receipt relating to the settlement of the former suit which the now plaintiff had brought against the Somervilles. The note was then, on whatever day this was, in the defendants hands. I should, from the statement of the cause of action against Thomas Somerville, have supposed the note bore date on the 12th of December, 1861, but Mr. Brogden gave a receipt as follows: "A. English v. Thomas Somerville, December 12th, 1861. Received from C. Clark, the note which was taken by him from the defendant in settlement of this suit, and suit versus Thomas and Francis Somerville, for £10 3s. 5d." Mr. Brogden does not say what the date of the note sued for is, but at all events, the evidence is sufficient to shew that defendant knew plaintiff in the transaction, and accepted his signature in his (defendant's) books in relation to some or all the suits, that plaintiff then asked for the note and defendant refused it, and afterwards sent it to Mr. Brogden.

There can be no lien, unless there be possession, and Brogden certainly was not in possession when the defendant made this first refusal, unless the possession of the defendant is to be deemed the possession of Brogden. As a question of law, I do not think it was necessarily so, for I am of opinion that the plaintiff recognised in that character by the defendant and present at the

arrangement ought to be considered as himself making it, intervening to discharge the former suit, and with a right himself to take whatever was taken for its discharge, and that his presence and acts superceded the authority of the defendant as acting for Brogden as well as Brogden's authority as employed as plaintiff's attorney to collect, and that no valid or existing lien had attached in favour of Brogden at the time of the first refusal, and as a matter of fact, I think the jury might well have found that defendant was a wrong-doer in withholding the note from plaintiff at that time; and again when the jury found the defendant receiving the $10 which he had previously demanded as the condition of his giving up this note, they might well consider that he ought not at the same instant to take the money and set up that he had not got the note. They might reasonably treat his taking the $10 as an asertion of his having it, and refuse to listen to his assertion after getting the money, that the note was out of his hands, or lastly, when the third demand was made, as I gather from the evidence there was a third demand, after Brogden had returned this note to him, they might well consider the plaintiff had satisfied every legitimate demand against him.

I think the substantial merits of the case were with the plaintiff that no legal impediment to his recovery was shewn at the trial, and therefore that he should be permitted to retain the verdict he obtained. I pay no attention, under the circumstances of this case, to the asserted uniform practice of clerks of division courts to pay over money only to the party on whose instructions the summons issued. Here the plaintiff became known to defendant, and he was aware that he was not merely a nominal plaintiff, but was beneficially interested in the suit.

It is unnecessary to decide whether Brogden was a competent witness. I incline to think that he was.

In my opinion the appeal should be allowed, and the rule *nisi* for a new trial should be discharged with costs.

Per cur.—Appeal allowed.

CHAMBERS.

(*Reported by* R. A. HARRISON, Esq., *Barrister-at-Law.*)

HOOKER V. GAMBLE ET AL.

Leave to amend after trial—Terms.

Plaintiff sued upon a bond conditioned for the payment of money by instalments, alleging, as a breach, non payment of an instalment which fell due on 1st August, 1858. Defendant pleaded. The cause was twice tried. On the first occasion a verdict was taken for plaintiff in the absence of defendants. Against that verdict plaintiff was relieved on payment of costs. On the second occasion a verdict was also rendered for plaintiff. That verdict was afterwards, on the motion of defendants, set aside, on the ground that plaintiff's claim, in respect of the instalment which fell due on 1st August, 1858, was proved to have been satisfied. Plaintiff afterwards applied for leave to amend his declaration by alleging nonpayment of a subsequent instalment, viz. the one which fell due on 1st February, 1859 This was granted, but only on the terms of the payment of the costs of the last trial, the rule setting aside the verdict, and the costs of the application. Payment of the costs of the first trial was not required, inasmuch as on that occasion the verdict passed against defendants solely by reason of their own default. [CHAMBERS, January 6, 1863.]

Plaintiff sued defendants upon a bond conditioned for the payment of money. The declaration alleged that defendants, by their joint and several bond, bearing date on 5th February, 1853, became bound unto the plaintiff in the sum of £5000, to be paid by the defendants to the plaintiff, which said bond was subject to a condition whereby it was declared that the said bond should be void if the said defendant, William Gamble, should, and would, well and truly pay or cause to be paid unto the plaintiff the principal sum of £2474 9s., together with interest in manner following: that is to say, the sum of £100 pounds on the first day of August and February in each year, next after the date thereof, with interest on the balance of the principal sum at each time of payment remaining due until the sum of £400 of the said principal sum of £2474 9s. should be paid, and from that time the sum of £150 on the like days of August and February in each year thereafter together with interest on the balance of the said principal remaining due at each of such days, until the further sum of £2000, other parcel of the said principal sum should be paid, and the sum of £74 9s., being the balance of the said principal sum of money with interest thereon on 1st August, 1863, and in case the said William Gamble should make default in the payment of any one of such instalments at the time so appointed for such payment, that then the whole of the said principal sum then remaining due, and the interest thereon, should become due and payable immediately. Breach, that although the said William Gamble did pay the several instalments that became due and payable from the date of the said bond, up to and inclusive of the instalment of one hundred and fifty pounds, with all interest due on the said bond on the first day of February, 1858, yet on the first day of August, 1858, there became and was due on the said bond, an instalment of one hundred and fifty pounds of principal money and the sum of thirty pounds fourteen shillings and seven pence for interest. Averment, that the said William Gamble did not pay the said last mentioned instalment of principal and interest on the said 1st August, 1858, whereby, and by virtue of the said condition of the said writing, obligatory, the balance of the said principal sum of £2474 9s. and interest on the said balance of principal became and was payable immediately.

Defendants pleaded to this declaration, and upon their pleas issue was joined. The cause was twice tried. On the first occasion a verdict was taken for plaintiff in the absence of defendants. Defendants were relieved from that verdict on payment of costs. On the second occasion a verdict was again rendered for plaintiff for £1815 17s. 9d. A rule was, in the term following, issued, calling upon the plaintiff to show cause why the verdict should not be set aside. It effected the instalment which fell due on 1st August, 1858, only. During Michaelmas Term last that rule was made absolute, the court being of opinion that the instalment which fell due on 1st August, 1858, had, according to the evidence, been paid.

Magrath afterwards obtained a summons calling on defendants to show cause why the declaration should not be amended, by alleging nonpayment of the instalment which fell due on 1st February, 1859.

G. D. Boulton shewed cause.

DRAPER, C. J.—I am disposed to allow plaintiff to amend his declaration by altering the breach, which was nonpayment of one instalment to nonpayment of a later instalment of the money secured by the bond declared upon. The only question is as to terms. There have been two trials. On the first the defendants were not ready, and a verdict for plaintiff was taken in their absence. From this they were relieved on payment of costs. The cause then went down a second time to trial and plaintiff succeeded, but there was leave reserved to defendant to move. On motion made the court set aside the verdict without costs.

On this state of facts it appears to me that the plaintiff is abandoning altogether the ground of action he had gone down to trial upon, not hoping to sustain it against the judgment of the court, and desires to introduce a new breach. He admits he was the cause of the last trial being useless, and so by his error put the defendants to unnecessary expense as to that trial. He should therefore pay the costs of that trial, of the rule setting aside the verdict, and of this application. I give him leave to amend on these terms.

I was pressed to give the costs of the first trial also, as the declaration was then in the same faulty state as on the last trial, but the defendants had to pay costs to get rid of a verdict which passed against them, owing to their own default in not being present when the cause came on. I therefore refuse to make the payment of these costs a condition precedent to leave to plaintiff to amend.

Order accordingly.

HIGGINS V. THE CORPORATION OF THE CITY OF TORONTO.

Amendment after trial—Terms.

Where plaintiff obtained a verdict on evidence which did not sustain his declaration as framed, and that verdict was afterwards set aside, on application of plaintiff for leave to amend his declaration so as to make it conform with the facts which he desired to prove at the trial was granted, but only on the terms of his paying the costs of the trial, the rule to set aside the verdict, and the application for leave to amend.

[CHAMBERS, January 8, 1863.]

This was an action brought by plaintiff against defendants for cutting a drain which led from his premises and so overflowing same with water, mud and filth.

The defendants pleaded not guilty.

The plaintiff took the cause down to trial in Toronto at the autumn assizes, 1860, and obtained a verdict. In the following term the verdict for the plaintiff was set aside for irregularity in the notice of trial, with costs to be paid by the plaintiff. It was then tried again in January, 1861, and the plaintiff obtained a verdict against which defendant moved, on the ground that the evidence did not sustain the declaration as framed. On 4th September, 1861, the rule was argued, and on 23rd September a new trial was granted without costs.

Plaintiff then applied to amend his declaration to make it accord with the facts which he desired to give in evidence.

It was opposed on the ground of long delay since the last trial, and it was also urged that the plaintiff should pay the costs of the last trial if the amendment were allowed.

Draper, C. J.—The verdict on the last occasion was only £25, and would not have been disturbed if the court could have found any evidence which would sustain it on the declaration as framed, yet the difficulty was discussed during the argument, and was in fact the main ground of the application for a new trial. No application was then made to amend. I have referred to my note of the judgment then given and find it expresses no doubt that the plaintiff had sustained some injury, for which, on a properly framed declaration, he might probably recover, though I do not yet see how the injury can be traced home to these defendants. I am not sure but that I should be doing plaintiff a kindness by refusing this application, but as he presses for leave to amend, I am not satisfied I ought to refuse it. It can only be granted on payment of the costs of the last trial of the rule setting aside the verdict, and of this application.

In this, I act on the same principle as in *Hooker* v. *Gamble* decided by me a few days since.

Order accordingly.

Lawson v. McDermott.

Action for seduction—Arrest—Application for leave to amend.

Where plaintiff having caused defendant to be arrested for the alleged seduction of his step daughter, she at the time of the alleged seduction not being in his service, and afterwards having discovered that he could not at common law maintain the action, applied for leave to amend his declaration by joining his wife, striking out the allegation that the girl seduced was "the daughter of plaintiff," and substituting the statement that she was the daughter of the plaintiff whose name was thus proposed to be introduced, the application was refused.

[Chambers, January 9, 1863.]

This was an application by plaintiff for leave to amend his declaration.

Plaintiff obtained a judge's order to arrest defendant in an action for the seduction of Eliza Shaw, "the step daughter and servant of plaintiff." Defendant was arrested and gave bail, and plaintiff declared in the usual form. Defendant pleaded not guilty, and that the said Eliza Shaw was not the plaintiff's servant.

It appeared from the affidavits of the plaintiff, filed on obtaining the order to arrest the defendant, that the girl was not in the plaintiff's service at the time of her seduction.

Plaintiff's application was for leave to amend his declaration by adding the name of Winfred Lawson, his wife, whom, in an affidavit filed, the plaintiff's attorney describes as "the mother of the step daughter of plaintiff."

Draper, C. J.—The plaintiff cannot maintain this action at common law unless the girl was his servant at the time of the seduction.

His wife can maintain an action under the statute though her daughter was not living with her when seduced.

If the mother's name be now introduced into the declaration, it will enable her treating her husband as being made a co-plaintiff for conformity's sake only, to recover for a cause of action belonging to herself, not to her husband, and for which he never could have sued in his own right, and which, in the event of her death, would not survive to him nor to any one else.

Under colour of an amendment, by adding another plaintiff, the object is to substitute for a cause of action claimed as vesting in himself at common law (but which he cannot prove) a cause of action given by statute to his wife, as mother of the girl seduced, and the declaration will require to be amended by striking out the allegation that Eliza Shaw is the step daughter of the now plaintiff, and substituting the statement that she is the daughter of the plaintiff whose name is introduced, and this is in a case where the defendant has been held to bail.

The effect would be to allow a defendant to be arrested for one cause of action and declared against for another, and as stated in the affidavit of the plaintiff's attorney, because owing to the "belief that the defendant was about to leave Canada, a capias was issued to arrest him, and the urgency of the case requiring immediate action, the cause was instituted in the name of the above plaintiff alone."

I do not think that on this statement I ought to allow the amendment, for which I am furnished with no authority, and which could not be made so as to prejudice the bail put in for defendant.

I therefore discharge the summons.

ENGLISH REPORTS.

(*From the Jurist.*)

COURT OF QUEEN'S BENCH.

SITTINGS IN BANC AFTER TRINITY TERM.

Regina v. Charlesworth.

Criminal law—Practice—Discharge of jury.

The defendant was tried for a misdemeanour. At the trial, a witness, called on behalf of the Crown claimed his privilege not to give evidence, on the ground that he would thereby criminate himself. The judge, who presided at the trial, refused to allow him the privilege; but the witness still refusing to answer, he was committed to prison for contempt of Court, and a conviction of the defendant being, under these circumstances, impossible, the jury, at the request of the counsel for the prosecution, and against the protest of the counsel for the defendant, were discharged without giving any verdict.

Held, that the defendant ought not to be allowid to put a plea upon the record stating the above facts, but that they ought to appear as an entry upon the record.

An entry was made upon the record accordingly, when it was further held, that whether or no the judge had power to discharge the jury, what took place did not amount to the same thing as a verdict of acquittal; and that the defendant was not entitled to judgment *quod eat sine die*, or to the interference of the Court to prevent the issuing of a fresh jury process. *Dubitantibus* Cockburn, C. J., and Wightman J., who thought, however, the case sufficiently doubtful to prevent the Court interfering in the way sought for by the defendant.

Quære, whether the judge had power to discharge the jury in this case?

Per Wightman J., that he had not.

This was an information for bribery, at the suit of the Attorney-General, against John Barff Charlesworth, under stat. 17 & 18 Vict. c. 102. The defendant pleaded not guilty.

The defendant was tried at the Spring Assizes for the county of York, before Hill, J., when one José Luis Fernandez, having been called as a witness in support of the prosecution, refused to give evidence, on the ground that he was not bound to criminate himself. The objection was overruled by the learned judge, but the witness still persisting in his refusal, he was committed to prison. Thereupon, on the application of counsel for the prosecution, the jury were discharged.

Sir *F. Kelly*, in Trinity Term, obtained leave to add a plea, stating the above facts; and in the same term, *Atherton*, S. G., obtained a rule, calling upon the defendant to shew cause why the plea should not be taken off the file.

Sir *F. Kelly*, *Bovill*, *Mellish* and *Maule* shewed cause.

Atherton, S. G., *Monk*, *Cleasby*, and *Welsby* were not called upon to support the rule, which the court made absolute, on the ground that the facts stated in the plea would appear upon the record in the ordinary course.

The following was the entry placed upon the record:—"Afterwards, at the day and place within contained, before the Hon. Sir Hugh Hill, Knt., one of the justices of our lady the Queen, before the Queen herself, and the Hon. Sir Henry Singer Keating, Knt., one of the justices of our lady the Queen, of the bench of justices of our lady the Queen, assigned to take the assizes in and for the county of York, come, as well the said Attorney-General of our lady the Queen as the said John Barff Charlesworth, by his attorney aforesaid: and the jurors of the jury, whereof mention is within made, being called, likewise come, who, to say the truth of the matter within contained, were elected, tried, and sworn.

And afterwards, at the assizes aforesaid, in the county aforesaid, the said jury, so sworn aforesaid, are then and there duly charged with the said J. B. Charlesworth, and he, the said J. B. Charlesworth, is then and there duly given in charge to the said jurors, so sworn as aforesaid, and thereupon public proclamation is made there in court for our lady the Queen, that if there be any one who will inform the aforesaid justices of assize, the Queen's Attorney-General, the Queen's Serjeant-at-law, or the jurors of the jury aforesaid concerning the matters within contained, he should come forth and should be heard: whereupon Sir William Atherton, Knt., Solicitor-General, offereth himself, on behalf of our lady the Queen, to do this; whereupon the court here proceedeth to the taking of the inquest aforesaid by the jurors aforesaid, for the purpose aforesaid, and during the taking of the inquest aforesaid, José Luis Fernandez, a witness produced before the said jurors for and on behalf of our said lady the Queen, the said José Luis Fernnadez, then being a material and necessary witness on behalf of our said lady the Queen, wholly refuseth to answer a certain question put to him by the counsel for and on behalf of our lady the Queen; whereupon the said Sir Hugh Hill, one of the said justices, having delivered his opinion that the said Fernandez is bound by law to answer the said question, and he, the said Fernandez, still refusing to answer the same, the said Sir Hugh Hill adjudges that the said Fernandez is by reason thereof guilty of a contempt of the court here; and thereupon the counsel for our lady the Queen declines to proceed further with the taking the inquest aforesaid, and calls upon the said justice to discharge the said jurors from giving any verdict thereon: against which the said J. B. Charlesworth, by his counsel in that behalf, objects and protests, and requires the said justice to proceed with the taking of the said inquest, so that the jurors aforesaid may deliver their verdict thereon, which the said justice refuseth to do; and thereupon the said justice then and there, for the reasons aforesaid, and for no other cause whatever, and without the consent and against the will of the said J. B. Charlesworth and of his counsel, orders that the said jurors shall be, and the said jurors, by the justice aforesaid, from giving any verdict of and upon the premises, are discharged Therefore the jury aforesaid are further put in respite before our lady the Queen at Westminster until" &c.

Sir *F. Kelly* then obtained a rule to shew cause instanter why judgment should not be entered for the detendant, that he be dismissed and discharged from the premises, and that he depart without delay; and why the award of jury process and all other proceedings should not be stayed.

Atherton, S. G., *Overend*, *Cleasby*, and *Welsby* shewed cause.—First, there is no precedent for entering judgment for the defendant quod eat sine die at this stage of the proceedings. The proper mode to take an objection of this kind is either by demurrer or by arrest of judgment. If this application were granted, the decision of the court could not be reviewed in a court of error, the issue in fact remaining undisposed of. [*Crompton*, J.—What we are asked to do is to refuse a venire de novo. That refusal will appear on the record; and if we are wrong, surely a court of error would set the matter right. (*M'Mahon* v. *Leonard*, 5 H. L. C. 931.) *Blackburn*, J.—The Judgment in *Campbill* v. *Reg.* (11 Q. B. 799) shews that this might be done.] Still the defendant would have a right to be discharged if judgment quod eat sine die were entered, so that the effect would be the same as a verdict of acquittal by the jury. Secondly, the facts of this case do not entitle the defendant to have this application granted. The judge had power in his discretion to discharge the jury, and that is all that need now be contended for. Whether or no his discretion was rightly exercised cannot now be considered. The rule laid down by Lord Coke, that "a jury sworn and charged in case of life or member cannot be discharged by the court or any other, but they ought to give verdict" (Co. Litt. 227, b.) is not true even in felony. The same doctrine is repeated in 3 Inst. 110, where it is applied to treason, felony, and larceny. And in Carth. 464, there is this passage—"Nota, per Holt, C. J., at the sittings in Westminster, 9th November, 1698, in a case of perjury tried before him, between *The King* and *Perkins*, he said it was the opinion of all the judges of England, upon debate between them, (1) that in capital cases a juror cannot be withdrawn, though all parties consent to it; (2) that in criminal cases not capital, a juror may be withdrawn if both parties consent, but not otherwise; (3) that in all civil cases a juror cannot be withdrawn but by consent of parties." But these passages are not law. The question was much discussed in *Reg.* v. *Newton*, (13 Q. B. 716) and all the authorities are there collected. In Ferrar's case (Sir T. Raym. 84) one of forgery, it is said to have been "resolved by all the justices, that although the jury be charged and sworn in the case of a plea of the Crown, yet a juror may be drawn or the jury dismissed, contrary to common tradition, which hath been held by many learned in the law." The same law is recognised in Doctor and Student, p. 271. In 2 Hale's P. C. 295, c. 41, it is said, "Nothing is more ordinary than after jury sworn and charged with a prisoner, and evidence given, yet if it appear to the court that some of the evidence is kept back or taken off, or that there may be a fuller discovery, and the offence notorious," then the jury may be discharged. It is not necessary to contend for anything so wide as that. [*Cockburn*, C. J.—That doctrine is certainly not in accordance with modern practice.] No; but it shews how far the rule laid down by Lord Coke, and attributed to Lord Holt, is from being correct.

The whole subject was considered in Kinloch's case, (Fost. 15, 22). There all the authorities are elaborately examined by Foster, J., who comes to the conclusion that the rule laid down by Lord Coke is subject to some exceptions. There are two classes of cases in which it is clearly now settled, that even in felony a jury may be discharged, namely, where a juror has fallen ill, as in *Rex* v. *Scalbert* (1 Vent. 69); *Rex* v. *Stevenson* (2 Leach's C. C., 546); and *Reg.* v. *Edwards* (3 Camp. 207); and where the jury are unable to agree (*Reg* v. *Newton*, 13 Q. B. 733). In *Reg.* v. *Stokes* (6 Car. & P. 151) the jury were discharged on account of the absence of a material witness. It is true that there the prisoner consented, but that could make no difference if the judge has no power to discharge at all. What is contended for is not an absolute power to discharge the jury in all cases, but a discretionary power to do so, if it be necessary to prevent a manifest failure of justice that this should be done. In the present case, if the jury had not been discharged, there would have been a manifest failure of justice, not a mere speculative failure, as in the case of a discharge for the purpose of procuring better evidence. If it were otherwise, a great door to fraud would be opened; as by a friendly witness refusing to give evidence great criminals might escape punishment.

Sir *F. Kelly*, *Bovill*, *Mellish*, and *Maule*, in support of the rule.—The result of all the authorities is, that at the present day, "when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict." The rule is laid down in these words by Blackstone in Com. 360. This rule is recognised in *Conway and Lynch* v. *Reg.* (7 Ir. Com. Law Rep. 171) and never has been doubted in modern times. It is contended that the exception mentioned in Blackstone has no application in this case. What case of "evident necessity" was there? "Evident necessity" means, the happening of some event which renders it physically impossible that the jury should deliver a unanimous verdict. Such an event would be the death or the serious illness of the judge, juryman, or the prisoner. It would also include cases in which the jury had *permanently* disagreed. But here there is no reason whatever why the jury should not in this case have delivered a valid and unanimous verdict if they had not been discharged. With the exception of the cases which occurred about Lord Hale's time, the practice in this respect has been uniform. No single case occurs of a jury having been discharged at any other period, exept in cases of necessity, as already explained, except in one case of collusion, and in cases in which it was done with the express consent of the prisoner. The case in the 21 Edw. 3, c. 18, cited in Co. Litt. 227 b., is explained by Foster, pp. 32, 33. (See Fitz. Ab., "Corone et Plees del Corone," pl. 449.) *Rex* v. *Jane D*——— (1 Vent. 69) is the case of collusion which has been referred to. In *Rex* v. *Mansell* (1 Anders. 103) the prisoner consented; but Foster J., seems to think that even in this case this ought not to have been done. (*Kinloch's case*, Fost. 31.) In *Hanscom's case* (in 15 Car. 1, cited in 2 Hale's P. C., 295) one of the jury had gone away; the case was, therefore, one of necessity. The cases which follow these in the time of Charles II. ought not to be taken as precedents. It was the worst period of the administration of

justice in this country. No one would now pretend to say that what was done in *Gardiner's case* (Kel. 46), *Jones and Bevor's case* (Id. 52), *Whitbread and Fenwick's case* (7 How. St. Tr. 79), *Bookwood's case* (13 How. St. Tr. 165), *and Cook's case* (Id. 324) in which the juries were discharged for mere want of evidence, are cases by which courts of law ought now to be governed. Since the revolution the practice has reverted to the older and more correct rule. Wherever the question has been raised, and the case has not been one of evident necessity, the discharge has been refused or held to be wrong. (*Rex* v. *Perkins*, Carth. 465 ; *Rex* v. *Morgan*, Hil., 9 Geo. 2, cited in Fost. 24; *Rex* v. *Jeffs*, 2 Str. 984 ; *Conway and Lynch* v. *Reg.*, 7 Ir. Com. Law Rep. 161.) On the other hand, all the cases in which the discharge has been made, and not impeached, are cases falling within the rule now contended for. In *Rex* v. *Kinloch* the prisoner had assented. In *Rex* v. *Meadow* (Fost. 76) the prisoner was taken in labour. In *Rex* v. *Edwards* (8 Camp. 207) a juryman was taken ill. In *Reg* v. *Newton* (13 Q. B. 716) and *Reg* v. *Davison* (2 Fost. & F. 250) the jury had permanently disagreed. With the exception, therefore, of the short period which immediately preceded the revolution the whole course of authorities is uniform, and shews, at the utmost, that except in cases in which it is physically impossible that the jury should deliver a unanimous verdict, cases of collusion and cases of consent, the jury when once charged cannot be discharged by order of the court. Secondly, if the discharge of the jury was wrong, there is error on the record; and though this might be rectified by a subsequent proceeding, still it is the duty of this court to rectify it if there are any legal means of so doing. Surely this court will not say that the discharge of the jury was wrong, and would be available, on arrest of judgment or in error, to reverse the proceedings, and yet send down the prisoner to stand a trial which, in the opinion of the court, must in any case prove abortive. The case of *Conway and Lynch* v. *Reg.* shews that the prisoners are entitled to judgment. *Cur. adv. vult.*

On the following day (June 26) the judgments were delivered.

Cockburn, C. J.—I am of opinion that this rule must be discharged. I adhere to the view expressed by the court in the course of the argument, that if we could see our way clearly to the conclusion that the learned judge, in discharging the jury in this case, had exceeded the limits of his judicial authority, and also could see that the discharge of the jury operated virtually as an acquittal of the defendant, the court ought not to allow its process to be further used, with a view to the prosecution of the second trial, but ought to make this rule absolute to enter final judgment for the defendant, notwithstanding that course might place the Crown in a more disadvantageous position with reference to the bringing error upon such judgment of this court. But I am equally clear, that unless the court can see its way conclusively to that result, it ought not to interfere in the present stage of the proceedings, but ought to leave the defendant, if on the second trial he should have the misfortune to be found guilty, to move in arrest of judgment, or bring his writ of error, as he may be advised.

Two questions present themselves: the one, whether the learned judge had authority to discharge the jury under the circumstances of this case; the second, whether the effect of that discharge of the jury, if done without authority, entitles the defendant at once to the judgment of this court, that he go without delay. Upon neither of those propositions is my mind at the present moment in that state of conviction and certainty, that I feel that the court ought to interpose in the manner prayed. On the contrary, I am bound to say—although I by no means desire that this should be considered to have the character of a definite opinion and judgment—that the present inclination of my mind, as at present advised, is adverse to the defendant upon both those points.

In the first place, with reference to the question of the authority of the judge to discharge the jury, I think it is impossible, after the argument that we have heard, and the authorities which have been brought to our notice, not to feel that the law is, to a certain extent, in an unsatisfactory condition. I apprehend that in no part of our procedure has the practice of the courts more fluctuated than with reference to the question of the discharge of juries on criminal trials. If we go back to my Lord Coke, we shall find him stating, in the most positive and unqualified terms, that a juryman, sworn and charged in the case of life or member, cannot be discharged by the court or any other, but must give a verdict. Now it is plain that that does not embrace several cases in which it is admitted on all hands that a jury may, according to modern practice, be discharged. My Lord Coke takes notice neither of the case of the death of a juryman, nor of the illness of a juryman, rendering it imperatively necessary that the trial should be stopped. It was pointed out, indeed, by Mr. Mellish, in his most lucid and able argument, that my Lord Coke must be considered as not comprehending that case, simply because the jury would, ipso facto, be discharged in such cases by the very force of circumstances, inasmuch as, either by death or by such illness as rendered a juryman's departure from the court a matter of absolute necessity, the jury would be reduced below the lawful number, and would therefore be dissolved. But it must further be observed, that Lord Coke takes no notice of cases in which it is admitted now that a jury might be properly discharged, as in the case of a discharge at the desire of the accused, with the assent of the prosecution, or the case (one now of every day occurrence) of a jury being discharged on account of the impossibility of their agreeing to their verdict. And indeed, if we go back to the period at which Lord Coke wrote—the earlier period of our law—one sees that the very object of the coercion to which juries were subjected in those times was to enforce by duress, if necessary, the unanimity of verdict which the law required. Hence, the practice of taking juries in carts to the confines of the county, keeping them together for the purpose of compelling them to give a verdict, at however much of personal inconvenience and suffering, not discharging them until the commission of the learned judge was at an end, by his ceasing to be within the confines of the county to which he had been sent. If, then, this was the law at the time Lord Coke wrote, certainly the law has undergone many most important changes at later periods. But I think it may perhaps be questioned, notwithstanding the great authority of that great name, whether my Lord Coke was well warranted in laying down the law in the positive terms in which he stated it; for if we look to the passage in Doctor and Student, which was referred to in the course of the argument, and if we look to what was stated at the conclusion of the report of *Mansell's case*, in Anderson, it would certainly lead one strongly to surmise that a different practice existed in the courts anterior to the day at which Lord Coke wrote; and it is observable that he founds his doctrine on the authority of a single case; and I think it is impossible not to believe that Foster, J., was perfectly right when he said that that case did not warrant the conclusion at which Lord Coke had arrived. At all events, it would seem that, at a very short period after Lord Coke wrote, the doctrine thus laid down by him in the 1st and 3rd Inst. was not recognised as the true doctrine by the judges of the time to which I have referred; for we find, from the explicit statement of Lord Hale, who wrote within a comparatively recent period after the publication of Coke's Institutes, that the practice not only at the great criminal court of this country, the Old Bailey, but upon the circuits, was directly contrary to the doctrine laid down by Lord Coke, and that both at the Old Bailey and upon the circuits it was the habit and practice of the judges, in cases where the prosecution appeared about to break down from the failure of proof, to discharge the jury, in order that an opportunity might be afforded of supplying the deficiency. One of two things follows—either the propositions of Lord Coke upon this subject were not considered by the judges who immediately followed him as the true exposition of the law, or else this was considered not a rule of positive law, but simply of practice and procedure, subject to variation by the authority vested in the courts of this country to regulate their own practice; because it is quite clear, and there can be no doubt about it, that that which has been ascribed in the course of this argument, and elsewhere, to a tyrannical and oppressive practice, which arose in the time of the Stuarts, was in fact a practice which existed for many years anterior to the time when its abuse caused it to be brought into question. For there can be no doubt, that, although by Scroggs, C. J., and his fellow justices, in the case of *Whitbread and Fenwick*, to which so much allusion was made in the course of the argument, this practice of discharging juries for the purpose of furthering the administration of justice and preventing its frus-

tration, was converted into an engine of party and political oppression, yet, when afterwards Whitbread and Fenwick were a second time put on their trial, it is a total mistake to say, that even Scroggs and his associates wrested or violated the law; they only held that to be the law which, according to Lord Hale, had been for many years before, by the most virtuous judges, himself among the number, treated as the law, and administered as such. But I can quite understand that, in consequence of the scandalous abuse of this judicial power and discretionary authority as an instrument of tyrannical oppression in such a case as the one to which I have been referring, the judges would consider whether the benefit to be obtained in preventing the occasional defeat of justice, owing to defective evidence, by the postponement of a trial, was not bought at too dear a cost, seeing the abuse to which such a practice was liable to be exposed: and hence came, no doubt, the consideration of the judges among themselves, to which Lord Holt referred, when, in *Perkin's case*, he stated how the judges had agreed that the law should in future be administered. Whether that was upon a consideration of the authorities, and a preference for my Lord Coke's view to that which had been adopted in the period which elapsed between his time and Lord Hale's time, and the time of the revolution, or whether it was a matter of arrangement among themselves as a matter of policy and expediency, it is difficult to say: it may have been either. There is a great deal to be said, I think, on both sides of the question. As Lord Hale points out, it is a grievous and a lamentable thing —a great scandal sometimes as well as a lamentable thing—that, from some defect of evidence which ought to have been forthcoming, and which possibly, by a postponement, might easily be supplied, notorious criminals escape the punishment which ought to await them, it being plain that a single case of escape from punishment, upon manifest although not legally proved guilt, is of the most mischievous consequence; one such escape operating to encourage others to commit crimes infinitely more than the conviction and punishment of many guilty men will operate to deter them from so doing. But, on the other hand, there can be no doubt that it may, in many instances, become the means of imposing great hardship and oppression upon the prisoners, especially of the lower class, as such persons generally are, who may find means on a single occasion to obtain legal assistance, and the presence of witnesses who could speak to their innocence, and on the second occasion might want means to provide those advantages. Therefore, I think, on the balance of good or evil, the law or practice, call it which you please, established after the revolution, and which has existed from that time to the present, is, on the whole, by far the better one, and the one which ought to be adhered to. The question is, however, whether it is a rule of positive law, or whether it is one of practice; and then arises the question, whether it is open to exception, and whether the present case would come within any such exception. What I am at the present moment pointing out is, that the law has fluctuated, and has been differently stated at different periods; for even, as stated by Lord Holt, as the resolution of the collected judges of England, it is quite plain that that statement of the law is no longer conformable to the practice which has prevailed at subsequent periods; for Lord Holt states that these three propositions—that in capital cases a juror cannot be withdrawn, though all parties consent to it; that in criminal cases not capital a juror may be withdrawn, if both parties consent, but not otherwise; that in all civil cases a juror cannot be withdrawn, but by the consent of all parties. Now, the first proposition was overruled in the case so much adverted to—*Kinloch's case*—because there the prisoner desired it, and the Crown assented to it. I see no difference between the case of the prisoner desiring it and the Crown assenting, and the case of the Crown desiring it and the prisoner consenting, if the prisoner considers that the postponement of the trial and the discharge of the jury will operate to his benefit. I cannot understand a principle such as that contended for on the part of the defendant, that there should be this authority if the prisoner initiates the application, and the Crown consents to it, and that there should not be the same authority if the Crown initiated it, and the prisoner, for his own purposes and convenience, assented to the proposition; but the proposition, as found in Lord Holt, would embrace the case which actually arose in *Kinloch's case*, because there, there was the consent of both parties. But besides that, he goes on to say, that in criminal cases not capital a juror may be withdrawn if both parties consent, but not otherwise; and so in civil cases. That entirely excludes the case of necessity. It excludes the case, which I may call a case of *quasi* necessity, where the jury is discharged in consequence of their not being able to agree. It is said, however, that that is a case of necessity too. I do not agree in that proposition. If by necessity you mean, as was argued for, physical necessity—that is, that the jury, from inability any longer to discharge their functions of jurymen, must be discharged, because it would be an inhuman practice to keep them together any longer—there are many cases in which we now discharge juries where that state of torture does not arise; and I understand even Sir Fitzroy Kelly to admit, that if a judge becomes satisfied that the difference of opinion among the jury is permanent, and that there is no hope of their ever being brought to unanimity, a judge has then authority to discharge them. I entirely agree in that. It is not necessary that you should wait —and, on the contrary, you ought not to wait—until the jury are exposed to the dangers which arise from exhaustion, or prostrated strength of body and mind, or until you have the chance of conscience and conviction being sacrificed for personal convenience, and to be relieved from suffering. Our ancestors seem to have thought differently. They seem not to have cared by what means unanimity was secured, so long as it was secured; but I think, in our days, that doctrine would not be entertained or acted upon by any one. Therefore, I say the statement of the law, as laid down by Lord Holt, is not in conformity with modern views on the subject.

Then we have a third statement of the law in Blackstone's Commentaries, who lays it down that the jury cannot be discharged, unless in cases of evident necessity, until they have given in their verdict. There, again, I say that is not a true or correct exposition of the law as practised in our day. We do take on ourselves, without the consent of parties, both in criminal and civil cases, where we find a jury have given a case all the attention they can bestow on it, that they have fully considered it, and that they cannot agree, and we are satisfied and confident that that is the true state of the fact—we do take on ourselves to discharge juries; and I trust that no judge will shrink from taking that course, because, as I said before, the jury ought not, if they cannot conscientiously bring themselves to a unanimous view of the subject to be exposed to personal suffering in order to obtain that unanimity, nor ought the parties to be exposed to the danger of a verdict which is not the result of the true conviction of those who are to decide the case, but the result of the suffering of those who cannot endure the inconvenience, and who must give way to those who happen to be stronger in mind or body than themselves. At the same time, while I cannot but point out these fluctuations in the law, still I entirely concur in this—that upon the whole, the doctrine or the rule, whether of law or practice I care not—that a jury shall not be discharged at the instance of the prosecutor, in order to enable the prosecutor to obtain evidence of which at the trial there appears to be a failure, is a sound salutary rule, and one that ought not to be departed from. Whether it be positive law, or whether merely a regulation of practice made by the judges in the time of Lord Holt, is to me a matter of comparative indifference. It has been the uniform practice of the judicial authorities of this country from that time to the present; and I take it, that a *rata praxis* like that becomes substantially a part of the law, and that no judge or body of judges ought to depart from it; and if it is found inexpedient, with a view to the administration of justice, with reference to those results that Lord Hale adverts to, it should be the act of the Legislature by which such a practice should be altered, and not the regulation of a body of judges, still less the act of an individual judge. But at the same time I should be exceedingly reluctant to say that there may not be cases in which there may be, superadded to the mere defect and failure of evidence, some additional circumstance which may call for the exercise of judicial authority to prevent a defeat of justice; and therefore I am exceedingly reluctant to lay it down, that the law is a positive law, such as either Lord Holt or Lord Coke have referred to in the passages to which our attention has been called. In the course of the argument I put the case of a

witness, either kept away from the court, or present in the court, and refusing to give evidence, in consequence of having been tampered with by the prisoner, or those acting on behalf of the prisoner, and justice thus frustrated, and I am not prepared to say that in such a case it would not be the duty of the judge to interpose, and to take upon himself, by virtue of his judicial authority, to prevent the frustration—the scandalous frustration of justice, which would take place if a man were to be acquitted under such circumstances. I put that more than once in the course of the argument, and I did not hear it fairly grappled with. Even Mr. Mellish, with his clear logical mind, and his ability as a disputant, did not appear to me to be competent to grapple with the case. It may be said, it is true, that it is better that in such a case there should be defeat of justice, however humiliating to those who administer it, and the public, who have an interest in its administration, rather than that a great principle and a salutary rule should be infringed upon; and it was said, that although it is true that no man, even in his wildest dreams, would think of imputing corruption to English judges, or the possibility of their being influenced by corrupt motives, they might be rash, or vain, or impatient, and under such circumstances lend themselves to the purpose of oppression in the administration of the criminal law. I own that I am not influenced by any such idle apprehension. I have been now for some years at the bar and on the bench, and have seen a good deal of the administration of justice, and I never yet saw a judge who, either from rashness, or vanity, or impatience, would lend himself to any such purpose, or do anything that was not right and fair, to the best of his knowledge and ability, between the Crown and the party accused. It would not be becoming in me to vindicate, or think of vindicating, myself from any such possible imputation; but, as regards those with whom I have the honour to act, either in this court or any other court, I must say with reference to any such offensive imputations, that I believe the Bar of England would at once repudiate the notion of there being any chance whatever of danger to the accused, from either the rashness, the vanity, or the impatience of judges: impatience there may be sometimes; the question is, whether it is not an honest and well-justified impatience, when elaborate arguments are wasted upon immaterial and undisputed propositions, or when material matters are in question, instead of forensic argument and disputation, when time is occupied in idle or commonplace declamation, or when arguments and observations are repeated again and again, and over again, to the wasteful abuse of the time of the court, which is in fact the time of the suitors and of the country? Now, I say this, that I am not prepared, either as a matter of law, or as a matter of expediency, to give up the judicial authority of a judge presiding at a criminal trial, in a case where justice is frustrated by what may be deemed to be the act of the prisoner, or something in which he concurs and co-operates, to allow justice to be defeated rather than exercise the authority which he may be believed to possess of postponing the trial, by discharging the jury. That would bring us, however, to this question—whether there are cases where, independently of the concurrence of the accused in the means whereby justice is sought to be frustrated, a judge may be justified in postponing the trial in order to prevent that frustration taking place; and we must take it here, that in this case the act whereby justice was defeated, or about to be defeated (because although, of course, we do not assume that the prisoner was guilty upon the charge preferred against him, yet justice was frustrated in this, that the enquiry was prevented by the act of the witness) was not one in which the defendant co-operated; and the question is, whether, under those circumstances, even supposing that a judge has in some cases, the authority to which I have been adverting, this was a case in which it could properly be exercised. The inclination of my opinion is, that under all the circumstances, if my learned brother who presided at this trial had the authority in question, it was a case in which it was not wrong to exercise it. On that there might be differences of opinion: some might think it was a case for its exercise, others not. I do not desire—it is not necessary, in the view I take of the case—to give any definite opinion on the subject. I think it is one of those cases on the confines, in which it is difficult to say what one would have done on the subject. This I know, that a more careful, cautious, or conscientious judge than the one who did act, and exercised his discretion on this occasion, never sat upon the bench; and as I find that all he doubted of was his legal power, but that he entertained no doubts as to this being a fit case for its exercise, if he possessed it, far be it from me to say that he acted wrongly.

But this is not the only difficulty in this case. We come to the second question in the case, and that appears to me to present still greater difficulties in the way of the defendant. Assuming even that the judge had not this power, or that he exercised it improperly, then comes the question, whether what he has done amounts to an acquittal of the prisoner, so as to entitle the prisoner to have judgment entered up for him as though he had been acquitted, because that is the practical result of the judgment which we are now asked to enter up on behalf of the defendant. I must say, on this I can add nothing to the conclusive reasoning of Crampton, J., in the case in 7 Ir. Com. Law Rep., on which so much observation has been made. No case of such a plea as this, except in that case, has ever been known to the law. It may be said, and with truth, that that may be because, since the days of Lord Holt, juries have not been discharged, and therefore the occasion of such a plea has never presented itself. But I agree entirely with Crampton, J., that the only pleas which are known to the law of England to stay a man from being tried upon an indictment or an information, are the pleas of *autrefois acquit* and *autrefois convict*, and it is clear that this amounts to neither. It is said that a man is not to be tried twice, and is not a second time to be put in jeopardy, and that that applies equally in a case like the present as it does in a case where the man has been acquitted or convicted before. But in that I cannot concur. Again: I say the reasoning of Crampton, J., is, to my mind, conclusive on the subject. It appears to me that when you talk of a man being twice tried, you mean a trial which proceeds to its legitimate and lawful conclusion by verdict; that when you speak of a man being twice put in jeopardy you mean put in jeopardy by the verdict of a jury, and that he is not tried, that he is not put in jeopardy, until the verdict comes to pass; because, if that were not so, it is clear that in every case of defective verdict a man could not be tried a second time; and yet it is admitted that in the case of a verdict palpably defective, although the jury have pronounced upon the case, yet if the verdict be defective, it will not avail the party accused if he is a second time put on his trial. I cannot say, therefore, that in my humble judgment, as at present advised—though it is not necessary to state more than that such is the present state and inclination of one's opinion—I cannot come to the conclusion that there has been in this case a trial; that the accused has been put in jeopardy; or that he is at all in the position, either in point of fact or in point of law, of a man who has been once acquitted, and who, having been once acquitted, cannot a second time be put upon his trial.

Now this being the view which I take of this matter, after all the attention which I have been able to give to this case—though as I said before, I do not at all wish it to be understood that in that I am speaking as upon a settled and final conviction and conclusion—in this state of things I do not think it is fitting for us to interpose, and that is all we have to deal with on the present occasion. It may be a hardship on the accused, it is true, that he should be put a second time upon his trial, when, perhaps, when this record shall finally be made up, and judgment entered up one way or the other, and that be taken to a court of error, it may be held that he ought not to have been put a second time upon his trial; but that I think we cannot help. Probably, it will be the only case in which such a question could present itself, because, if this be taken to a court of error, we shall have it finally and definitively settled whether or not a prisoner, who, instead of having a verdict given one way or the other upon this trial, is a second time brought to trial, because the jury have been discharged on the first occasion, is entitled to have the benefit of those circumstances to operate by way of acquittal, so as to entitle him to final judgment. Whenever that is settled, as I suppose it will be in this case should it eventually become necessary, this question will no further arise. The great and important question for consideration in this case would then be finally and conclusively settled, and no such case can afterwards arise. The present question is, whether we are bound at the present moment, in this state

of the record, to interfere, and to prevent this case from going to its final conclusion. I think, that, unless we see our way clearly and conclusively, as I said before, to the settled and certain conviction that the defendant is entitled to be treated as though he had had the benefit of an acquittal, we cannot with propriety interfere. It may be—I do not say that it is so, the inclination of my opinion is the other way—but it may be, that by such a course we should deprive the Crown of the opportunity of taking this case to error. Therefore, I am of opinion that we ought not now to interfere; that this case must take its course, like many other cases where a judge may have erred, if in this case he should have erred. There may be cases in which there is no remedy except in the event of a result fatal to the accused, that might give him an equitable ground for the clemency of the Crown, in the shape of a pardon, if serious doubts should be entertained as to the propriety of the proceedings. But in this case even that would not be necessary, because there is the opportunity of taking the opinion of a court of error in case eventually the result of the trial should be against him. All I can say is, that at present I am of opinion we ought not to interfere, and therefore this rule should be discharged.

WIGHTMAN, J.—I should have wished for a longer time, in a case of this importance, to consider the many, and not always concurring authorities that have been cited upon the argument; but as time is of importance, as it is said, I have given them the best consideration that I can.

The two great questions that were argued before us were—first, whether the judge who presided at the trial was warranted in discharging the jury; and, secondly, whether, if he was not, the defendant could again be put upon his trial, and this court grant a *venire de novo;* or whether the defendant was entitled, upon the matters appearing upon the record, to judgment *quod eat sine die.* It appears by the record that the defendant, being charged with a misdemeanour, pleaded not guilty; that a jury was impannelled and sworn to try that issue; and that because a material and necessary witness for the Crown refused to give evidence, the judge, at the request of the prosecutor's counsel, discharged the jury from giving any verdict.

Upon the first point, namely, whether the judge was warranted in discharging the jury under the circumstances stated upon the record, a great many cases were cited in argument, some in which the jury had been discharged on criminal trials, upon grounds nearly similar to that in the present case, and others in which the jury had been discharged on the ground of necessity; as upon the illness of a juryman, or of the prisoner, or other circumstances occurring which rendered the further proceeding with the case impracticable; and it was said, and I believe correctly, that in no instance had the jury been discharged under such circumstances as the present since the Revolution. The cases will be all found collected in the report of the case of *Conway and Lynch* v. *Reg.*, and were all commented on in the course of the argument. In *Rex* v. *Kinloch*, Foster, J., also reviews and comments upon the cases and the law upon this point, and expresses a strong opinion against the propriety of the Court, in its discretion, discharging a jury after evidence given and concluded on the part of the Crown, merely for want of sufficient evidence to convict, but refrains from giving any opinion as to the propriety of such a course where undue practices have been used to keep witnesses out of the way, or where witnesses have been prevented by sudden and unforeseen accidents. The case nearest to the present which has occurred in modern times, of which I am aware, is that of *Rex* v. *Wade*, in which the prosecutrix, in a trial for a rape, when she came to be sworn as a witness, appeared to be wholly ignorant of the nature and obligation of an oath; and the judge before whom the trial occurred discharged the jury, in order that the witness might be instructed as to the matters upon which she was deficient, but reserved the propriety of the discharge of the jury for the consideration of the judges, who all, with the exception of two, who were absent, were of opinion that the discharge of the jury was wrong, and that the prisoner ought to have been acquitted; and a pardon was recommended.

It is obvious that the power of discharging a jury at the instance of the prosecutor, on the ground that the evidence is not strong enough to warrant a conviction, but that upon another trial better and more cogent evidence might be obtained, is more objectionable than in such a case, and may produce the greatest hardship upon the prisoner or defendant, and I cannot think that such a power ought to be exercised upon such a ground; and I think that in this case my Brother Hill, whose only object was to prevent what he most reasonably considered might probably produce, a failure of justice, was wrong in discharging the jury upon the ground suggested in the present case.

But assuming that he was wrong, the second question then arises, how can this error of the judge, if it be one, be taken advantage of by the prisoner or defendant, in case it is proposed to put him upon trial a second time? Or, indeed, can he take advantage of it at all, except as a ground for the interference of the Crown, by a pardon, as recommended in the case of *Rex* v. *Wade?*

It is said for the defendant, that he is entitled to judgment upon the record as it stands, *quod eat sine die*, upon the ground that, as the judge at the trial ought not to have discharged the jury, but to have directed an acquittal, he is entitled to have the same judgment as if he had been acquitted. But no precedent or authority has been cited to warrant such a judgment in such a case. In the case of *Conway and Lynch* v. *Reg.*, the court discharged the prisoner, but it does not appear that they gave such a judgment as that now prayed. Upon a plea of *autrefois acquit*, such a judgment might be given as the jury would have actually pronounced their verdict of not guilty. But it is said, that as it is a rule of criminal law that a man shall not twice be put in jeopardy for the same offence, if he has once been put upon his trial, and the jury sworn, he has been put in jeopardy, and therefore cannot by law be tried again, and so is entitled to judgment *quod eat sine die.* It is necessary to consider in such a case what is meant by putting a man in jeopardy, and at what period of the proceeding is he so placed. If he is placed in jeopardy when the jury are sworn, and evidence given, he is in jeopardy though a juryman were taken ill, or some unforeseen accident occurred, which would be within the ordinary excepted cases in which a jury may properly be discharged; or the jury may give an imperfect verdict, or one which cannot be supported in point of law; in all which cases the prisoner or defendant has been placed in jeopardy, if his being charged before a jury sworn to try him, and evidence given, be a placing him in jeopardy. But in such cases there seems no doubt but that a *venire de novo* may be awarded, and that the defendant is not entitled to judgment. Has he been more in jeopardy when the jury are wholly discharged, as in the present case, then when they give an imperfect verdict, or are discharged by reason of one being taken ill before they have given any verdict? Many instances may be given, fatal it may be to prisoners, which would not entitle them to judgment. Suppose a judge were improperly to admit evidence obtained under circumstances which made it inadmissible, and the prisoner was convicted upon such evidence, could he claim judgment *quod eat sine die*, or must not he rely, as in *Rex* v. *Wade*, upon the interference of the prerogative of the Crown to pardon? Upon the whole, I am disposed to think with Crampton, J., as he expresses it in his elaborate judgment in *Conway and Lynch* v. *Reg.*, that "the true and rational doctrine is, that where a trial proves abortive, by reason of no legal verdict having been given, a *venire de novo* may go, whether the result arose from the mistake of the judge or of the jury."

I have not arrived at this conclusion without much doubt, but I have the less difficulty in expressing it, as the objection now urged for the prisoner will be equally open to him upon writ of error if there should be another trial, even if proved guilty; and if the verdict is for him, the question will not arise.

CROMPTON, J.—It seems to me that the only question before us in this case is, whether or not we ought to award jury process; and I am satisfied, from the discussion which we have heard on the part of the Crown (those who appeared on the part of the defendant, I think, were relieved on this part of the case), that the defendant has a right to come before us, and say, "Matters appear on this record on which you ought not to award new process;" whether it is a *venire* or a *distringas* (as, I believe, was argued in my absence) is immaterial: it is, in effect, whether new process ought or ought not to be awarded; and whatever the

result of that may be, it is a judicial act, on our part, to award the process or refuse it—an act, upon which, if we award it improperly, no doubt a writ of error lies for the subject; and whatever the result is, whether a writ of error would lie for the Crown (which, I understand, was also argued when I was away) or not, in my opinion makes no difference, because I think we are bound to give our judgment that this process should not issue, if it is made out to our satisfaction that there is a matter on the record which brings it to issue. The only other question that might arise in the case is this, whether there is that matter appearing on the record which, in effect, terminates the proceeding, either as preventing an awarding process, or as shewing that the party ought to be discharged. Therefore it comes, in my mind, to the question, does or does not the matter appearing on this record prevent fresh process issuing? Now, I certainly am not able to see that, in my judgment, there is anything which appears on this record which has that effect. I think that an abortive trial of this kind is not a termination of the proceeding, however it has occurred—whether by the act of the judge or by the act of the jury; whether by a juryman going away (as it was put in the course of the argument), or whether it be the act of the mob disturbing the proceedings; and I should doubt it, even in the case of the Crown, if such a case could happen, actually interfering. I quite agree with what my Lord and my Brother Wightman have said as to this part of the case. It appears to me that it is an attempt to extend the old plea of *autrefois acquit*, and that there is no case, when the authorities are examined, which will at all bear out the proposition, that an abortive trial does prevent a *venire de novo* in the case of a misdemeanour. There has been a technical point taken, which was stated originally by Lord Holt, and afterwards mentioned by Lord Wensleydale—there is said to be an objection of right to a *venire de novo* going in any case whatever in the case of felony. Whether that be so or not (I own I should have a strong opinion about that, and I think *Rex* v. *Fowler* (4 B. & Al. 273), to some extent, is an authority upon it), certainly that technical objection does not apply to a case of misdemeanour. Then we have to look to see whether it is or is not satisfactorily made out, that a trial which fails in this way has the effect of putting the defendant in the position of being *autrefois acquit*. I think it has not. There has been no trial, which is the first averment to be made in a plea of such a nature, and the party has not been in jeopardy in the legal sense of the word. In one sense, the party is in great jeopardy if there is a verdict against him on a bad indictment, but not in jeopardy, in the legal sense of the word. I think the party has not been tried, nor been put in jeopardy, in the legal sense of the word; and I think that this part of the case was not so fully argued as the other part of the case; there have been no arguments adduced to alter the conclusion in my mind to which I have come, founded very much on the reasons in the judgment of Crampton, J., to which reference has been made by my Lord and my Brother Wightman. I think the reasoning in that case, not only as to that part of his judgment, but as to the whole of his judgment, is perfectly convincing and unanswerable; and, without repeating those reasons, I quite concur in them, and think that an abortive trial of this kind does not amount to anything on which a judgment for the defendant can be prayed in the case of misdemeanor as in the case of a former acquittal or conviction. Mr. Mellish did not seem to me to meet or grapple with that part of the case; but he put it on this, that if there was anything wrong done by the judge, and put on the record, that that could be made ground either of error or of quashing the proceedings. I do not at all agree in that. There are a great many things done by the judge, which I shall have occasion to refer to afterwards, which cannot be made the ground of a proceeding of this nature. It is not because the party may raise any doubt on it upon the record — it is not because there is something done which one may not approve or wish to see done, which necessarily gives the right to consider a trial as one terminating in favour of the defendant.

Now, the old notion that when there was a jury once charged with a prisoner, that jury could be the only jury to try him, has, I think, been long exploded. It was said to be first exploded, I think, in Ferror's case; at all events, it has not been acted upon, according to the old notion laid down in Lord Coke, ever since Ferrer's case, and the contrary practice has so long prevailed, that I think we cannot adhere at all to the old rule. I take the same view on that part of the case as my Lord has done, when he traced the different fluctuations that had occurred in the practice. I think very strongly in favour of Mr. Justice Crampton's notion, that this is matter of practice; it may be called in one respect, a matter of law, because the practice of the court is, to some extent, matter of law; but matter of law or of practice, it seems to me we must take the rule now to be, that the same jury ought to try the case, subject to the power of the court to interfere, if they see it is a proper case for interference; and I think we cannot look upon it now as a rule, that we should have no such power in point of law. I have a strong inclination of opinion that the jury ought not to be discharged, unless there is some very strong reason, which I think is for the judge to decide on. This makes me incline to the notion that it is a matter rather of practice than of law; and when I say of practice, I mean practice in the sense of a rule which the judges ought to adhere and yield to, and that they may be said to act improperly if they depart from it. Now, it seems to me that what was complained of as mischievous in the practice adopted in the earlier times—in the time of Charles II., and probably before that—was an abuse of the former practice of discharging the juries at the time when it was necessary, and that it was the abuse of the practice which was complained of, not that there was ever any doubt what the result would be if this improper practice took place. I look at the proceedings in the case of Fenwick and Whitbread, where this practice of discharging the juries was used in so odious, and dangerous, and unconstitutional a sense, that it cannot be too strongly reprobated, as being taken for the very purpose of the prisoner's being tried again, and the judge knew that if they discharged the jury the party had not the benefit of an acquittal, and that therefore he was liable to be tried again. Again I look at what Lord Holt and all the judges of England said as to this, namely, that they would not discharge the jury, to be founded on this—that if they did discharge the jury, the party would be subject to a new trial. It is now said that discharging the jury is the same as a verdict of acquittal. In effect, I think, the very object and reasoning of the judges agreeing to this rule was, that the abuse of discharging juries for the purpose of getting further evidence was a matter very much to be reprobated, but that it would not have the effect of putting the defendant in the position in which he could say that he ought not to be tried again, and that the result of such a proceeding would be to subject him to a new trial, and that therefore they would not discharge the jury. I think, with the exception of *Conway* v. *Reg.*, in Ireland, there have been no cases where a matter of this kind has been treated as a legal bar to fresh process issuing, or has been treated as a bar to the proceedings, or a termination of the proceeding in favour of the prisoner. All the other cases seem to me to admit of a very different answer. Wade's case, which was so very much relied on, was a case where the judges met, as they used to meet in those times before the court for considering Crown cases was established, to consider whether anything wrong had been done at the trial; whether there had been a wrong direction given; whether they had admitted wrong evidence, or wrongly refused evidence for the prisoner; or any matter of that kind, which was not a ground upon which the defendant could ask to be relieved from the consequences of the verdict, but in which a judge might be doubtful if he had acted rightly; in all those cases they met together and took the course, if they had been wrong, of recommending a pardon. I do not think it has been suggested that it ever could be made matter of plea before the case of *Conway* v. *Reg.* Now, in that case there are three very learned judges delivering their judgment against one. On examining the judgment and the reasons, I must own that I am entirely satisfied with the judgment of Crampton, J. In a case which has occurred since (Newton's case), a very strong opinion was given by the Court that the discharge was not equivalent to an acquittal. In that case the matter came before the Court on an application for a *habeas corpus*. It is difficult, in my mind, to see, if the proceeding was terminated on the ground that the discharge of the jury amounted to an acquittal, how the prisoner was not then entitled to the writ asked for. If the proceedings were terminated against the de-

fendant, I should have thought the Court, on an application for a *habeas corpus*, would have discharged her. I feel a difficulty in seeing how, in that case, the committal still stood. If the committal was for murder, then, if the argument for the defendant is right, the prosecution for that murder was done away with, and it was the very case in which the prisoner ought to have been released. I use that case for the purpose of shewing that the court do not consider themselves as concluded by the case of *Conway* v. *Reg.* Lord Denman there says, "The jury were improperly discharged, according to the argument for the prisoner, and therefore, as it is contended, the prisonor must be set at liberty. I do not think that conclusion follows, either logically or on the legal authorities. Even assuming that the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, or how it can be made the subject of a plea. On this, however, I give no opinion, but merely state it by way of protestation, against being supposed to have decided that it may be so pleaded." Then he says afterwards, "I am of opinion that the judge in this case acted rightly; but even if he had acted improperly, I think it does not entitle the prisoner to be set at liberty." Then Patterson, J., says, "There has been no trial resulting in a verdict; what took place was not a trial determining the question of her guilt or innocence. Therefore, even if I saw greater reason to doubt the propriety of what took place at the assizes, I should say she was not entitled to be discharged." What my Brother Coleridge and my Brother Erle said—by Brother Erle particularly—as to the discretion which the judge has, has been mentioned so often in the course of the argument that I will not further refer to it; but it does seem to me that the court there considered it, at all events, an open question; and Lord Denman, I think, expresses the inclination of his opinion that it could be made the subject matter of a plea, and was not equivalent to a determination in favour of the defendant of the indictment.

Now, the last case on the subject, the case of *Reg* v. *Davidson*, (2 Fost. & F. 250, seems to me a still stronger authority. There, as it appeared on the record, there was no ground, within the rule laid down and attempted to be supposed by Sir Fitzroy Kelly and Mr. Mellish, for the jury being discharged; certainly no ground, whether according to their argument or not, according to the case of *Conway* v. *Reg.* In Davidson's case, it was pleaded that the discharge took place "for and by reason of no sufficient and legal cause whatever." It is true that there is a replication put on the record, that "for a long space of time"—which we all know in pleading means no time at all—take it a long time if it be necessary for the purpose of the pleading—that for some long time they had not come to their conclusion, and then, because it was the last case at the session, none of the commissioners chose to wait any time for the verdict—which it was their duty to do. I apprehend —they discharged the jury. That seems to me, according to the case of *Conway* v. *Reg.*, not to be justified; but however that may be, the court do not put it on that ground, but they put it on the ground, that this was a matter that cannot be made the subject of a plea. That was the decision of a court, in one sense inferior to this court, because a writ of error lies from that court to this; yet when we consider that it was in the place where the great criminal trials of the country take place, before a commission composed of three learned judges, with a very solemn argument on the plea—it is a case of as great authority as the one in the Irish Reports. I treat the opinions of those learned judges who presided in the court in Ireland with the greatest respect, but I think, on examining it, the one judge who differs from them gives by far the most conclusive reason for his opinion. Now, in Davidson's case you have a solemn argument before three judges, and I think they decided the very point before us. "We are all of opinion," said the Lord Chief Baron, "that it is unnecessary to hear further argument; the question is, whether the plea is sufficient, and the prisoner's counsel chiefly relies on the case of *Conway* v. *Reg.* Now, though it has no doubt been laid down in the text-books that a jury cannot be discharged except under certain circumstances, it does not appear that prior to that case, the improper discharge of a jury was ever made the subject of a plea. I may observe, that in that case the Irish Court of Queen's Bench were not unanimous; and therefore, if the necessity arose, I should consider that we were quite at liberty to review it; but it is observable that the case before them was one of felony, the present being one of misdemeanour only." I will not stop to make any remark on the distinction last adverted to, but it is rather a curious matter that from the very beginning, in almost every case, I think up to the time of the Revolution, the rule has been put as applicable to the case of life and limb, which is the same as felony, and not as extending to the case of misdemeanour, much less to the case of a proceeding in our own court, where the parties on the one side and the other proceed in a very different manner to what they do in general criminal courts. The party here has the benefit of a new trial, and there are a great many things which do not apply to cases of felony; but certainly the rule, as laid down by Lord Holt, and according to my own notion, the practice, as adopted by the judges, or growing up of itself after the time of the Revolution, has extended both to felonies and misdemeanours; and I think the general rule which ought to guide judges is, that it ought not to be done except in cases of evident necessity or propriety in cases of a criminal nature of any kind. In Davidson's case, the Chief Baron goes on to say, "We are of opinion generally, that when a judge has exercised his discretion, that discretion is not to be made the subject of question. It cannot be ground of error, nor can it be traversed before a jury. It seems to me, therefore, that the plea the prisoner has placed upon the record is bad." My Brother Martin puts it entirely on the question of its being a misdemeanour; and my Brother Hill says, that he adopts the position laid down by Crampton, J., in his judgment, where he says, "It is clear the judge has a discretion to exercise." Where is the legal limit of his power to be fixed? The prisoner's counsel could not fix it. The judges in Kinloch's case, and Sir M. Foster, says it cannot be fixed. I need scarcely add that I cannot fix it." (7 Ir. Com. Law Rep. 172, 173.) Now, I think those authorities are certainly stronger in favour of its not being a matter of plea than any cases that have gone before, and I do not find it at all made out to my satisfaction; on the contrary, I think the proposition is not a true one, that such matter operates as a plea, whether it is pleaded to a new indictment, or whether it appears, as in this case, on the record. I think that what appears on this record does not operate so as to prevent fresh process being awarded, and does not operate as the termination of the proceeding; and therefore, I think, that in point of law we cannot refuse to award the necessary process for summoning a fresh jury.

Then there is the other part of the case which has been discussed, and which, I think, one ought to give one's opinion upon. I certainly look upon this as a rule to guide judges, which has been acted upon ever since the Revolution, and which I think ought to apply both to misdemeanours and to cases of felony; and I think it is a matter of practice, or rule of law if you like, that the judge ought not to interfere, because the case for the prosecution fails for want of evidence; and certainly it strikes me that this is a case of that description. There may be cases of collusion in which it may be done—I do not say there are; it is a very nice question; and I think Mr. Mellish and Sir F. Kelly both decline to say that it could not be done in a case of collusion. But here we have no case of collusion at all; it is the same case as if a witness does not choose to come into court for some reason or other—not very different to my mind than if he does not answer satisfactorily. It is a failure of evidence on the part of the Crown. Whether that be a matter of discretion or not, I think I am bound to say, as we have heard so much discussion on the matter, I certainly for one, as at present advised, should have directed an acquittal. I think that the importance of the general rule is greater than the importance of justice being baffled in any particular case. It is rather put, I think, by the Crown as if the judge ought to interfere, the witness being fined and behaving ill, because he was baffling justice; but unless that is brought home to the defendant, it does not seem to my mind at present to be a satisfactory distinction. At the same time, I cannot say that the whole matter being before my Brother Hill, and he acting in the exercise of his discretion—certainly, I can say, most conscientiously, having a better opinion of his judgment in such a matter than my own—I cannot say that he acted wrongly upon it. All that I should say is, I would have acted on the general rule, and

on the universal practice, as observed by my Brother Wightman, since the Revolution, not to discharge the jury because the case fails for want of evidence. At the same time it is very desirable that justice should not be baffled in this way; and it is one of the defects in our trial by jury, that very often a point arises at the trial which there is no mode of sifting, and one party or the other has the advantage of it. When trials are protracted, as they are abroad, that is supplied; with us there must be an acquittal or a conviction at once; and it would be a very bad practice, I think, that, on the ground of there being a failure of evidence, the jury should be discharged. I think that the practice of discharging the jury too soon because they cannot agree is also an objectionable one. It is said that it is necessary to discharge the jury as soon as you see they are not likely to come to an agreement. I think we ought to take some mean course as to that. Perhaps, it is hardly a matter involved in the present discussion. It always seems to me very dangerous to say, that in a certain time, or in a few hours, the jury would be discharged; but that they ought to be kept, not to coerce them, as put by the Lord Chief Justice, to give a wrong verdict, but such a time as to prevent their saying, "We can wait for such a time; we know we shall be let off, and we will not give a verdict." Therefore, I do not at all reprobate the old practice of confining the jury for a reasonable time. Confining them without meat, drink, and fire, and exposing them to hunger, and thirst, and cold, seems a very barbarous relic, which, I think, might as well be got rid of, but that they should be confined a reasonable time, so that they shall have time to consider, and not merely wait in order to avoid giving an unpleasant verdict. I think, in our discretion, we must take care to avoid one extremity or the other. I shall conclude by saying, that I think that this rule is of very great importance. Certainly it is a rule of practice, if not of law, and I think it ought not to be departed from merely because of the failure of the prosecution in point of evidence. Without saying that my Brother Hill was wrong, I certainly come to this conclusion, which I think I ought to give—I think, according to my Brother Wightman's notion, I should have felt myself bound by the practice to have directed an acquittal. Upon the whole, I am quite satisfied that there is no matter on this record which entitles the prisoner to ask for discharge from the indictment, or to prevent the Crown from having a fresh jury process. Therefore, I think that the rule should be discharged.

Blackburn, J.—I also think that the rule should be discharged. This is an information for a misdemeanour; issue was joined in this court on the plea of not guilty. There is also an award of jury process, and a return of the Nisi Prius record, on which are entries of what took place at the trial at York. From these we find that the jury were sworn, and the case commenced, but that no verdict was given, the judge having discharged the jury under the circumstances stated in the record. On this the question arises, what is this Court to do judicially? The counsel for the defendant contend that it is a rule of law in all criminal cases, as well misdemeanours as felonies, that when once the jury is sworn and the trial begun, the jury must give their verdict one way or the other, unless discharged under circumstances different from those in this case. And they further contend, that if the jury be discharged improperly, the issue can never be tried again, so that judgment could be given against the defendant on their verdict, if found for the Crown. If they are right in this contention, I think this Court should not permit its process to be used for the purpose of causing a trial which could not be available, and the defendant would be entitled, as of right, to a judgment refusing process, and discharging the defendant from this information, the precise form of which judgment we need not consider now. But unless the defendant is right in saying that, as a matter of law, the discharge of the jury operates so as to prevent the issue being tried on a future occasion, the Crown is, I think, entitled, as a matter of right, to an award of process, in order to have the issue tried, which we must not deny.

The judge at the trial has power to discharge the jury whenever it is proper; and he is the sole judge of the propriety—in this sense, at least, that when he decides that the jury are to be discharged, all must obey him, and the jury must be discharged. It may well be that his order, though it must be obeyed, was improperly made: but it seems to me that to entitle the defendant to the judgment his counsel pray for, they must show not only that the discharge of the jury under the circumstances stated on the record was improper, but also that an improper discharge of the jury is, in point of law, equivalent to an acquittal, and entitles the defendant to be discharged, as much as a verdict of not guilty would have done; and in my mind the only question we have to decide is, whether it does amount to a bar in law, and I think we must decide it. It is not sufficient for the defendant, if his counsel can make out that there has been an improper deviation from practice, unless they shew that it is in law a bar.

There are rules of practice (I may take as a familiar example that by which a judge recommends a jury not to act on the non-confirmed evidence of an accomplice) which are so well established that a judge is blameable if he departs from them, and yet a conviction obtained against such a rule of practice would be good in law. In such a case, if the defendant has suffered injury, there is an equitable claim upon the Crown to redress this injury. It is for the proper constitutional advisers of the Crown to say whether such a case is made out. In Wade's case, which was mentioned by my Brother Wightman, we were not deciding on the law, but were consulted as the advisers of the Crown. They thought that it was an improper proceeding on the part of the judge to discharge the jury in order to postpone the trial till a witness could be educated, so as to understand the nature of the oath; and I agree with them; for it seems to me that the evidence given after an education of this sort would be of a very questionable kind. So thinking, they recommended a pardon; but their doing so was not an expression of opinion that the course taken by the judge was beyond his power, or that he had not discretion in a fit case to discharge the jury; and as far as the course adopted by them in recommending a pardon is any evidence of their opinion, they thought it no bar in law. Here we are not acting as the constitutional advisers of the Crown; we are to say whether it is legal to proceed to try this issue after what has happened. It is for the law advisers of the Crown to say whether, if it is legal it is also proper. That is a question for the constitutional advisers of the Crown, of whom I am not now one, to determine on their own responsibility. I have, however, no objection to state my own opinion as to the propriety of the course taken on the trial of this case, though it is somewhat extra-judicial.

I agree, that in general it is very objectionable for a judge to discharge a jury, after a trial has begun, on account of any failure of evidence. The liability to abuse is so great, that I think this should not be done merely on account of the failure of evidence. But I think it cannot be said, that if a judge has power by law to discharge a jury in such cases, he should never exercise that power. In cases of collusion, where it appears that the defendant has instigated a witness to absent himself, or the like, I think a judge ought to use his power. In the present case I agree with the defendant's counsel, that there is nothing stated in the record to lead us to the conclusion, that the defendant instigated the witness to refuse to give evidence. If there were, I should have no doubt that it would have been improper not to discharge the jury. But I think, from the statements on the record, that it is probable that the witness was not instigated by this defendant at all. Still, I think the judge had facts before him from which he might well draw the inference, that the witness refused to answer for the purpose of defeating justice, by procuring the acquittal of this defendant and the other defendants, through the absence of evidence, thinking he could do so with impunity. I think that, under these peculiar circumstances, it was very desirable that not only should the witness who committed this contempt of court be fined and imprisoned, but also that he should be baffled in the object he proposed for himself. It may be that the general rule, that a criminal case once begun should be disposed of, is of such consequence, that it would be better to suffer the wrongdoer to obtain his end than break through the rule; and I will not take on myself to say that a judge who, acting on that notion, should, in such a case as the present, direct an acquittal, would not do well. But, on the whole (though not without doubt), I think that my Brother Hill did better in discharging the jury.

All this, however, is in the nature of *obiter dicta*. The one point on which I rest my judgment is, that at all events, in a case

of misdemeanour, the discharge of a jury sworn to try an issue after the trial has begun, in my opinion, even if improper, is not a legal bar to the trial of the issue by another jury. I have said, "at all events, in a case of misdemeanour," because that is the only question before us, and because the law of England undoubtedly does, in *favorem vitæ*, make a distinction in many cases, and it may be in this, between the modes of procedure in the trial of felonies and misdemeanours.

The whole foundation of the argument of the defendant is rested on two passages of Lord Coke, where he expressly speaks only of felonies where life and limb are in danger, and where a privy verdict may not be given. He is silent as to the effect of an infringement of this rule, and it may well be doubted whether he is doing more than laying down a general rule of practice which he thought ought to guide the Court in felonies, but which was not generally followed.

Before the Revolution, it certainly was the practice to discharge the jury whenever the judge thought the interests of justice required it, in order that there might be a second trial. This was done in all cases of treason and capital felony as well as misdemeanours. The practice is stated by Lord Hale in nearly the same terms as it is stated by Lord Chief Justice North in the case of *Whitbread and Fenwick*. Lord Hale justifies the practice for reasons which are plausible, and which shew that he thought the discharge was no bar to a second trial. He justifies the practice, because, if the jury were discharged, a notorious murderer might be brought to justice, who could not have been so if the discharge was a bar as much as the acquittal. But though his reasons are plausible, the case of *Whitbread and Fenwick* shews that the practice was liable to a great abuse, and I think it clear that the modern practice, by which a criminal trial is not interrupted after it has commenced (unless in very exceptional cases), is very much better. I cannot doubt that a judge would more properly be removed from his office, and impeached, if he were now to discharge a jury under such circumstances as those under which the jury were discharged on the first trial of *Whitbread and Fenwick*. I think an Attorney General who persevered in putting them on their trial again would be deserving of impeachment. But, supposing this to be done, I doubt if the judges before whom the prisoners were arraigned the second time would do otherwise than tell them that there was no legal bar to the indictment, even in a case of treason.

After the Revolution no alteration was made, by the Bill of Rights or any other act, in the law or practice as to criminal trials, but the practice was changed. The reaction against the old abuses was great. In *Rex* v. *Keate* (1 Ld. Raym, 138), in 1696, a special verdict was found in a case of felony. The verdict was such that Holt, C. J., and Foster, J., thought it warranted a judgment for the Crown. Eyre and Rokeby, JJ., thought the verdict uncertain, and that a *venire de novo* ought to issue. It would appear, from the various reports of this case, that there was a doubt whether there could be a *venire de novo* in a case of felony, which, as it seems to me, could only be on the ground, that, in accordance with the doctrine of Lord Coke, in Co. Litt. 227, b., the jury once charged with the prisoner ought to give their verdict, and could not be discharged. In the end no decision was given, as Lord Holt himself took exceptions to the indictment which was quashed. This is the only case I find in which the point arose as a matter to be decided as a question of law. It was soon after this case that, in *Rex* v. *Perkins*, Lord Holt made the statement, that, according to one report, "he had had occasion to consider of this matter;" according to another, "that all the judges of England were of opinion, in debate among themselves," that in capital cases a juror could not be withdrawn: in other words, a jury could not be discharged with consent; and in misdemeanours not without consent. What Lord Holt did in *Rex* v. *Perkins* is what, in every view of the case, is now approved of. The judges could by their resolution alter the practice, but not the law. It has never been decided that in felony there can be a *venire de novo* on an imperfect verdict, though the very able argument of Crampton, J., in *Conway and Lynch* v. *Reg.*, leads me to think it probable that it can. But if Lord Holt thought that there could be no *venire de novo* in case of an imperfect verdict in misdemeanour except by consent, his opinion has been repeatedly overruled; for I take it to be clear that, on an imperfect verdict in misdemeanour, a *venire de novo* is awarded; (see *Rex* v. *Trafford*, 8 Bing. 204); and I agree with the reasoning of Crampton, J., in *Conway and Lynch* v. *Reg.* (7 Ir. Com. Law Rep. 178), which shews that there is no distinction in principle as to its effect as a bar between a discharge of a jury upon an imperfect verdict and any other discharge of a jury. As far as authority goes, the distinction between felony and misdemeanour here becomes important. On the authorities, there is a doubt in cases of felony; in misdemeanour, I think it is clear that a *venire de novo* may be awarded.

On the argument before us it was contended that there was a distinction between a discharge of the jury, because the judge had become convinced that it was impracticable that they could give a verdict, which, it was said, was a case of necessity, and a discharge of the jury where it was manifestly still practicable that they should give their verdict, but where the judge thought that it was desirable for the ends of justice not to take their verdict, though it was practicable. In the latter case it was said to be *ultra vires* and illegal. The distinction is intelligible, but it cannot be supported without overruling Kinloch's case. There the verdict of not guilty might very well have been taken, though the prisoners had not the opportunity of pleading the abatement. It was entirely a voluntary act on the part of the Court which led to a discharge of the jury, and, as is pointed out by Crampton, J., in *Conway and Lynch* v. *Reg.*, the whole reasoning of Foster, J., is founded on the supposition that the judge held his discretionary power, though he ought never to exercise it without very good reason indeed. The case of *Conway and Lynch* v. *Reg.*, is, as I have already observed, a case of felony, and is so far not necessarily a case in point in the present one of misdemeanour. But I must say that the admirable judgment of Crampton, J., convinces me that even in a case of felony he was right and his colleagues were wrong. I will not weaken what he said by repeating or abridging it, but refer to the report, only saying that I subscribe to all his reasoning, except that, as I have already said, I doubt if he is justified in treating it as settled (see p. 178 of the report) that there must be a *venire de novo* in a case of felony on an imperfect verdict. I think this is a point still undetermined by authority (see *Campbell* v. *Reg.*, 11 Q. B. 799), and since the decision in *Conway and Lynch* v. *Reg.* there have been two cases in England in which the question arose. In *Reg.* v. *Newton* (18 Q. B. 716), Lord Denman, C. J., said, "The prisoner was given in charge to a jury at the assizes, and therefore it is contended that she must be set at liberty. I do not think that conclusion follows, either logically or on the legal authorities. Even assuming the discharge of the jury was improper, I do not see how it is equivalent to an acquittal, or can be a bar to a trial, nor how it can be made the subject of a plea." And Patterson, J., says, "There had been no trial resulting in a verdict. What took place was not a trial determining the question of her guilt or innocence. Therefore, even if I had great reason to doubt the correctness of what took place at the assizes, I should say she was not entitled to be discharged." These opinions were given on a return to a *habeas corpus*, where the question before the court was, whether the prisoner could be detained in custody to abide a fresh trial. The question whether there should be a fresh trial was not so distinctly raised as in the present case, but it was before the Court, and the two learned judges just quoted evidently thought that even in the case of a capital felony an improper discharge of the jury was not equivalent to an acquittal. The last case on the subject is *Reg.* v. *Davison* (2 Fost. & F. 250), where the precise question now before us was raised on demurrer at the Central Criminal Court. There, to an indictment for misdemeanor, it was pleaded that the prisoner had been given in charge to a jury, and that they had been improperly discharged by the justices. The replication stated no more than that the justices did it in the exercise of their discretion, because all other business was at an end, and the jury said that they were not likely to agree. This was admitted to be true by the demurrer; and if there was no more than that which is stated in the replication, surely the discharge of the jury was indiscreet and premature. Both Pollock, C. B., and Martin, B., take the distinction between the case before them, which was one of misdemeanour, and that of *Conway and*

Lynch v. *Reg.*, which was one of felony, but rest their judgment on the more general ground, that the improper discharge of the jury could not be the subject of a plea; and my Brother Hill quotes and concurs in the judgment of Crampton, J., in the Irish case.

I think the authorities quite sufficient to authorise us to decide that the discharge of the jury is no legal bar to another trial, and therefore that there ought to be such jury process as is necessary to produce that further trial. Whether that is to be entered on the record as a *venire de novo*, or as a continuation of the former jury process, is a matter not now before us.

Rule discharged.*

GENERAL CORRESPONDENCE.

Police Magistrate—Right to practise as an attorney.

To the Editors of the Law Journal.

Gentlemen,—As a general rule magistrates are not practising attorneys, but the Police Magistrate of the city of Toronto appears to be an exception to the rule. Can you inform me whether or not in law he is entitled to practise as an attorney? Your opinion will oblige

An Enquirer.

Toronto, January 27, 1863.

[Recorders and police magistrates are appointed by the Crown, and hold office during good behavior: (Con. Stat. U. C., cap. 54, sec. 375.) Each is ex officio a justice of the peace for the city or town for which he holds office, as well as for the county in which the city or town is situate: (*Ib.*) The Governor General may, by letters patent under the great seal, appoint the recorder to preside over and hold the division court of that division of the county which includes the city: (*Ib.* sec. 383.) While a recorder is authorized to hold the division court, he is not allowed to practise as a barrister, advocate, attorney or proctor in any court of law or equity: (*Ib.* sec. 385.) We know of no such provision which in express terms disables a police magistrate from practising as a barrister, attorney or solicitor in Upper Canada. It is true that Con. Stat. Can., cap. 100, sec. 2, provides that, "When not otherwise specially provided by law no attorney, solicitor or proctor shall be a justice of the peace in or for any district or county of this province during the time he continues to practise as an attorney, solicitor or proctor;" but we cannot see our way to the conclusion that this *per se* disables a police magistrate to practise as a barrister, attorney or solicitor.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. Evans v. The Bristol & Exeter Railway Com.

Carrier—Delivery—Evidence.

In proving delivery of goods by a carrier, though it is not necessary to give evidence of delivery into the hands of the consignee or his servants, it is necessary to show an actual delivery of the goods into their possession.

* No further proceedings were taken by the Crown in this case, a *nolle prosequi* having been entered by the Attorney General.

EX. Leech v. Gibson.

Practice—Trial—Non-appearance—Nonsuit—Costs of the day.

If when a cause is called on, the Plaintiff is not ready for trial, and the Defendant is so, but does not apply for a nonsuit, he cannot have the costs of the day.

EX. Higginbotham v. The Great Northern Railway Co.

Carrier—Damage to goods—Evidence.

In an action by consignee of goods against carriers for damage caused by want of care in the carriage, proof that the goods were in proper condition when received by them, and were damaged when delivered is sufficient. Although the jury find that the damage was caused partially by bad packing, that does not answer the action, and goes only to the amount of damage.

EX. C. Wright v. Wilkin.

Devise upon condition—Trusts and conditions—Mortmain Act.

A devise of lands to A., upon the express condition that A. should pay certain legacies within twelve months from the decease of testatrix. *Held*, that it was a trust, and not a condition, the breach of which would give the heir a right of entry.

Where lands are devised, subject to certain trusts, some of which are bad by the Statute of Mortmain, the devisee takes the lands free of such trusts.

EX. C. Cahill v. The London & N. W. R. Company.

Railway Company—Passengers Luggage—Merchandise.

Where a railway company contracts with passengers for certain hire, to carry them with their personal luggage only, and a passenger is conveyed, with a box which he has with him as personal luggage, but which is in fact merchandize, the company are not liable for its loss, unless the package is unmistakably merchandize

EX. Jones v. Davies and Wife.

Ejectment—Merger of estate for years in freehold—Tenancy by the Courtesy initiate.

D., the male defendant, being lessee of an estate for years, his lessor devised the lands in fee to D.'s wife, subject to the payment of an annual rent charge to the plaintiff with a proviso for entry in case of non-payment. D. had issue by his wife.

Before the lease for years had expired, the plaintiff brought an action of ejectment for non-payment of the rent charge.

Held, (affirming the judgment of the Exchequer) that the action was not maintainable; that the devise in fee to the wife did not operate as a merger of the lease for years; that during the lifetime of the wife the husband was only tenant by the courtesy initiate and not consummate, and consequently had not such an estate of freehold in his own right as would merge the term.

C. P. Brown v. Tibbetts.

Set off—Attorney's bill of costs—Demurrer—Practice.

The declaration alleged that the defendant, an attorney, promised to indemnify the plaintiff against all costs which he migh incur in a certain action which the defendant was to carry on for the plaintiff as his attorney; that the plaintiff was compelled to pay a certain sum for costs in that action; that all things had happened to entitle the plaintiff to have the defendant's promise fulfilled; that the defendant had not performed his promise or repaid the plaintiff the sum expended by him in payment of such costs. To so much of the count as related to the payment of money by the plaintiff, the defendant pleaded at set-off of his bill of costs. Replication that the defendant did not one month before suit deliver to the plaintiff a signed bill of costs. Rejoinder, that the said charge became due after the passing of 6 and 7 Vic., ch. 73, demurrer to replication. Demurrer to rejoinder.

Held, that the defendant might set-off his bill of costs without having delivered a signed bill one month previous to action, and that as the plea of set-off was confined to the specific sum paid by the plaintiff it was a good plea of set-off, although the count to which it was pleaded might carry special damages.

C. P. LAWRENCE v. WALMSLEY.

Equitable plea—Promissory note—Surety.

To a declaration in a promissory note the defendant pleaded as an equitable plea that he made the note jointly with E., for the accommodation of E., and as his surety; that at the time of making the note, the plaintiff having notice of the premises, agreed in consideration of the defendant's making the said note as surety, to call in and demand payment of the said note from E., within three years; that a memorandum of the agreement was to be endorsed upon the note, which by mistake was not done; that the plaintiff did not demand payment of E. within three years whereby he lost the means of obtaining payment from E., who has since become insolvent.

Held on demurrer that the plea was good, on the ground that the plaintiff had not performed the condition in consideration of which the defendant became surety.

Quære per WILLIAMS, J., whether the averment that the plaintiff thereby lost the means of obtaining payment from E. was material.

B. C. FAWKES v. LAMB.

Principal and agent—Broker—Contract—Evidence—Sale note.

Where a written contract for the sale of goods was silent as to the time for which warehouse-room was allowed by the seller to the buyer, it is competent for either party to show by parol evidence what time is allowed in such a transaction by general custom, but not to shew that the parties themselves had agreed by word of mouth that a certain definite time should be allowed.

Plaintiff, a broker, having goods of T. in his possession for sale, contracted with defendant by a sale note delivered by the plaintiff to the defendant to the following effect: "I have this day bought in my own name on your account of T." certain goods, and signed by plaintiff "A. Fawkes, broker."

Held, that T. and not plaintiff was the person entitled to sue.

CHANCERY.

M. R. DILLWYN v. LLEWELYN.

Will—Construction—Tenant for life—Implied gift of inheritance—Acquiescence.

A testator devised his real estate to his wife for life; remainder to his son Lewis for life; remainders over. During his (the testator's) lifetime, his son Lewis requiring a place for his residence, the testator and his wife agreed that he should take possession of estate X., part of such real estates, build a house, and live there. The arrangement was evidenced by a memorandum, signed by the testator and his son Lewis, as follows:—"X., together with my other freehold estates, are left in my will to my dearly beloved wife; but it is her wish, and I hereby join in presenting the same to our son Lewis, for the purpose of furnishing him with a dwelling house." Lewis took possession of X., and expended during the lifetime of his father, and with his knowledge, a large sum, in the erection of a house and buildings thereon.

Held, that the transaction did not amount to a gift to the son of the inheritance in X., but only of the life interest of his mother therein.

V. C. K. WILLIAMS v. THOMAS.

Settlement—Right to follow trust money—After acquired property—Costs—Letter written "without prejudice."

A husband and wife under their marriage settlement are to have the use and enjoyment of all the personal estate of the wife, together with chattels of the husband during their lives, and of all such personalty as they may become possessed of or entitled to during the coverture. Shortly after the marriage the husband builds houses on land (not his own but adjoing his own) and obtains a lease and builds other houses, stating that they are built with his wife's money and then dies. The wife remains in possession of the property and dies intestate, and the heiress of the husband brings an action of ejectment against the wife's representative, and the tenants to recover possession. An injunction is obtained to restrain the action, the plaintiff, the wifes representative, claiming the houses and lease, and asking by his bill for a conveyance, account, injunction and receiver, the defendant's solicitor offering "without prejudice" to take the money laid out as a charge on the houses.

Held, that the money so laid out is a charge on the houses and leases, and is *corpus* and not income, and that the offer of the defendant's solicitor may be used against the plaintiff on the question of costs, and inasmuch as the decree is on the same terms as the offer, that the plaintiff must pay the costs.

M. R. JAY v. RICHARDSON.

Vendor and purchaser—Restrictive covenant by lessor binding on purchaser—Building public houses—Notice on sale of reversion—Duty of purchaser to enquire—Perpetual injunction—Time.

The owner of building land demises a plot thereof to A. for a term of forty years for the purposes of the erection of an hotel or inn, and the lease contained a covenant by the lessor that he, his heirs or assigns, would not at any time during the term let any house, building, or land for the erection of an hotel or inn, or for the sale of ale, beer, or spirits, within a quarter of a mile of the plot of ground so leased.

Held, that this restrictive covenant amounted to a covenant to do nothing, so as to suffer any house or building to be used as an hotel or public house within the prescribed distance, and that it was binding on the purchasers with notice, as well as the lessees of other plots of the building land within that distance who claimed under the lessor, and a perpetual injunction was granted to restrain a purchaser from allowing or letting his land during the term of forty years, to be used as an hotel or inn.

A reasonable delay in filing the bill, although it might have been material in the case of an application for an *ex parte* injunction, was held not to have effected the right of the plaintiff to the perpetual injunction prayed by the bill.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

DANIEL CLARKE, Esquire, M.D., to be an Associate Coroner for the County of Oxford.—(Gazetted January 17, 1863.)

JAMES S. CROOKSHANK, Esquire, to be an Associate Coroner for the County of Simcoe.—(Gazetted January 17, 1863.)

MARSHALL BROWN, Esquire, M.D., ALFRED AYERST, Esquire, HENRY TAYLOR, Esquire, GEORGE DENNISON, Esquire, PETER BAXTER, Esquire, WM. H. FRANKLIN, Esquire, JAMES HILL, Esquire, EDMUND GODFREY, Esquire, and BRAMWELL WATKINS, Esquire, to be Associate Coroners for the United Counties of Frontenac, Lennox and Addington.—(Gazetted Jan. 24, 1863.)

THOMAS M. ARMSTRONG, Esquire, M.D., to be an Associate Coroner for the County of Simcoe.—(Gazetted January 24, 1863.)

NOTARIES PUBLIC.

JOHN MACBETH CURRIE, of Niagara, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted January 17, 1863.)

CALVIN BROWN, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted January 17, 1863.)

REGISTRAR.

JAMES J. PEARSON, of Lloydtown, Esquire, to be Registrar of the North Riding of the County of York.—(Gazetted January 17, 1863.)

INSPECTORS OF ANATOMY.

DAVID THOMPSON, to be Inspector of Anatomy for the Village of Yorkville.—(Gazetted January 24, 1863.)

TO CORRESPONDENTS.

"CLERK 6TH DIVISION COURT, COUNTY NORFOLK"—Under "Division Courts."

"AN ENQUIRER"—Under "General Correspondence."

DIARY FOR MARCH.

1. SUNDAY..... *2nd Sunday in Lent.*
2. Monday ..... Recorder's Court sits. Last day for notice of trial for Co. Ct.
8. SUNDAY..... *3rd Sunday in Lent.*
10. Tuesday ..... Quarter Sessions and County Court sittings in each county.
12. Thursday..... Sittings of Court of Error and Appeal.
15. SUNDAY..... *4th Sunday in Lent.*
9. Monday..... Last day for service for York and Peel.
17. Tuesday..... Chancery Sittgs. Ex. and Hg. Hamilton and Sandwich. Last
22. SUNDAY..... *5th Sunday in Lent.* [day of notice for Brantford and London.
24. Tuesday ..... Chan. Sitt. Chatham. Last day of notice for Simcoe.
26. Thursday .... Declare for York and Peel.
29. SUNDAY ..... *6th Sunday in Lent. Palm Sunday.*
3. Tuesday..... Chy. Sitt. Brantford & London. Last d. not. Guelph & Sarnia.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

MARCH, 1863.

THE LATE SIR JOHN B. ROBINSON, BARONET.

The present year will long be remembered as that in which two much respected judges were taken from among us by the hand of remorseless death.

In our last number we had to deplore the death of that good and able man, the late Mr. Justice Burns. In the present number we are called upon to chronicle a still greater loss—that of the late Sir John Beverley Robinson, who for many years was Chief Justice of Upper Canada, and, at the time of his death, President of the Court of Error and Appeal.

Our duty is a sad one. We had hoped for many years to have been spared the necessity of performing it, but the Judge of all men, and Ruler of all things, has otherwise decreed.

The life of Sir John was a long and momentous one. He was no ordinary man. His example was a good one; his very name became among us a household word, typical of honor, honesty, and truth.

The family of the late Baronet is of old and good standing in Yorkshire, England. His lineage is traceable back to Nicholas Robinson, of Lincolnshire, gentleman, who lived in the reign of King Henry VII. The family afterwards removed to Yorkshire, and were settled there in the early part of the reign of Queen Elizabeth, living near Cleasby, a small village upon the Tees. One of their descendants, John Robinson of Cleasby, was married, in the reign of Charles I., to a daughter of Christopher Potter, Esq., by whom he had four sons. Two of these died young. Another, John, became Bishop of Bristol, and afterwards of London, in the reign of Queen Anne, and was a Lord Privy Seal; he also held the office of Ambassador to Sweden from 1683 to 1708, and was First Plenipotentiary at the Congress of Utrecht in 1712. Another son, Christopher, was the first of the family who emigrated to America. He had been educated at Oriel College, Oxford, and came out to Virginia as private secretary to Sir William Berkeley, Governor of the colony, in the reign of Charles II. Here he remained; became shortly afterwards Secretary for the Colony, and married, leaving a son, John, born in 1683, who subsequently became President of the Council of Virginia. This Mr. Robinson married Katherine, daughter of Robert Beverley, of Rappahannock, formerly of Beverley, in Yorkshire, England. From this marriage sprung ten sons, and on the breaking up of the "Old Dominion" by the war of independence some of the family espoused the Revolutionary cause, and their descendants are now in Virginia, connected with the Beverleys, Randolphs, and other old families of that State. Others adhered to the side of the Crown, and fought for it during the war. Among the latter was Colonel Beverley Robinson, who became a noted loyalist. His name and that of his residence, "Beverley," upon the Hudson, are connected with all the principal events of the revolutionary contest in that part of the country. He was at last attainted of treason by the American Government, and his property confiscated. By his marriage with Susannah Phillipse he had several children, one of whom, Sir William Robinson, K.C.H., Commissary-General, served in Canada in 1812; and another, Sir Frederick Phillipse Robinson, G.C.B., was in 1815 Commander-in-Chief of His Majesty's Forces in Canada, and Provisional Governor of the Upper Province. Another of the family, who adhered to the Crown, was Christopher Robinson, father of the late Baronet. This gentleman was educated at William & Mary College, at Williamsburg, Virginia, which institution he left on the breaking out of hostilities between the colonists and parent country. By Sir Henry Clinton he was commissioned to an ensigncy in the Queen's Rangers, then commanded by Colonel Simcoe, in which corps he served till the peace, in 1783, when the regiment was reduced. He then went, in company with many other U. E. Loyalists, to New Brunswick, where he resided for a few years, below Frederickton, on the St. John River. In 1784, he married Esther, daughter of the Rev. John Sayer, and four years afterwards removed with his wife and children to Canada.

The father of Sir John first settled at L'Assomption, but three years afterwards removed to Berthier, where his

second son, John Beverley, was born, on the 26th July, 1791. In the following year, at the solicitation of Major-General Simcoe, his former commanding officer, he removed to Upper Canada, where he first settled at Kingston, and shortly afterwards came to Toronto. Here he commenced the practice of law, and on the formation of the Upper Canada Law Society was elected one of its first benchers. He afterwards represented the United Counties of Lennox and Addington in the Legislative Assembly, and also held a commission as Deputy Ranger of Woods and Forests for Upper Canada. Of his public career there is little recorded, but he was well known to have been a gentleman of great courage and much kindness of disposition. He died, having for many years been a sufferer from gout, on the 4th November, 1798, leaving a family of three sons and three daughters. His eldest son, Peter, represented for many years the County of York in the Legislative Assembly, and afterwards became a member of the Legislative Council and Commissioner of Crown Lands, and he died in the year 1838. William, his youngest son, a gentleman of considerable ability and highly esteemed, is still living. He has also been in the House of Assembly, having for many years represented the County of Simcoe, he was at one time Inspector General of the Province, afterwards Commissioner of Public Works, and is now one of the two Commissioners of the Canada Company.

John Beverley having been left an orphan at the early age of seven years, Mr. Stuart, father of the late Archdeacon of Kingston, a gentleman universally respected, owing to his former friendship to Mr. Robinson, and attracted by the qualities of the lad, undertook the guardianship of his future course of life; and having placed him under the tuition of Dr. Strachan, now the venerable Bishop of Toronto, John Beverley accompanied him as a pupil, on the opening of the grammar school, to the village of Cornwall. Sir John Robinson's school-boy life was a true index of the future man. From the first he evinced that love of study, that untiring perseverance, and that steady industry, which so particularly characterized him in after years. He excelled in classics and English literature, and was proficient in mathematics. His mind, we are told, was wonderfully comprehensive; he could master the contents of a book sooner than any of his companions, and, owing to his extraordinary memory, could not only retain what he read, but, on a mere perusal, was able to repeat long passages from favorite authors with accuracy. He advanced with great rapidity at school, and soon attained the foremost place among his fellows. Uniting with his scholastic attainments uniform good conduct, he naturally became a great favorite with his tutor, a feeling which afterwards matured into a staunch and enduring friendship. It lasted, uninterruptedly even for a single day, through every phase of their varied lives, and terminated only in his death. Nor should we omit to mention that at this early age Sir John Robinson evinced a love of truth and amiability of disposition, and displayed in a marked manner those sentiments of piety and virtue, which continued to influence his future life. In the pastimes of the play-ground he took the same lead as he did in the school: few could match him in manly exercises and feats of agility; and his pleasantry and readiness to oblige made him the idol of his school companions, and their valued friend in after years. Among his cotemporaries, there were no less than four, besides himself, who attained to an eminent position on the bench—the present Chief Justice of Upper Canada, the Hon. Henry John Boulton, the late Chief Justice of the Common Pleas Sir James Buchanan Macaulay, and the late Mr. Justice Jones; a circumstance not only remarkable of itself, but strongly suggestive of the merits of the training, scholastic as well as social, which fitted so many men, all at one time boys together at a village grammar school, for such high standing in legal honors.

At the age of sixteen, having a strong desire to study law, he placed himself under articles to Solicitor-General Boulton, with whom he studied for three years. During this period he acted for a friend as Clerk of the House of Assembly, and having given general satisfaction, at the close of the session his services were rewarded by a vote of £50, "for his extraordinary attention to the duties of his office."

Unable to continue his studies during Mr. Boulton's absence from the country, he entered the office of Attorney-General Macdonald, and there completed the remainder of his time. Before, however, he could be called to the bar, his services were required in a far different capacity. In 1812 the American Government declared war against Great Britain, and chose Canada, as being the most vulnerable part of the empire, for attack. True to the traditions of his ancestors, he at once exchanged the pen for the sword, and forsook all private enterprises to follow the fortunes of the British flag. In the capacity of Lieutenant in the York Militia, he accompanied General Sir Isaac Brock in the bold expedition which resulted in the capture of Detroit. After the surrender of that important fortress, he was placed in the detachment which formed a guard over General Hull, who, with a large part of his force, had been brought down from Lake Erie as prisoners of war. On the return of the detachment, they were again sent, with recruited numbers, on active service, to the Niagara frontier. On the 13th of October, the memorable battle of Queenston Heights was fought, where the gallant Brock was killed, together with his aid-de-camp, Attorney-General

Macdonald. In this engagement Lieutenant Robinson commanded a flank company of militia, and was mentioned in Sir Roger Sheaffe's despatch as having "led his men with great spirit." Immediately after the action he was again detached to escort the American prisoners to Kingston, among whom was Colonel (now General) Scott, late Commander-in-Chief of the United States Army. Here Lieutenant Robinson's military career ended, for on his return to Toronto he learned to his great surprise that he had been appointed to the position of his former principal, as Attorney-General of Upper Canada. This office, by rule of rotation, properly fell to Solicitor-General Boulton; but having had the misfortune to be taken prisoner by a French privateer, on his voyage to England, he was unable to profit by the opportunity for promotion The appointment of Mr. Robinson, who had then hardly attained his majority, and might be said not to have completed his studentship, met with warm approval, and was strongly recommended by Judge Powell, "as fully justified by the high character the young student had already attained for legal knowledge, and the zeal and assiduity which he always brought to the performance of every duty that devolved upon him."

Having been called to the bar by a special rule of the Court of King's Bench, which was afterwards confirmed by an act of Parliament, Mr. Robinson performed the duties of his position until the year 1815, when Mr. Boulton returned to Canada, and assumed the office of Attorney-General, Mr. Robinson being appointed Solicitor-General in his stead.

Shortly after his appointment to the office of Solicitor-General, he procured leave of absence, and proceeded to England, in order to be called to the bar of the mother country. He was then however, only able to complete some of his terms, and was not called to the English bar, as a member of the Honorable Society of Lincoln's Inn, until 1823.

In 1817, Mr. Boulton became a Judge, and Mr. Robinson was again appointed Attorney-General, which office he continued to hold until his subsequent elevation to the bench. It was during this tenure of office that the celebrated controversy between the North West Company and Lord Selkirk occurred, ending in a most calamitous manner, and causing various criminal prosecutions to be instituted, the management of which necessarily devolved upon the Attorney-General. Time will not permit us to enter into the details of these important trials; and we cannot better describe the ability with which Mr. Robinson vindicated himself against the charges which had been preferred by Lord Selkirk, and the manner in which he conducted himself throughout, than in the words of Lord Bathurst's despatch to the Lieutenant-Governor of Upper Canada, in May, 1829. His Lordship stated, "that he had laid the report of the Attorney-General before H. R. H. the Prince Regent, and that he should not do justice to the Attorney-General if he were to forbear expressing the satisfaction which he had derived from his detailed explanation, and desiring the Lieutenant-Governor to assure him that the temper and judgment with which he had conducted himself during the whole of these long and difficult proceedings, had received His Royal Highness' entire approbation."

In the year 1821, Mr. Robinson entered the House of Assembly as the first representative for the town of York (now the city of Toronto), for which constituency he continued to sit until his appointment as Speaker of the Legislative Council. He at once joined himself to the Tories, and, with the same rapidity that attended his former promotions, he was soon the recognized leader of that party. In the following year, he was charged with a mission to England, for the settlement of the difficulties that had arisen between Upper and Lower Canada, relative to the apportionment of certain customs duties collected at Montreal. The general satisfaction which was entertained at the success of his efforts was suitably expressed in a vote of thanks from both branches of the Legislature. During this visit to England, the Imperial Government, in recognition of his public services in the colony, offered him the appointment of Chief Justice of the Mauritius; but he preferred to earn his well-deserved promotion among his own people, to whom he was strongly bound by ties of a private as well as of a public nature.

The refusal of this appointment redounds greatly to the credit of Sir John Robinson. The office was a valuable one not only from its high position, but from the remuneration attached to it which was nearly three times that of the highest official in Canada. His decision in this matter has shown more forcibly than any act of his life how great a love he bore to his native land, and establishes the fact, that his public acts were influenced solely by motives of the purest patriotism, and not by any sordid or selfish hope of personal advancement. He subsequently declined the proffered elevation to the bench in this country on the retirement of Chief Justice Powell, and it was only at the earnest solicitation of his friends that he was induced, on the retirement of Sir William Campbell in 1829, when the Chief Justiceship again became vacant, to accept that high office.

The political career of Sir John Robinson has been assailed times innumerable, and as often defended; but in this he has only shared the fate of all who have embarked upon the stormy sea of political life. It is neither our province nor desire to enter upon a discussion of the

merits or demerits of the policy of the government of which Sir John Robinson was the head, and which ruled Upper Canada for so many years. If, viewing his political conduct by the light of modern experience, it can be said that in his opposition to Responsible Government he erred, all will admit that his error was of the head, not of the heart.

Sir John held the doctrine that parliamentary representation was essentially different from delegation; that as a representative, he was neither elected to legislate for a particular class, nor to advocate exclusive interests; nor was he a mere agent, with defined powers, and intrusted, as it were, with proxies of the votes of his constituents, to give effect to limited instructions. He claimed the right of individual judgment, and that he was intrusted with discretionary powers, to be exercised as conscience and circumstances suggested. In an address to his constituents he thus expressed himself: "You will do me the justice to remember that I have always plainly told you that there was no object I could propose to myself in my political career, for which I would exchange the satisfaction I desire to enjoy at its close, in the reflection that I have ever moved in that path which my judgment pointed out to be the right one. Whenever it shall appear that this conduct disqualifies me for running the race of popularity, I shall cheerfully submit to the consequences."

As a parliamentary leader, Sir John has scarce ever been equalled in this colony. Amid the turmoil and excitement attendant upon constitutional changes, he not only kept his obligations to his friends, but, without pandering to their passions, gained the honorable estimation of even his bitterest opponents. The secret of his success was his sterling honesty of purpose, and his unbending integrity in its performance. He could be courteous and conciliating to all, without weakening his influence or compromising his principles; and both friend and foe applauded that reliability and truthfulness, which at once despised artifice and all kinds of deceit. As a speaker, Sir John Robinson had few equals. He was a good debater, forcible in expression, and convincing in argument. His ability in responding to an opponent was unmatched. Never taken by surprise, he has been known, after a long and stormy debate, conducted against him by no mean antagonists, to rise, without the slightest preparation, and grapple with every proposition, leaving no argument unanswered or misstatement uncontradicted. He had great command of language. His speaking did not, perhaps, often rise to eloquence, in the general acceptation of the term. He seldom attempted to electrify, or appeal to the feelings and passions of his audience; he looked upon eloquence and wit as weapons of delicate nature, the use of which was blunted and impaired by frequent employment. But on the few occasions when he appealed to the loyalty of his followers, or repelled, in a burst of virtuous indignation, some ill-intentioned personal attack, he seldom failed to rally his friends into enthusiasm, and cover his opponents with shame and confusion. On one occasion he thus replied to an opponent: "My acquaintance with the honourable member is of long standing, and I have derived a respect for his character as an individual that has not been destroyed by the extreme injustice he has exhibited towards myself individually, as a member of this House. In his private relations I see there is much to esteem, and I respect him for his integrity in personal transactions; but from my observation of his public conduct during the time we had sat together in a former parliament, I must declare it to be impossible that any candid and honorable mind can seriously approve of it, for it was at once ungenerous and unjust. He seemed to have a mind formed for brooding over the most unworthy suspicions, and suffered feelings not of the most amiable or enviable kind so far to overcome his judgment and obscure all sense of justice, that he would, with a degree of heat and impatience that almost prevented his utterance, inveigh against the public authorities of his country, and support his convictions by statements of fancied grievances, which vanished the very instant they were examined. So here the honorable and learned member, upon an occasion that neither called for nor justified such a display of temper, has sought relief for his mind by bringing up charges against me, which, if there was the slightest foundation for them, ought to disgrace me as a public officer and a man. All this time has he been wearing the smile and holding out the hand of friendship, while it is now quite evident he has been tormented with a feeling towards me, for which God knows I have never given him cause, and which goads him on to conduct in the highest degree unjustifiable and indefensible. * * * * As to his personal attacks upon me, I beg him to be assured that I regard them with unqualified contempt. I know the motives by which they are prompted, and I expect he will proceed to the last inch in his attempts to injure me; but I defy his efforts; I ask no indulgence; I serve a just Sovereign; that conviction is sufficient to render me fearless and independent; and I assure the honorable and learned member that all such efforts will recoil, as fit they should do, upon his own head."

The fruits of Sir John Robinson's life as a legislator are to be found in the pages of our statutes. Several of our most important acts were framed by his own hand. They bear evidence of his great legislative ability, and of his clear perception of an existing evil or defect, and the remedy most fitted to remove it. They show his strong attachment

to monarchical institutions—his intention to preserve the relations of the Province with the empire; and they are further characterized by that close approximation to those British institutions which have so long been our pride and our boast.

Sir John Robinson's political life may be said to have ended upon his elevation to the bench, though by the nature of his appointment as Chief Justice he was till the Union, President of the Executive Council and Speaker of the Upper House. Little of general interest occurred in the proceedings of that chamber from the time he entered it until the union of the Canadas in 1840, when he ceased to be a member.

On the 4th December, 1837, commenced the Rebellion, headed by the late William Lyon Mackenzie. Every loyal subject flew to arms. Sir Francis Head, in his despatch to the home government, mentioned, that "one of the first individuals he met, on going to the City Hall, with a musket on his shoulder, was the Chief Justice of the Province." Among the necessary consequences of this disloyal outbreak were several prosecutions for high treason. Sir John Robinson was the Judge whose painful duty it became to try the unfortunate Lount and Mathews, who had been ringleaders in the rebellion, and their execution has been made the ground for affixing a stigma upon the authorities of that time. It has been asserted that the Government were in receipt of a despatch from England, forbidding capital punishment for political offences without the approval and sanction of the Imperial authorities; but like many other charges made under similar circumstances, we believe this to be quite incapable of proof, and altogether contrary to facts. We believe that in truth no such despatch was known to, or received by, the Government. So clear is the memory of the Chief Justice from the imputation of having advised the Lieutenant-Governor to carry out the extreme penalty of the law, that he had ceased for some time previously to be a member of the Executive Council. Indeed we are not sure that Sir John was ever a member of Sir Francis Head's cabinet. In passing sentence on the prisoners, he very properly dwelt upon the enormity of their crime, but his remarks were imbued with compassionate and sorrowful feeling; and a gentleman (in court at the time) has remarked, "that after the prisoners had pleaded guilty, and the sentence of death was passed on them, of the three individuals concerned the Chief Justice was certainly the most painfully affected."

The last political act of Sir John Robinson was his able reply to Lord Durham's Report, in 1840, the merits of which were thus reviewed by the *Times*: "After having given it a most attentive perusal, we feel warranted in aying, though without absolutely committing ourselves to the opinions of the author, that it contains a larger stock of useful and authentic information, in regard to the present position, wants and prospects of that colony, than any other production on the same subject we have happened to meet with." The independent spirit and true patriotism evinced by Sir John Robinson upon this occasion, is entitled to the greatest praise. By the manner in which he wrote he placed himself in direct antagonism to the views of the Governor and his advisers. The greatest exertions were used, both by threats and promises, to induce him to withdraw his opposition. They proved, however, of no avail.

Though we may lament the absence of so great and conscientious a statesman from the halls of the senate, yet, for the sake of his fair fame, we rejoice that he was no longer arrayed in the strife of political warfare. For two-and-twenty years his star, clear and brilliant, never paled or waned. During that lengthened period the voice of the people was unanimous in admiration of his talents, and in praise of his integrity; and even his former opponents, forgetting past differences, vied with his friends in the strength and sincerity of their applause.

Neither time nor space will permit us to enter into the details of his judicial career, or to particularize his decisions, which occupy so large a place in the many volumes of our Queen's Bench reports. His judgments firmly establish his fame as a jurist, and will be ever a mine of priceless value. They will for all time remain a noble monument in memory of departed wisdom—a vast storehouse of legal wealth, from which ready supplies of judicial knowledge may hereafter be drawn. In this youthful country we have had no state trials of such importance as to be recorded with legal accuracy, and perused with interest as matters of history; and though there are many cases in our reports which have caused some stir at the time, and have involved deeply important interests, yet they are so chiefly connected with individual enterprise, that it would be impossible to review them in the limited space of a memoir.

Sir John Robinson was, we believe, the youngest Chief Justice that ever sat in a British court of justice. His reputation at the bar had qualified him for the post, for he certainly had no equal in his day, and his judicial career has established the propriety of his early elevation. His practice at the bar, though from the commencement large and lucrative, considering the circumstances of the colony, was necessarily limited. It may seem strange to those who knew Sir John as a statesman and a Judge, and have observed his determination of character, to be told that it was by slow degress that he obtained that self-possession which so distinguished him in the senate and on the bench. Such, however, was the fact. In the first case he ever

brought before a jury, he experienced a partial failure. It was an action of assumpsit. The young advocate was entirely confused in his address to the jury, and after some few and incoherent remarks in explaining the nature of the action resumed his seat. Mr. Justice Scott, who had entrusted to him his business on ascending the bench, was presiding at the time; and his lordship, either out of disappointment in his friend, or of remembrance of his former zeal for his clients' interests, leaned over his desk, and in ill-disguised astonishment exclaimed, "*Why! is that* ALL?" Indeed Sir John's nervousness was no slight obstacle to overcome, for he himself said that it was literally true that for some time after he had been called to the bar, he never saw one of the jury. That he surpassed his cotemporaries at *nisi prius*, we are not prepared to affirm; we think he had certainly his equals; but in soundness and depth of legal knowledge, he was preëminent.

But, distinguished as was his reputation in the senate and at the bar, it was on the bench he displayed the highest perfection of his attainments. We know not in which judicial capacity we admired him most. At *nisi prius* he presided with calmness, courtesy and dignity. His strict impartiality and love of truth was proverbial; and whether it was a Queen's counsel or the most inexperienced barrister on the rolls, he paid the same attention to his argument, and gave to each equal consideration and protection. His love of order, and his sense of the respect due to the dignity of a court of justice, made him prompt to suppress any indecorum; and when disapproval or even censure was called for, he befittingly expressed his opinion, though always in a courteous manner. His addresses to the jury were delivered with ease and grace, and were clothed in the clearest and simplest language. He was remarkable for his accuracy in stating the whole facts of the evidence, and it was seldom that a new trial was granted on the grounds of his misdirection on points of law. In sentencing prisoners, full of tenderness and compassion, he indicated the charitable feelings of his heart; and the kind and wholesome advice he was in the habit of giving to those who had entered on a career of crime, and for whose reformation there was yet some hope, was marked by the deepest feeling.

In full court, Sir John Robinson was always the pride and favorite of the bar. The reputation he enjoyed, and the weight of his opinion, greatly increased the business of the court in which he presided. He was always distinguished for his readiness and acuteness, and he had seldom any difficulty in grasping the most intricate cases. In his hands the business of the court was never in arrear, and the knowledge of unfinished work was a burthen on his mind, to relieve himself from which he would use the most strenuous exertion. In every case that was reserved, he gave his decision in writing; and though some of his judgments are considered lengthy, the fault, if it exists, may be accounted for by his great anxiety to make them clear and satisfactory. Few opinions will ever command more respect, or carry more weight, than those delivered by Sir John Robinson. They are remarkable for their lucid argument, deep learning, strict impartiality and pure justice; they are untinted by fanciful theories, prejudice, or political bias; and they bear evidence of that careful research, that deep thought, that unwearied application and untiring patience, which he brought to bear on every subject that came under his consideration. In whatever branch of jurisprudence we examine his judgments, we find evidence of his intense study. Equity or common law, civil or criminal law, pleading, practice, and evidence—all exhibit the same copiousness of research, and the profound comprehensiveness of his legal attainments. He may be said to have studied law as a science, but in the words of Mr. Whiteside, "he objected to the triumph of form over substance, of technicality over truth;" and though he gave to legal objections their full force and effect, his quick apprehension of facts soon separated the chaff from the grain.

It was seldom that his judgment was not upheld by the majority of his court, or affirmed on appeal; and, with one exception, his decision has never been reversed on reference to England. In the well known case of *Paterson et al.* v. *Bowes* (4 Grant 170), for the recovery of £10,000, on a bill filed by some of the inhabitants of the city of Toronto, on an alleged breach of trust on the part of the mayor of the city, Sir John Robinson's opinion was only supported by one other judge, upon the appeal from the Court of Chancery. He, however, adhered to it, and in a judgment of great length and undoubted ability, stated his objections to the conclusion of his brother judges. Mr. Justice McLean, the present Chief Justice, supported Sir John; and though the case was carried to England upon the strength of their opinion, it is the only instance in which their decisions were not upheld by the Privy Council.

As an equity judge, Sir John Robinson was no less entitled to respect than in the courts of common law. One of the most important appeals was the case of *Simpson* v. *Smith* [Error and Appeal Cases], where the Court of Chancery held, that under the 11th section of the Chancery Act of this Province, they might, under certain circumstances, refuse redemption, notwithstanding twenty years had not elapsed since the mortgagor went out of possession. In the result of this case an immense tract of land and important interests were at stake; it involved the whole of the property known as Smith's Falls. The judg-

ment of the Court of Chancery was appealed from to the four judges who at that time sat in the Court of Appeal. They were equally divided in opinion, and the case was carried to England. There the court was unanimous, and the Right Hon. Pemberton Leigh (now Lord Kingsdown) remarked, with reference to the judgment of the Chief Justice, that "he never saw a judgment more elaborately and carefully reasoned, or more admirably expressed."

The last case of public interest which occurred during the period Sir John Robinson presided in the Court of Queen's Bench, was the famous Anderson Extradition case. The sympathy that was evinced both here and in England on behalf of the fugitive, is of too recent date to be forgotten. Opinions were freely expressed; public meetings were held; newspapers teemed with leading articles, and the anti-slavery views of their correspondents; and even the judgment of the court was anticipated. The Chief Justice had probably formed a decided opinion upon the argument; for in deferring the decision of the Court, a few days afterwards, on account of one of the judges not having arrived at a conclusion, he stated that his own mind was made up, and he was then ready to express it. The following week the judgment of the court was delivered, in favor of the surrender of the prisoner, McLean, J., dissenting; and though their judgment was neither in support of nor against slavery, but based entirely upon the consideration of the treaty existing between the United States and Canada, so strongly prejudiced was public opinion that the popularity of the bench seemed likely to suffer. But, in the words of an able English cotemporary, "These judges, proof against unpopularity, and unswayed by their own bitter hatred of slavery, as well as unsoftened by their own feelings for a fellow-man in agonizing peril, upheld the law made to their hands, and which they are sworn faithfully to administer. *Fiat justitia.* Give them their due. Such men are the ballast of nations." The case was afterwards brought up before the Court of Common Pleas; and having been argued there on a technical point that had not been raised in the Queen's Bench, the prisoner was discharged. Though no judgment was given in the Common Pleas upon the broad question as to the right of the United States authorities to the slave, each of the judges was careful not to express dissent from the decision of the other court. (In re Anderson 11 U. C. C. P.)

Canada has never had a judge who so completely enjoyed the confidence of the entire legal profession as Sir John Robinson. His natural affability, his unassumed dignity and unruffled temper, made him not only revered but even loved. By his brother judges he was regarded with admiration and no opinion were they so anxious to obtain, or valued so high. The proudest of the bar had never to complain that they received no credit at his hands for eloquence or ability, and the humblest barrister who occupied the furthest bench had never to murmur that his feeble efforts met with no encouragement. Even the youngest student approached him with respectful assurance, and there are many who will recall with grateful remembrance the kind and assisting hand he extended to them. To all he exhibited the same patient attention and equality of temper; and it was truly remarked by the learned Treasurer of the Law Society, that during all the time he sat on the bench, extending over a period of nearly the third of a century, no one could recall an unkind expression, or remember a single instance of impatience. But the appreciation of his judicial services was not confined to the precincts of the courts. The whole country has borne testimony to his worth. People had long been accustomed to look with confidence to his decisions, to regard the purity of his administration of justice as the foundation of their liberties, and his impartiality as the palladium of their most cherished rights. Nothing that we can pen will add to the unsullied purity of his character, for never did ermine grace truer nobility. Blameless did he preserve the chastity of his oath. With no cause unheard, no judgment perverted, "he did well and faithfully serve our Lady the Queen and her people in the office of Justice; he did equal law and execution of right to all the Queen's subjects, rich and poor, without having regard to any person."

In the month of June last, Sir John Robinson took his farewell of the bar. He was still to remain among them as President of the Court of Appeal, but the close connection that had hitherto existed between them was then finally severed. He had seen nearly all his former companions pass away, and only one of his early compeers was there to witness the close of his long, useful and eventful career. As he had been the youngest of his Sovereign's judges, so he now retired, having presided a longer period than any Chief Justice before him, in any of the courts of Her Majesty's dominions. The Bar presented him with suitable addresses, and the Law Society honored him with the most magnificent banquet that ever took place within the Province.

Sir John Robinson received not only a full share of distinction in his native country—the gratitude and respect of his fellow-colonists having elevated him to a position second only to Her Majesty's representative—but he also won well merited honors in England. In 1838 he was offered a knighthood, which honor, for private reasons, he respectfully declined. In 1850, our gracious Sovereign was pleased to appoint him a Companion of the Bath; four

years afterwards he received from Her Majesty his patent as a Baronet of the United Kingdom; and on his last visit to England, in 1856, the University of Oxford conferred upon him the honorary degree of Doctor of Civil Law.

It is not the common fortune of public men to have their services appreciated during the performance of their labors, or to be admitted as "prophets in their own country." It happens, however, that the services of some men are so valuable, and their merits so universally recognized, that they receive as it were by public acclamation their meed of honor. Sir John Robinson never appeared in public without receiving that attention to which his virtues and services entitled him.

His literary attainments were of no ordinary nature, Accomplished in the classics, he has been frequently known to choose a Latin author to occupy his leisure moments on the circuit. He took great interest in science, and was extensively read in philosophy and history. He excelled in the ease and elegance with which he composed and was a complete master of every branch of English literature. Some of his charges to grand juries are master-pieces in their way, and his addresses on public occasions were remarkable for their erudition and classic beauty. One of the finest of these addresses he delivered on laying the foundation-stone of the Provincial Lunatic Asylum. It will bear favorable comparison with similar productions of the ablest writers, and its vein of thought and purity of style can scarcely be surpassed. His frequent quotations showed his familiarity with the writings of the best poets, and a few fragments of his youthful productions in verse indicate his taste for that attractive literature. He took great interest in studying the works of British statesmen, and the writings of the English essayists were his delight.

On the foundation of the University of Trinity College, Sir John Robinson, in recognition of his virtues and high attainments, was elected Chancellor by the unanimous voice of its Senate. This high position he greatly valued, and he devoted much of his time and ability in promoting the interests of the institution, to which he was warmly attached.

Sir John Robinson's social life exercised a great influence on the masses. His love of virtue, his abhorrence of vice, and his avowed enmity to immorality and excess, exercised, through force of example, an undoubted influence for good on the minds and morals of the people. The purity of his life was a pattern to all, and his unvarying consistency was watched and imitated by the pious and good. His private life gained for him, if possible, more thoroughly the affections of the people, than even his public services.

The personal appearance of Sir John Robinson was particularly attractive. His features were refined and impressive, and his open countenance, full of benevolence and dignity, was scarce ever clouded with a frown, or darkened by reservedness. The dignity and gracefulness of his deportment was noticeable by the most casual observer. With an entire absence of affectation, he had that ease of movement, that refinement of taste, and suavity of manner, which is the certain index of a well-bred man: in fact he was a true type of "nature's gentleman."

The leading trait in Sir John's character was his loyal obedience to the call of duty. "Indeed," said a cotemporary, "it was his persistent devotion to duty that led to the great mistake of his life. Gifted with a healthful and active mind, together with a strong and vigorous constitution, he overlooked the great truth, that none of nature's laws can be transgressed with impunity, and that there are boundaries which human exertion must strive in vain to pass; and with a zeal and noble self-devotion which neither the premonitory warnings of disease nor bodily suffering could abate, he weighed down his earthly tenement by incessant toil, and, rather than seek the necessary repose which length of services permitted, and impaired health demanded, he sacrificed his valued life in obedience to the sacred dictates of conscientious duty."

It is difficult, in a limited space, to give a true estimate of Sir John's character. He had none of those peculiarities or eccentricities which frequently characterize the dispositions of great men. The nobility of his mind, in the contemplation of the realities of life, had that contempt for the vanities of the world, without which no man can be truly great. He rose above the sordid appetite of loving money; and he would rather have sacrificed all that he had, than have it even supposed that he had gained personal advantage at the public expense. On one occasion, in return for his public services, he was offered a whole township by the Imperial Government, but declined to accept it.

Sir John had the faculty of order and great method in all that he did. He was gifted with remarkable accuracy and strength of memory; he was one of those "who never forgot anything;" and from all parts of the country he was frequently appealed to, to explain the relationship of present affairs with the distant past.

His manners and tastes were simple and unaffected. He was of easy access, obliging to all, amiable, cheerful and instructive. He was humble without ostentation, complaisant without design, courteous without flattery. His conversation was varied with lively illustrations of wit and humour. It was one of his rules never to speak of on judicial matters in public, and he had the happy facility of unbur-

thening his mind from his onerous judicial labors when in the company of his friends. His amusements were simple, and regulated with prudence. In his younger days he was a good horseman, and in later years found constant enjoyment in improving the garden attached to his residence. Generously hospitable, none enjoyed sociability more than Sir John, and it was his greatest pleasure to promote good humour and happiness. He had a largely extended circle of friends, and retained to the last the intimacy of his early associates. He daily won golden opinions from his more recent acquaintances. He was not dogmatical or pertinacious in his private opinions, nor did he ever betray the least anxiety to lead in conversation, or to disparage the opinions of others; at the same time he never disguised his decided contempt for anything tricky, ignoble or mean. His kind heart was always ready to welcome or advise a friend, and his hand was at all times open to relieve any urgent case of suffering or necessity. With such pleasing virtues, few could help loving him. There was something "homespun" about him: his geniality of manner, his amenity of disposition, his genuine kind-heartedness, and his downright honesty of purpose, made him the idol of society, and the valued companion of all who were honored by his friendship.

Nor must we omit the mention of his beautiful domestic life. His home was a pure and happy one, and was hallowed by the virtues of his amiable family. A true and tender husband, a kind and indulgent parent, a sincere and constant friend, he was endeared to all his intimate acquaintances, and was little less than adored by the members of his family.

Sir John was emphatically a good man; an upright, God-fearing Christian, who, by deeds of piety and love, let his light shine before men, and served his God above many. His attachment to the Church of England, in whose principles and doctrines he had received careful instruction, was deep-seated and unwavering. It was one of his dearest objects in life to promote its welfare, and establish it in his native land. He honored it by his religious excellencies, as well as by an open advocacy of its cause in its temporal struggles. Though he was uncompromising in the doctrines taught by his Church, the charity of his religious opinions extended to all denominations of professing Christians. He had love without bigotry, zeal without fanaticism. His ideas of religion were enlarged and noble, not confined to the preciseness of a ceremonial, or a mere profession of belief. He made it a rule never to speak ill of any one, observing the divine command, "Love thy neighbour as thyself." To be of use, or to give pleasure to his fellow-creatures, was an element of his nature, and essential to his happiness. Another admirable trait in Sir John's character was his strict observance of the Sabbath. On that day he resolved never to perform any secular duty, and, no matter how great was the press of business, or how strong the temptation, nothing could induce him to make an exception to this sacred rule. Indeed the lofty religious sentiment of Sir John Robinson was the talisman to his happiness. It exalted his mind above the vanity of worldly things; it endowed him with a loyalty of character, an honesty of purpose, and an integrity in the performance of duty. Supported by this sentiment, neither his intercourse with the world, nor his arduous public services, could dull the amiability of his disposition; nor could the fatigue of long confinement, or the irritability of pain, ruffle the exquisite sweetness of his temper.

For many years of his life, Sir John was a severe sufferer from hereditary gout. His last attack, which in the end proved fatal, extended over a period of nearly six months, during which time he was frequently subject to severe and acute pain. He bore it throughout with singular patience and hopefulness. Early in January, contrary to the express wish of his friends, he presided at the Court of Appeal, and on his return home persisted in preparing his judgments. The effort was his last. On the night of Wednesday, the 21st, his disease assumed an aggravated form, which compelled him next morning to take to his bed, from which he never afterwards rose. On the following Saturday and Sunday there was a slight change for the better, but on the Monday the disease again assumed a more serious aspect, and twenty-four hours afterwards all hope for his recovery had vanished. He died on Saturday, 31st January. All the beauties of his Christian graces shone forth in his last hours. Peaceful, happy and resigned, retaining his consciousness almost to the last—surrounded by his own beloved ones, in whose sorrowful prayers he calmly joined; cared for and soothed by all that skill and tender affection could bestow, in the blessed assurance of a heavenly rest, he gently resigned his soul to Him who gave it.

At the request of the Law Society, and many influential citizens and friends, the funeral was allowed to assume a character which would permit of an expression of public feeling. On Wednesday, 4th February, the remains were removed from his late residence to Osgoode Hall, to be conveyed thence to their last resting-place. The Hall and Court were hung with black, which, as it wound round the white Caen pillars, had a mournful and impressive effect. Thither were assembled all classes of society. The Militia appeared in full force, together with the Officers of Her Majesty's troops in garrison. The Clergy of all denominations, the Judges of the Courts, the members of the Bar,

the Universities, the County Council, the City Corporation, and citizens of every class, creed and calling, swelled the ranks of the mournful procession, in token of their last homage to his memory. The weather, though intensely cold, could not suppress the feelings of the people. The streets were thickly lined; every store was closed; business was universally suspended, and black was hung from many of the windows facing the streets through which the cortege passed. From the Cathedral, where the service was read to a densely crowded audience, the procession continued its way to St. James's Cemetery. There the last offices were performed; the Church offered one more prayer; friends dropped one more tear, and the cold earth closed over all that was mortal of SIR JOHN BEVERLEY ROBINSON.

So lived in honor and died in peace the greatest man that Canada has ever produced.

SPRING ASSIZES, 1863.

EASTERN CIRCUIT.

HON. CHIEF JUSTICE DRAPER.

Cornwall	Wednesday	18th March.
Brockville	Tuesday	24th "
Kingston	Monday	30th "
Perth	Wednesday	8th April.
Ottawa	Tuesday	5th May.
L'Orignal	Monday	11th "

MIDLAND CIRCUIT.

HON. MR. JUSTICE HAGARTY.

Belleville	Monday	16th March.
Cobourg	Tuesday	24th "
Whitby	Monday	6th April.
Peterborough	Tuesday	14th "
Lindsay	Tuesday	21st "
Picton	Tuesday	28th "

HOME CIRCUIT.

HON. MR. JUSTICE MORRISON.

Milton	Tuesday	17th March.
Barrie	Monday	23rd "
Welland	Tuesday	31st "
Hamilton	Monday	6th April.
Niagara	Monday	20th "
Owen Sound	Tuesday	12th May.

OXFORD CIRCUIT.

HON. THE CHIEF JUSTICE OF UPPER CANADA.

Woodstock	Tuesday	17th March.
Brantford	Tuesday	24th "
Cayuga	Wednesday	1st April.
Stratford	Tuesday	7th "
Berlin	Monday	13th "
Guelph	Monday	20th "
Simcoe	Tuesday	28th "

WESTERN CIRCUIT.

HON. MR. JUSTICE RICHARDS.

London	Monday	16th March.
St. Thomas	Wednesday	25th "
Goderich	Tuesday	31st "
Chatham	Tuesday	14th April.
Sarnia	Tuesday	21st "
Sandwich	Tuesday	28th "

HON. MR. JUSTICE CONNOR.

City of Toronto	Monday	16th March.
York & Peel	Monday	13th April.

JUDGMENTS.

QUEEN'S BENCH.

Present: MCLEAN, C. J.; HAGARTY, J.; CONNOR, J.

February 7, 1863.

Darling v. *Weller.*—*Held*, that a mere retainer does not bind an attorney to register and re-register judgments. Rule absolute to enter non-suit.

Winter v. *Keown.*—Rule absolute for new trial on payment of costs within a month, else non-suit.

Cornwall v. *Gault.*—Rule absolute for new trial. Costs to abide the event.

Jenkins v. *Davis.*—Rule absolute to enter non-suit.

Fortune v. *Cockburn.*—Judgment *non obstante* on second issue.

The Queen v. *Corwin.*—*Held*, that on an indictment for manslaughter in the short form given by the Legislature, not in terms charging an assault, there can be no conviction for an assault. Conviction quashed.

The Queen v. *Shuttleworth.*—Conviction affirmed.

Craig v. *Bowen.*—Rule *nisi* discharged.

Present: MCLEAN, C. J.; HAGARTY, J.; CONNOR, J.

March 2, 1863.

Lomas v. *British American Insurance Co.*—Verdict to be entered for defendants on the second plea. 1st plea and replication to the second plea bad on demurrer. Rule absolute.

Provisional Corporation County of Bruce v. *Cromar.*—Judgment for defendant on demurrer, and rule *nisi* for new trial discharged.

Robertson v. *Freeman.*—Judgment for defendant on special case.

Glass v. *Whitney.*—Judgment for defendant on demurrer.

Thayer v. *Fuller.*—Rule absolute for new trial without costs.

Cataraqui Bridge Company v. *Holcomb.*—Rule *nisi* discharged.

Hendershott v. *Hendershott.*—Rule amended by directing new trial upon payment of costs.

Present: MCLEAN, C. J.; HAGARTY, J.; CONNOR, J.

March 7, 1863.

Oswald v. *Eybert.*—*Held*, that after a return of *nulla bona* to a *fi. fa.* goods, issued to the county in which the venue is laid plaintiff may issue at once *fi. fa.* lands to other counties, but cannot issue a *fi. fa.* goods to a different county, and make a seizure in that county, concurrently with the issue of a *fi. fa.* lands to that county. Rule absolute without costs.

Colgan v. *Hayden.*—Rule *nisi* for new trial discharged.

Ham v. *Lasher.*—Rule absolute for new trial. Costs to abide the event.

Gayner et al v. *Salt.*—Rule *nisi* granted.

Bleakley v. *Easton.*—Verdict reduced to $2,200.

Bleakley v. *Easton.*—Judgment for plaintiff on demurrer. McLean, C. J., *dubitante.*

Irwin v. *Ingraham.*—Rule absolute for new trial on payment of costs.

Murray v. *McCarty.*—Rule discharged.

Regina v. *Dawes.*—Conviction affirmed.

Ganton v. *Sisk.*—Rule absolute for new trial. Costs to abide the event.

Buffalo and Lake Huron Railway Co. v. *Hemmingway.*—Rule *nisi* granted.

COMMON PLEAS.

Present: DRAPER, C. J.; MORRISON, J.

March 2, 1863.

Bullen v. *Moodie.*—Judgment for sheriff and his deputy, but for plaintiff against remaining defendants.

Held, that an ex parte order to commit a judgment debtor, though a justification to a sheriff, is no justification to plaintiffs or their attorney.

Baldwin v. *Elliott.*—New trial on payment of costs.

Allan v. *Fisher.*—Rule discharged.

McAlpine v. *Township of Ekfrid.*—Rule absolute on payment of costs.

Munn v. *Galbraith.*—Rule discharged.

Kaley v. *Donaldson et al.*—If plaintiff elect to take verdict for $100, appeal dismissed, otherwise allowed.

Bender v. *Jesselin.*—Rule discharged.

Thompson v. *Falconer.*—Rule absolute without costs.

Reg. v. *Pierce.*—Defendant convicted for celebrating a marriage after having been expelled from the church, and while defendant was not a clergyman. Conviction held good.

McKay v. *Maguire.*—Appeal allowed as to new trial.

Whyte v. *Fee.*—Appeal allowed and a nonsuit entered in court below.

Simpson v. *County of Lincoln.*—Rule absolute to quash by-law.

Maynard v. *Gamble.*—Rule absolute to set aside nonsuit.

Smith v. *Evans.*—Rule absolute for new trial without costs.

Matthewson v. *Henderson.*—Judgment on demurrer for defendant on 4th and 5th pleas; for plaintiff on 6th, 7th and 8th pleas. Leave given to plaintiff to amend on payment of costs.

Crawford v. *Beard.*—Judgment for defendant on demurrer.

Smith v. *Warner.*—Rule absolute for new trial without costs.

Thompson v. *Crawford.*—Rule absolute to set aside nonsuit and enter verdict for £35.

Phelps v. *Wilson.*—Rule absolute for new trial on payment of costs.

Present: DRAPER, C. J.; RICHARDS, J.; MORRISON, J.

March 7, 1863.

The Queen v. *Port Huron, Whitby and Scugog Railwry Co.*—Rule granted to the agent of the Attorney General.

Hodgins v. *Hodgins.*—Rule to reduce verdict by the sum of £39 9s. 1d. (Richards dissentiente.)

Henneker v. *British America Assurance Company.*—Judgment for plaintiff on demurrer to 2nd and 5th pleas: judgment for defendants on demurrer to replication to third plea. Rule absolute to enter nonsuit, on application of Galt, Q.C., made rule to enter nonsuit instead of verdict for defendants.

Crooks v. *Dickson.*—Judgment for plaintiff on demurrer.

Cornell v. *Power.*—Rule for new trial discharged.

McGuffin v. *Ryall.*—Verdict for defendant on 1st, 5th and 7th pleas: verdict for plaintiff on other issues. Damages, $908. Wood obtained a rule *nisi* to enter judgment for plaintiff on issues found for defendants *non obstante veredicto*. Rule to enter for judgment *non obstante veredicto* discharged. RICHARDS, J., dissenting. Defendant obtained rule to reduce verdict. The other rule being discharged unnecessary to express any opinion as to this rule. RICHARDS, J.—I think the plaintiff entitled to recover, notwithstanding the verdict for the defendant.

Turner v. *Corporation of Brantford.*—Judgment for the defendants on demurrer to 2nd plea.

Cochrane v. *Commissioners of Peterborough Town Trust.*—Appeal allowed, and judgment entered for the defendants on demurrer, on ground that defendants are sued as a corporation, and should have been sued as trustees.

Re Bright v. *City of Toronto.*—Rule discharged with costs.

Ex parte David Mason and Church. Rule absolute for a *mandamus.*

Snider v. *Snider.*—Rule absolute to reduce damages to 1s.

Buck v. *McCollum.*—Judgment for tenant on first plea and for demandant on second plea.

McKay v. *Rayner et al.*—Rule absolute on payment of costs.

Huntingdon v. *Lutz.*—Rule absolute for injunction.

Shaw v. *Morton.*—Stands.

Bank of Upper Canada v. *Grand Trunk Railway Co.*—Stands.

Reg. v. *Corporation of Paris.*—Stands for judgment in term.

Reg. v. *Northern Railway Co.*—Stands for judgment in term.

SELECTIONS.

SELECTIONS FROM OLD REPORTERS AND TEXT WRITERS.

In "The Epistle Dedicatory" to Croke's Reports, Sir Harbottle Grimston writes of the reporter, his father-in-law, that he was continued a judge of the Court of King's Bench, "till a certiorari came from the great judge of heaven and earth, to remove him from a human bench of law to a heavenly throne of glory."

The gravity of the poor laws was enlivened, and the sterility of settlement cases agreeably refreshed, by a catch introduced by Sir James Burrow into the report of *Rex* v. *Norton* (Burr. 124). The reporter says, "I do not find the case of *Shadwell* and *St. John's Wapping* (which had been cited in the argument) in any printed book or manuscript. But I guess it to be the same case which I have heard reported in the form of a catch, to the following effect (if my memory serves me right):—

"A Woman having a Settlement,
Married a Man with none;
The Question was, he being dead,
'If that she had, was gone.'
Quoth Sir *John Pratt**—'Her Settlement
SUSPENDED did remain
Living the husband: but, him dead,
It doth *revive* again.'"

CHORUS *of Puisne Judges.*

Living the Husband; But, him dead,
It doth revive again.

The case of *The King* v. *Burford* is thus reported in Ventris (1 Vent. 16):—

"He was indicted, for that he scandolose & contempuose propalavit & publicavit verba sequenta, viz.: That none of the justices of the peace do understand the statues for the Excise, unless Mr. A. B,, and he understands but little of them; no, not many parliament-men do not understand them upon the reading of them. And it was moved to quash the indictment for that a man could not be indicted for speaking such words; and of that opinion was the court: But they said he might have been bound to his good behaviour."

Words spoken of an attorney, "Thou canst not read a declaration," per quot, &c. THE COURT. The words are actionable though there had been no special damage; for they speak him to be ignorant in his profession, and we shall not intend that he had a distemper in his eyes, &c.—Judgment was given for the plaintiff (*Jones* v. *Powel*, 1 Mod. 272.)

"One of the cases in Littleton," says Mr. Wallace (The Reporters, 3d ed. 193,) "would present but a bad idea of the manners at Oxford, in 1625. We find, at least the Principal

* Then Lord Chief Justice.

of St. Mary's Hall libelling one of the Masters of Art, and a Commoner of the same Hall, '*pur ceo que il appel luy* Red Nose, Mamsey Nose, Copper-nose, Knave, Rascal, and Base Fellow, *et autres words non dissonant*, (Ralph Bradwell's case, Lit. 9).

"Another case speaks as ill of the behaviour of communicants in those days of Archbishop Laud. The Reverend Mr. Burnet sues one Symons in the High Commission Court, '*pur ces que appel luy fool en leglise et dit a lui Sirrah! Sirrah!*' and because, moreover, he, Burnet, being vicar there, Symons, at Whitsuntide, after the Communion was ended, took the cup and drank all the wine that was left: and that when Mr. Burnet took the cup from him 'Symous violently *reprise ces hors de ces mains arriere in facie Ecclesiæ devant que les parishioners fueront tons dehors leglise.*' It is curious and perhaps worth noting, that the court decided that all the wine that was left after the communion belonged to the parson. The same declaration will be found, I believe, in the rubric to the Book of Common Prayer, printed in the time of Charles II. It shows the doctrine of that day, though at present a special and more reverent provision is made for the case," (Burnet *v.* Symons Lit. 154).

In an appeal of death, the defendant waged battel, and was slain in the field; yet judgment was given that he should be hanged, which the judges said was altogether necessary, for otherwise the lord could not have a writ of escheat, (Co. Litt. 390, n.)

An English monk goes into France, and there becomes a monk; yet is he capable of any grant in England, because such profession is not triable, and also because all profession is taken away by statute, and by our religion holden as void, (Ley's case, 2 Roll. 43).

It is a rule of law, that *idem non protest esse agens et patiens;* and therefore a man cannot present himself to a benefice, nor sue himself. So no man can summon himself; and therefore if a sheriff suffer a common recovery, it is error, because he cannot summon himself, (Dyer, 188 a; Owen, 51). A man cannot be both judge and party in a suit; and therefore if a judge of the Common Pleas be made judge of the King's Bench though it be but *hac vice*, it determines his patent for the Common Pleas; for if he should be judge of both Benches together, he should control his own judgment; for if the Common Pleas err, it shall be reformed in the King's Bench. Littleton, Chief Justice of the Common Pleas, made Lord Keeper, yet continued Chief Justice. So Sir Orlando Bridgeman was both Lord Keeper and Lord Chief Justice of the Common Pleas at the same time, for these places are not inconsistent, (1 Sid. 338, 365).

If one that is seised in fee of an orchard, makes a feoffment of it to J. S., and goes into the orchard and cuts a turf or a twig, and delivers it in the name of seisin to the feoffee over a wall of the same orchard, the feoffee then being on other land not mentioned in the feoffment, this is a void livery, (2 Roll. 6, pl. 5). As to when a man shall give and take by his own livery, see Perkins, s. 205.

An infant brought an action of trespass by her guardian; the defendant pleads that the plaintiff was above sixteen years old, and agreed for sixpence in hand paid, that the defendant have license to take two ounces of her hair; to which the plaintiff demurred; and adjudged for her, for an infant cannot license, though she may agree with the barber to be trimmed, (*Scroggan* v. *Stewardson*, 3 Keb. 369.)

A woman shook a sword in a cutler's shop against the plaintiff, being on the other side of the street; and in trespass for assault and battery, there was a verdict of the assault and not guilty of the battery. It was prayed to give no more costs than damages, and so granted; which was noble, (*Smith* v. *Newman*, 3 Keb. 283).

The following is the charter given by William the Conqueror to Norman Hunter:—

I William the third year of my reign
Give to thee Norman Hunter
To me that are both leef and dear
The Hop and the Hopton
And all the bounds up and down
Under the Earth to Hell
Above the Earth to Heaven
From me and mine
To thee and thine
As good and as fair
As ever they were
To witness that this is sooth
I bite the white wax with my tooth
Before Jug Maud and Margerie
And my youngest son Henry
For a bow and a broad arrow
When I come to hunt upon Yarrow. *

A. the attorney of *B* brought an action against *C.* for saying to *B.* "Your attorney is a bribing knave, and hath taken twenty pound of you to cozen me." Judge WARBURTON held the words not actionable, for an attorney cannot take a bribe of his own client; but HOBART said he might when the reward exceed measure, and the end of the cause of reward is against justice; as if he will take a reward to raze a record, &c. And HOBART says, after he had spoken, Justice WARBURTON said that he began to stagger in his opinion, so that the plaintiff had judgment, (Hob. 8, 9; and 1 Roll, 53.)

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 32.)

BAILIFF'S ASSISTANTS.

There is no provision in the statute authorising bailiffs to appoint deputies. If the right to appoint was a question to be determined on common law grounds merely, the bailiff would probably be held to have the power; for, as already observed, the general rule with regard to all ministerial officers is, that they may appoint deputies. But the express provision enabling clerks to do so, plainly implies that bailiffs are not authorized to exercise any such power. Both clerk and bailiff are ministerial officers; but to a certain extent the Legislature may be supposed to have trusted the principals—clerk and bailiff—in the execution of both offices, making special provision, however, in the case of the clerk that the duty of his office might, on certain contingencies, be executed by deputy. A bailiff, doubtless, may call in assistance, when necessary, in the execution of his duty; and every such assistant, acting under the direction of his principal, will be within the protection of the statute, and be held in law to be the

* See Speed, 424, b; 2 Roll. Abr. 181; Merton's Anglorum Gesta, in Vita IV. 1.

principal's deputy (though not deputy-bailiff) while doing any particular act—as in securing, keeping possession of property seized, or the like, under the bailiff's direction. Indeed such assistants are recognized in several sections of the statute. Section 195 provides that no action is to be brought against a bailiff, "or against any person acting by his orders and in his aid," &c.: and in sections 184, 196 and 197 assistants are referred to. It does not appear essential to due service of the ordinary summons, to appear that it should be made by the bailiff of the court, if duly served by any literate person, it is apprehended it would be sufficient, though no charge could be taxed for the service or mileage, unless effected by an authorized person. In practice it is not unusual to appoint a person a bailiff (*pro hac vice*) to effect a particular service, where the circumstances warrant such a course; and in that case the regular expense of service would be chargeable in the usual way. But all process of execution and warrants must be executed by the bailiff personally.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—Your solution of the two following points no doubt would be of interest to your readers, as they are cases that frequently occur, and recently came up in my court.

Say—Attachments are got out against an absconding debtor, fourteen days before the sittings of the court. Of course, pursuant to the act, judgment could not be given the first court, there not being thirty days before the court. A creditor has a claim of three dollars against the absconding debtor, which is too small a sum to get an attachment on; but as the amount does not require personal service, sues his claim in the ordinary way, and gets service by having the summons left with the debtor's wife. Court sits; and the plaintiff gets his judgment for three dollars; has an execution issued, and orders the bailiff to seize and sell the goods he holds by virtue of the attachment. As the attaching parties have as yet no judgments, should the bailiff sell and satisfy the three dollars claim or wait, and let that claim come in *pro rata* with the attachments; or should the claims under the attachments take priority over the execution?

Again: A creditor sues out an attachment against an absconding debtor. The bailiff finds perishable property, which he takes to the clerk. The creditor orders the clerk to sell the goods. The clerk asks for indemnity. Creditor cannot procure satisfactory security. To keep the property until the sittings of the court would cost more than the value of the property. What disposition of the property can the clerk make?

Yours truly,
CLERK 6TH DIVISION COURT CO. NORFOLK.

[Goods when seized under attachment are properly handed over to the custody of the clerk of the court, and are held by him according to the requirements of the statute. These goods are in the custody of the law for a certain purpose, and would not be liable to seizure under "the three dollar execution," nor could the execution creditor in that suit share *pro rata*.

The attaching creditors would, we think, take priority. If the claim, with costs, came to $4, possibly the judgment creditor might sue out an attachment upon the judgment and come in for a share. The words in sec. 199 are, any person indebted, &c., "*or* upon any judgment."

The provisions of section 213 leave it optional with the clerk to require security, or to sell without it. In the case put we think it would be advisable for the clerk to sell the goods. The original fault would lie with the bailiff, who ought not to seize perishable goods without a bond, as required by and upon the conditions mentioned in sec. 214.]—EDS. L.J.

SARNIA, February 18, 1863.

To the Editors of the Law Journal.

GENTLEMEN,—There appears to be considerable doubt as to the construction of secs. 101 and 102, 22 Vic. cap. 19. I take the liberty of addressing you and requesting your opinion on the subject. As it is a question of general interest to those practising in the court, I am persuaded you will kindly give it an insertion in your next issue.

Quære—Is not the 102nd section, 22 Vic. cap. 19, explanatory of 101st section; and if so, has the judge power to examine the plaintiff to a suit where the opposite-party objects, and where the amount claimed exceeds $8.

I remain, yours, &c.,
ENQUIRER.

[We think the judge has *the power* in every case to examine the parties, but that such power should be sparingly exercised, or be confined to cases in which, from their nature, there is a poverty of unexceptionable evidence, yet still sufficient to raise a presumption when the parties' oath is taken to supplement it.]—EDS. L. J.

THE EFFECTIVE WORKING OF THE DIVISION COURTS.

We have received a long communication from a writer who speaks upon "an experience of over twelve years in the Division Courts." He desires to see some general supervision as to their mode of working, "which would place the practice and administration of law and justice, in what was intended for an almost domestic and poor man's tribunal in the different localities, upon a uniform plan." And as a matter of fact he asserts "that the plan of procedure is not uniform, or else those who work in those Courts do not all work to the plan."

With all respect for our correspondent, we entirely disagree with his views as to a remedy for the alleged evil. The Division Court system contains *in itself* ample power

to remedy evils of the kind and to secure uniformity of procedure. It is, no doubt, very difficult to secure complete uniformity on all points, when some thirty functionaries are engaged in administering a particular law, with the aid of some five hundred ministerial officers, and when each of the thirty functionaries act so far independently that the one is not legally bound by the decision of another.

But has uniformity been earnestly studied? We fear that earnestness amongst officials is rather a rare virtue, otherwise we might naturally suppose that those who have public duties to perform would be *anxious* to have all the aid possible in fitting themselves for the discharge of those duties. And without just now referring to other helps, we cannot but feel surprised that no conference of the county judges (as amongst the assistant barristers in Ireland) has taken place for years, at which matters of procedure could be discussed, the younger officers benefiting by the matured experience of their senior brethren, and all deriving advantage from the inter-communication of views and opinions. No one but the ignorant man, or one puffed up by vanity, can be indifferent to what has been urged or done by others situated as he himself is, under circumstances similar to those upon which he may at any time be called upon to deliberate and act; and only the blockhead would despise the advantages to be gained from free discussion amongst experts on a subject of common interest to all.

The same remarks apply, though not with the same force, to all subordinate officers. The expense of such a conference, say once in a year or once in two years, would be very trifling, and we cannot help thinking that there is a little supineness in quarters where it should not exist, or such meetings would have taken place.

But then, it may be said, there is a Board of Judges appointed to settle conflicting points, and from time to time to frame guiding rules for procedure. This is very true, but a general conference would also be of infinite value, and enable *all* to profit by the knowledge and experience of each. We have heard, moreover, no general desire expressed for a meeting of the Board of Judges—some perhaps not desiring to be fettered by rule, preferring the arbitrary exercise of individual humour; others fearing a ruling on various points would show the practice sanctioned by them to be wrong; and others again perfectly indifferent to the matter, only anxious to go through business as easily as possible, without one thought or aspiration towards efficiency and improvement in the system with which they are connected.

Whatever the causes of indifference, it must eventually, if continued, lead to evil results; people will not separate the system from its administration, and confounding both, or rather judging of one by the other, will at some day be attacking the system itself, and seek to replace it by something else. It is certainly a good rule not to argue *et abusu contra usum*, but those who suffer through want of uniform and proper administration will be inclined to adopt Pope's idea touching administrative value, and say—

> For forms of Government let fools contest,
> Whate'r is best administered is best,

and admit the truth of Bacon's axiom: "The life of the laws *lies in the due execution and administration of them.*"

We put these considerations very strongly before our readers, particularly officers of the courts. If there be but a tithe of truth in the allegations of our correspondent, and which will form material for remark in several numbers to come, there is a criminal indifference to what is right, or positive ignorance, in more than one quarter from which better things might be expected. For ourselves, we shall not hesitate to speak out when facts properly authenticated, coming from an unprejudiced quarter, are laid before us. We believe the Division Court system to be admirably adapted to the purposes for which it was designed, and that where real tangible evils exist the fault is due to administration, mal-administration or feeble administration, and not to the law itself (though we are willing to admit that there is some room for improvement in detail). To be consistent, therefore, we can give no uncertain sound when doings are exposed which are calculated to bring the system into disrepute.

The *Law Journal* bases its claims to usefulness, so far as the Division Courts are concerned, in no small part on the advantages it offers as a channel of communication for what passes and is decided in all the courts, and because it enables judges, clerks and bailiffs, to know what is done in other counties, as well as affords a field unsullied with political prejudices in which subjects of interest and importance can be suggested and discussed, and knowledge advanced and error dissipated.

Our columns have always been open to just complaints, and to information or suggestions, from practitioners, officers and others, on matters within the scope of the publication; and thus to some extent our official and other readers have had the advantage of a monthly conference and the friendly light of information on difficult or complicated points, from all parts of Upper Canada. We have not received, it is true, all the aid we ought to have expected, seeing that the county judges in Upper Canada expressed themselves favourable to the undertaking some eight years ago—"recognizing in the plan of publication a source of *great public utility in advancing the sound administration of justice* in courts which from their local character so immediately comprehend the interests evolved

from the masses of a peculiarly industrious and progressive people."

Such assistance as we have received we would gratefully acknowledge, but regret that not more than four or five of the judges are to be numbered amongst those who assisted us with materials for this work of "public utility."

It has ever been our aim to turn the information and assistance given to the best possible account, to enable subordinate officers to act with confidence and safety in the discharge of their duty, and to secure uniformity as well as soundness in administration, that the public may derive all the advantage which the Division Courts are calculated to confer "upon a peculiarly industrious and progressive people."

In this spirit we welcome the communication now before us; and with a very few regular correspondents of the same stamp, we would not despair of curing in one year most of the evils of administration which this writer laments.

Doubtless, points may remain on which it is impossible to reconcile conflicting views without an adjudication, of some rule laid down by authority. Yet the number of these can be but few, and numerous debatable points dwindle down with marvellous rapidity under the process of a full and free discussion.

In the administration of the Division Courts, the judge, very seldom have the benefit of legal assistance in examining the intricate points constantly engendering by complications in the thousands of cases coming before them, and it can be no matter of surprise if they occasionally fall into error. So do the judges of the Superior Courts. Neither the one nor the other can lay any claim to infallibility, and neither, we must suppose, would be above hearing "the *pros* and *cons*" of a subject. A judge can have no desire but to know what the law is in any case coming before him; and, to quote a somewhat hackneyed truism, any man may err in judgment, but none but a knave or a fool will persevere when convinced of error.

We are obliged to postpone notice of the details given in the communication referred to, till next number. Many subjects are dwelt upon; each would almost require an article to itself. Certainly one or two of the judges, according to our correspondent's report, seem to have strange notions of the law and to take strange liberties with the statutes.

This great truth, applicable in matters of small concern as well as great, can never be too often repeated, namely, that while extensive discretion ought to be given to those who administer the laws, it should not depend upon accident or the temper or private opinions of judges what character the law should assume.

UPPER CANADA REPORTS.

IN APPEAL.

[Before The Hon. Sir J. B. Robinson, Bart., President; The Hon. Archibald McLean, Chief Justice of Upper Canada; The Hon. William H. Draper, C.B., Chief Justice of the Court of Common Pleas; The Hon. Vice-Chancellor Esten; The Hon. Mr. Justice Burns; The Hon. Vice-Chancellor Spragge; The Hon. Mr. Justice Hagarty; and The Hon. Mr. Justice Morrison.]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

(*Reported by* Alexander Grant, Esq., *Barrister-at-Law.*)

Evans v. Evans.

Specific performance—Laches.

In the year 1850, the owner of 100 acres of land, with the view as was admitted of retaining his son upon the property and settling him in life, agreed to convey to him in fee simple 50 acres of this land, worth at least £150, upon payment of £50, payable in six years without interest, and executed a bond for that purpose. After obtaining this bond, the son went to work about the country, and resided for some years at a distant part of the province, sometimes returning when out of employment and residing with the other members of his father's family, and during such residence was in the habit of assisting in doing the usual work of the farm. Nothing was ever paid on account of the purchase money, although it was alleged the son was entitled to a credit on account thereof for services rendered. After a lapse of a period of about ten years, a bill was filed by the son to enforce a specific performance of the contract evidenced by the bond, and a decree was pronounced in favour of the plaintiff. Upon an appeal to this court this decree was reversed, and the bill in the court below dismissed with costs, unless the plaintiff should within one month deliver up the bond to be cancelled, in that event the dismissal to be without costs. [Draper, C. J., and Esten, V. C., dissenting.]

The bill in this cause was filed by Thomas Evans against George Evans, setting forth, that in April, 1850, defendant had agreed to sell and convey to plaintiff 50 acres, part of lot number 24, in the first concession of Albion, for the price of £50, payable according to the terms contained in the recital to a bond executed by the defendant to the plaintiff on the occasion of such sale, and which bond was set forth at length in the bill; that after the execution and delivery of this bond, the plaintiff, at defendant's request, agreed to serve defendant as a labourer on his farm, the remuneration for which was to be applied upon and form part of the payment of the purchase money of the land; that under the agreement, plaintiff had so worked for twelve months—such services being worth £30; that it was also arranged that plaintiff should pay the taxes on the land, he first being let into possession and enjoyment thereof; that accordingly, about twelve months after the execution of the bond, plaintiff applied to defendant to let him into possession, which was refused, and defendant continued to retain the possession thereof. The bill also charged that plaintiff had another claim against defendant, on a promissory note for £30, with interest thereon, such sums in all amounting to much more than was due to defendant in respect of the purchase money agreed to be paid; and prayed specific performance of the contract, and an account of what was due.

The defendant answered the bill, admitting the contract alleged, but stated that, at the time of entering into it, the property was of much greater value, and that his sole reason and inducement for agreeing to sell it for so small a sum was, as the plaintiff well knew, to endeavour by that means to keep the plaintiff on the farm, instead of suffering him to go to the United States or some other part of the country; but denied that plaintiff had served him as alleged, but, on the contrary, that immediately after the contract left and went elsewhere, and had never remained on the farm as had been intended; that plaintiff had never complied with the terms and conditions of the bond by payment of the consideration money or taxes, and that therefore he (plaintiff) was not entitled to any relief. The answer further stated that, about the year 1856, and after the time limited for payment had elapsed, defendant set up the plaintiff and his sister in a tavern belonging to defendant, where he remained for about a year, when he left, when he made a claim against defendant for boarding some of his workmen, and that, in consequence, defendant gave plaintiff the note for £30, at which time plaintiff did not assert any claim to the property, or to have the note credited on the bond, and which

defendant submitted was evidence of plaintiff having abandoned the contract; that the claim of plaintiff was a stale demand, and that by reason of plaintiff's laches the same could not be enforced.

The answer further stated, that on the 26th January, 1859, the defendant being in want of money, and supposing that plaintiff had abandoned all claim to the property, had mortgaged the same with other lands to one Stephen S. Lee and Alan Cameron, for $900, of all which the plaintiff was aware, as defendant verily believed.

Evidence was gone into; that on the part of the plaintiff, being chiefly with a view of showing that he had complied with the stipulation agreed upon between the parties of working for the defendant, one Evans, a relation of the parties, swore that about the 6th of February, 1861, he went with plaintiff to defendant in order to make an arrangement of the differences before suit, when defendant refused to give the deed, and said if plaintiff waited till defendant's death he would give plaintiff his share; that the witness tendered defendant $55, which was the balance due on the land, after deducting six months' labour ($66) and a note of $83, with interest on it ($19); that on this occasion defendant stated he had offered plaintiff $1000 and some farming utensils in lieu of the 50 acres; that he would like to keep the land, for which reason he had made the offer. This witness said the place was worth $1,600, some time being given; that he did not know where plaintiff lived after getting the bond. John Lyndsay, a witness for plaintiff, proved that, in the fall after the bond was given, plaintiff was working for defendant; that he had heard defendant offer the $1000 and farming implements to plaintiff; that at the time of the bond the land was worth $1000, and that he had heard defendant say in presence of plaintiff that he was selling him the land to keep him at work. Ellen Matthews (sister of plaintiff and called by him) swore that she had heard plaintiff and defendant converse about the land; plaintiff had been working off and on for defendant before the bond was given; she had heard her father speak about the bargain; he always allowed he would give the land to the plaintiff; about a year after the bond, the defendant said that if plaintiff would settle and marry he might go upon the land; that she had seen plaintiff working for defendant since the bond was given, could not say how long; that plaintiff had been back and left defendant frequently; that he was more frequently away than at home during the last four or five years, and that about six years ago she had heard plaintiff complain of not getting possession of the land. Other witnesses called by the plaintiff proved that defendant had always desired to keep the land in his family; that he had stated he would rather pay the money ($1000) than break the farm, as thereby he might get a bad neighbour; that plaintiff had been in the habit of working for other people; that he staid at his father's house when out of work, but worked while there.

The plaintiff was examined by the defendant. On his examination he swore that the bond had been given for work done before 1850, after that he was to have wages, which were to be applied to the land, which he was to get possession of after a year. One witness (Hessy) called by the defendant stated that plaintiff had been living at the Grand River for about four years, and while there witness had a conversation with him, in which he stated that he thought he would never return home; that he had some claim against his father, but did not like to put it in force, because he did not think it was his right, and his father was not able to pay it or suffer the loss; he did not say what the claim was, and witness did not ask him.

The cause came on to be heard before his Honour V. C. Esten, on the 25th day of January, 1862, when a decree was made, by which it was declared "that the plaintiff is entitled to a specific performance of the contract in the bill of complaint of the said plaintiff in this cause set forth upon payment of what shall be found due by the plaintiff to the defendant in respect of the purchase money agreed to be paid therefor, subject, however, to the mortgage security in favour of Stephen S. Lee and Allan Cameron in the said bill mentioned, and doth order and decree the same accordingly, and it is ordered that it be referred to the master of this court to take an account of what is due by the plaintiff to the defendant for the purchase money of the said land and premises, and in taking such account he is to set off and allow against such purchase money whatever he may find to have been the value of the services (if any) rendered by the plaintiff for the defendant at any time subsequent to the date of the contract, and also to set off and allow against such purchase money any sum or sums of money he may find due from the defendant to the plaintiff upon any other contract or consideration, and also in like manner to set off and allow against such purchase money and interest the costs of plaintiff to be taxed by the master, and upon payment by the plaintiff to the defendant of any balance which shall be found due to him upon taking such account, it is ordered that the defendant do execute a good and sufficient deed of conveyance in fee simple of the parcel of land in the said bill mentioned, being, &c.; such conveyance to be settled by the master of this court in case the parties differ about the same, and the said defendant undertaking to satisfy and discharge the said mortgage in favour of Stephen S. Lee and Allan Cameron according to the requirements thereof. This court doth order and decree that the defendant do satisfy and discharge said mortgage, and in the event of the master finding that the amount due in respect of the purchase money and interest shall be insufficient to balance the amount which shall be found due to plaintiff, including the costs aforesaid, it is ordered that the defendant do pay to the plaintiff the amount of the deficiency, such deficiency not exceeding however the costs which shall have been so taxed and allowed to the plaintiff. And this court doth reserve the consideration of further directions and of subsequent costs."

From this decree the defendant appealed, for the following reasons:

1st. Because the court should have declared that the contract in the pleadings mentioned had been abandoned by the parties, and should have therefore refused specific performance.

2nd. Because from the laches of the respondent the court should have refused him any relief.

The respondent, in support of the decree, assigned the following reasons:

That the decree made by the court cannot be appealed from, inasmuch as it orders the payment of money, an account whereof has not been taken, and to secure the payment whereof the appellant has not made the requisite provisions. That as the decreeing or refusing specific performance of a contract is discretionary, this court would not interfere with the judicious exercise of that discretion by the court below, to whom the same peculiarly belongs, and that, therefore, there is no error in the said decree.

That there was no abandonment by the respondent of the contract whereof specific performance was decreed by the said decree in the court below, and no evidence of any such abandonment was furnished or offered in the court below.

That there were no laches to disentitle the respondent to the relief granted to him by the said decree.

That if there were any error in the said decree the appellant ought to have caused the same to be reheared before the full court below.

The appeal coming on to be heard—

Blake and *G. D. Boulton* for the appellant.

Although the lowness of the price agreed to be paid for the land may not of itself be sufficient as a ground of defence, it is certainly material when taken in connection with the other considerations which arise in the case—such as settlement by the plaintiff on the property, for it is perfectly clear from all the evidence that this object was the main if not the sole moving cause for the father agreeing to convey to the son. On this understanding the bond was executed, and this may be shown by parol as a defence to a bill seeking specific performance.—*Beaumont* v. *Dukes* (Jac. 422), *Meyers* v. *Watson* (1 Sim. N.S. 128).

The application for and refusal of possession occurred as stated by the bill, in 1851, was a sufficient repudiation of the contract, and yet no proceeding is taken to enforce the contract for ten years afterwards. This was such laches as should disentitle the plaintiff to any relief in a Court of Equity.—*Hook* v. *McQueen* (8

Grant). The execution of the mortgage to Lee & Cameron with the knowledge of plaintiff, was strong evidence of abandonment.

Blevins, for the respondent, referred to *Norway* v. *Moors* (5 Grant, 611), as to the effect of a statement in the bill being contradicted by evidence. *Carolan* v. *Brabazon* (3 J. & Lat. 444) shews that to prove a defence on the ground of abandonment, the fact of abandonment must be proved as clearly as the original agreement. He cited *Clark* v. *Hart*, 5 Jur. N.S. 447; Fry on Spec. Per. 306; Sng. V. & P. Ss. 211-212.

Sir J. B. Robinson, Bart.—I think there is nothing in this case which stands in the way of a determination by this court of the question whether it is or is not consistent with equity that the plaintiff should have a decree for specific performance. As to the reference to the master which the decree contemplates, that would not be upon any point material to our forming a judgment upon the main question. The necessity for such reference is dependent on the decree for specific performance being upheld.

Then as to the ground of objection to the appeal, that it was discretionary with the court to decree performance or not, and that there can be no appeal from the exercise of mere discretion. That is true in a limited sense, but not universally, or there could scarcely be an appeal in any suit of this description; whereas we have had many, and shall not improbably have to dispose of more. It is no doubt within the authority of an appellate jurisdiction to determine in this case, as in others, whether the judgment of the Court of Equity in a matter which may be admitted to be in some measure discretionary has been given in accordance with the general principles which in such cases govern courts of equity. It need hardly be said that a judgment decreeing specific performance may in many more instances be found the subject of an appeal than a judgment refusing it. This is an order of the former kind.

This case should not, in my opinion, be looked upon as if the transaction were enirely one of business—in which the motive of each party is, for all that appears, to get an equivalent for what he gives. This is a bill filed by a son against his father, to compel him to carry into effect an agreement, positive enough no doubt on the part of the father, but in which the son has lost all remedy at law by most unreasonable negligence and delay.

It does not appear that the defendant exacted any undertaking from the son to pay the sum of money mentioned in the defendant's bond as the consideration for the land which he was to convey, nor any undertaking to pay the taxes.

All that we see, or hear of, is a bond from the defendant to the plaintiff, that he will make him a deed of the land in question, 50 acres in the township of Albion, provided the plaintiff should pay him £50 in six years from the 1st September, 1850, that is to say, £10 on 1st September, 1852, and the remaining £40 in four equal annual payments on 1st September in each of the four years following; so that the whole price should be paid by 1st September, 1856; and the plaintiff was in the mean time to pay all taxes on the 50 acres. No interest was to be paid, according to the terms recited in the defendant's bond to convey. The agreement therefore properly speaking was all on one side, and that is a material feature in the case.

At the time that the defendant thus bound himself to convey to his son these 50 acres for £50, to be paid in six years, the land it appears by the evidence was well worth £150, and is now worth from £300 to £400.

It is quite plain that there must have been some particular purpose to be answered to the father by selling to his son 50 acres of the same lot on which he lived for a third of its value. I have no doubt that the object was that which is indicated in the evidence, and is in some measure admitted by the plaintiff, namely, to keep the son from wandering about, laboring for strangers, or wasting his time perhaps more unprofitably.

Or it may have been that the motive also entered into his father's mind of making in this manner a provision for this son, in proportion perhaps to what he might be able to give to his other children, for the land given to him upon these easy terms would be in a great measure a gift.

These considerations apply strongly against treating this as an agreement to be enforced against the defendant by any active interference of a court of equity, where the son is chargeable with great laches in omitting to do what he was bound to do in order to bring himself within the terms of his father's bond.

On considering the whole evidence, I find it not easy to satisfy myself what labor the son had done for the father after the execution of the bond, which the father afterwards agreed to allow for as part payment of the £50. It is very imperfectly proved, and the evidence that is given is contradicted.

The cases which are referred to in Mr. Fry's work on Specific Performance, chapter 24, are very strong to shew that the court should not lend its aid to the plaintiff to enforce special performance against the father, after a delay of so many years, where the plaintiff has not in the mean time been in possession and has made no improvements, and has neglected so long to enforce the agreement after he had, as he admits, full notice that his father, in consequence of his negligent conduct, intended not to consider the agreement still in force which had been so long disregarded, that is, I mean, the specific agreement to convey the land, though he had offered no alternative.

I think the decree should be reversed and the bill dismissed with costs, though, if my brothers concur, I should have no objection to follow the course taken in *Spurrier* v. *Hancock*, 4 Ves. jr. 694, by adding, "unless within one month the plaintiff should deliver up the agreement;" and in that case without costs.

Draper, C. J.—I can see nothing in this case to take it out of the general rule, that the specific performance of an agreement for the sale of lands should be decreed. I think, for the reasons assigned by the learned Vice Chancellor, the decree should be affirmed and the appeal dismissed with costs.

Esten, V. C.—I think the decree pronounced by me in favour of the plaintiff should be affirmed. The estate was sold at an undervalue by a father to a son, who had acted towards him in a praiseworthy manner, but for a substantial consideration, and this circumstance can therefore form no bar to a specific performance. The bond is proved and constitutes a valid contract within the Statute of Frauds. The only defence then which can be raised to the suit is abandonment or laches on the part of the plaintiff. The defendant was anxious to keep his son in the neighbourhood, and see him married and settled. I am satisfied that he never intended to rescind the contract. The plaintiff paid a substantial part of the consideration, and at the end of the year asked for possession; when the defendant said that if he would marry and settle he would admit him into possession. The plaintiff was not prepared at that time to marry, and time passed, the plaintiff and defendant having dealings with each other. The defendant never notified the plaintiff that if the contract were not performed he would rescind it. He brought the land into cultivation, intending probably the plaintiff to have the benefit of it when he should settle. During this time the plaintiff left the bond in the hands of George Evans, with instructions to press it, but he did not, and Mrs. Matthews took it away. On the plaintiff's return from the Grand River he pressed his claim, and the defendant, not insisting that the contract was at an end, made a very advantageous offer of compromise to the plaintiff. Upon the whole, considering the circumstances of the case and the relation existing between the parties, I think no abandonment and no sufficient laches exist in the present case to debar the plaintiff from the relief he seeks. I do not attach any weight to the declaration of the plaintiff as mentioned in the evidence of Hessy, although I think he was speaking the truth to the best of his recollection. Mrs. Hessy exhibited a good deal of feeling in delivering her testimony. She was only ten years old at the time of the transaction which she relates. The defendant should have acquiesced in the demand of the plaintiff, and accepted the money which he tendered to him.

I think the appeal should be dismissed, and with costs.

Hagarty and Morrison, J. J., concurring in the views expressed by the president, the appeal was allowed and the bill in the court below ordered to be dismissed.

QUEEN'S BENCH.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*

THE CORPORATION OF THE COUNTY OF MIDDLESEX V. THE CORPORATION OF THE CITY OF LONDON.

Jury expenses—Consol. Stats. U. C., ch. 31, secs. 155, 156—Mode of computation.

In computing the proportion of jury expenses payable by a city and county under the Jury Act, secs. 155, 156, the assessed value of the ratable property of the city, on which their proportion is calculated, is to be taken not as the assessed annual value, but as a sum of which that forms ten per cent.: *e. g.* if the annual value in any year be £6,000, the share of the city is to be calculated upon £60,000.

[Mich. Term, 26 Vic.]

This was an action brought by the plaintiffs against the defendants to recover the sum of $3,409 24, for the use of the gaol and court-house by the defendants, and for the proportion of the expenses incurred by the plaintiffs for the payment of jurors for the years 1855 to 1861, inclusive, and interest.

The cause came on to be tried before McLean, C. J., at London, when a verdict was taken for the plaintiffs for $3,409 24, subject to the opinion of the court upon the following case:

The only matter in dispute between the parties in this suit is with respect to the amount which the city ought to contribute to the jury expenses, the parties differing as to the mode by which that amount should be computed.

Accordingly, referring to the statutes 22 Victoria, chap. 31, of the Consolidated Statutes of Upper Canada, entitled, "An act respecting jurors and juries," sections 155 and 156, the plaintiffs affirm that the proportion payable by the city should be regulated as follows:

Assuming the assessed annual value of the ratable property in the city of London, for any year, to be £6,000, the plaintiffs affirm that this sum of £6,000 must be taken as ten per cent. of the actual value of that property, which actual value would consequently be £60,000, and that therefore this sum of £60,000 should be taken as a basis upon which the amount payable by the city for the jury expenses of that year ought to be computed.

On the other hand, the defendants deny that the above mode is the correct mode of computation, and affirm, that assuming the assessed annual value of the ratable property of the city, for any year, to be £6,000, this sum of £6,000 must be taken as the basis upon which the amount payable by the city for the jury expenses of that year ought to be computed.

If the court shall be of opinion in the affirmative—that is to say, that the mode of computation which the plaintiffs contend for, as mentioned above, is in accordance with the law—then the verdict is to be entered for the plaintiffs as aforesaid, for the sum of $3,499 24.

But if the court shall be of opinion in the negative—that is to say, that the mode of computation which the plaintiffs contend for, as mentioned above, is not in accordance with the law, but that the mode of computation contended for by the defendants, as above mentioned, is correct—then the verdict is to be entered up for the plaintiffs for the sum of $984 51.

A schedule, which it is considered unnecessary to give here, was attached to the case, showing the actual value of the ratable property of the county of Middlesex, and the annual value of the ratable property of the city of London for the years 1855 to 1861, inclusive, respectively, and the population of the city and county in different years, in order to assist in illustrating to the court the two modes of computation above mentioned, and their effect, if required.

Connor, Q. C., for the plaintiffs. *McMichael* for defendants.

MCLEAN, C. J.—The assessment in cities and towns being upon the annual value, and in counties upon the actual value, the third sub-section of section 155 declares that the annual value shall be held to be ten pen cent. of the actual value. The whole object of that enactment is to equalize as nearly as can be done the proportions to be paid by each, for if some such standard were not established it is evident that persons assessed yearly on the actual value of property would pay an amount far greater than those in cities assessed only on the annual value. I think the plaintiffs are right in their mode of computation, and that they are entitled to recover according to that mode.

HAGARTY, J.—We may safely assume that such a construction as the city contends for could hardly have been intended by the legislature, as it would apparently defeat all idea of any rational proportion between the respective ratable property of each municipality as the measure of liability.

The defendants insist that the words are, on the assessed value, and that in their city the only assessed value is the annual value, and that it is only this annual value that is the assessed value.

It may be literally true that in the city rolls the only value appearing is an annual value, except perhaps, that if the roll, strictly conforms to the 19th section of the Assessment Act (Con. Stats. U. C., chap. 55), one column would shew the total value of personal property, and another column the yearly value of the same.

We also know judicially that in the city assessment roll, in the case of real estate, the assessed value is an annual value; and the legislature expressly meet a case like the present by qualifying sub-section 2 by the succeeding sub-section 3, that in comparing the value of ratable property in any city or town and county for the purposes of the act, the assessed annual value shall be ten per cent. of the actual value, and, in the next section, that the actual or annual value shall be that shewn by the assessment rolls.

I therefore think the plaintiffs' construction is the true one, and that the *postea* should be delivered to them for the sum claimed.

Postea to the plaintiffs.

COMMON PLEAS.

(*Reported by* E. C. JONES, ESQ., *Barrister-at-Law, Reporter to the Court.*)

IRESON V. MASON.

Contract—Common counts, construction of—Duty of Court—Misdirection.

One L. advertised for tenders for an addition to a store, intending to furnish the brick for the work himself. Having changed his mind, he notified the architect that the contractor was to furnish the brick; and the architect notified the persons tendering by leaving a written notice on his desk, where the specifications were put for the inspection of those tendering. The plaintiff, it was shown, tendered for the work, but the defendant's tender was accepted, and the plaintiff sub-contracted under him. Upon an action brought by the sub-contractor against the contractor for the price of the brick, the learned judge left the question on the contract to the jury, who found for the plaintiff.

Upon a notice of a new trial, on the ground of misdirection,

Held, that it was the duty of the judge to have construed the contract, it being the province of the jury to decide upon surrounding facts and circumstances, if there were any, to vary it; and that it not being shown that the defendant was aware the plaintiff had tendered on the understanding that the bricks were to be furnished by the defendant.—A new trial was ordered, without costs.

Common counts, for work and labour. Money and account stated.

Pleas.—1st, never indebted; 2nd, payment; 3rd, set-off.

The case was tried in March last, at the assizes for the city of Toronto, before Hagarty, J.

It appeared that Rice Lewis desired to have alterations and additions made to his store, and employed an architect to prepare plans, &c., for that purpose. The architect prepared a specification, and invited tenders. The specification, as originally drawn, provided that the proprietor should furnish the necessary brick; for at that time Mr. Lewis had determined to find brick. Afterwards he changed his mind, and desired that contractors should tender, they finding the brick; and the architect swore this was before the tenders were sent in, and that he had communicated this to those who sent in tenders; that he told all to include materials in their tenders; he wrote a notice, and left it on his table; that the plaintiff tendered for the work, and his tender was produced to Lewis; he would not swear that he told the plaintiff. The defendant got the contract, and then the plaintiff made a tender as follows to him:

"Toronto, August 20, 1861.—Mr. Mason: Sir,—My estimate of the works as follows at the alteration of Mr. Rice Lewis' store is, for the excavation, rubble masonry, brick work, cut stone, and plastering. $263 00
Plastering under shingles partition 20 00

$283 00

(Signed) WM. IRESON."

The architect was pressed as to his communicating the change in the specifications to the plaintiff. He said he did not remember, as a fact, that plaintiff saw his memorandum (the written memorandum left on the architect's table) as to materials; but he tried to make all understand this—all who called. However, another party, who tendered for the work, swore that he never heard of any change as to the bricks, and that he tendered on the specification excluding bricks, and that plaintiff tendered under him to the architect; that plaintiff's tender was $263, exclusive of bricks.

Five architects (besides the one who prepared the specification), on reading the plaintiff's tender to defendant, said they should consider it to include materials, unless it were made (*i.e.*, founded) on a specification which excluded bricks from the contractor's tender, which should be according to the specification.

The defendant's counsel contended that the tender, as it stood, must govern. The learned judge left the jury to say what work the tender applied to, saying it was admitted the tender must have reference to some work specified or described, as it is to do the work for a sum specified in bulk.

The jury found for the plaintiff.

In Easter term, *R. A. Harrison* obtained a rule *nisi* for a new trial, for misdirection and on the law and evidence, contending that the learned judge should have put a construction on the tender, and not have left it to the jury; and that the proper construction of the tender was, that it included the bricks as well as putting them up.

In Trinity term, *M. C. Cameron* showed cause, citing *Bambridge* v. *Wade*, 16 Q. B. 59.

Harrison, contra, referred to *Charlton* v. *Gibson*, 1 C. & K. 541; *Besant* v. *Crop*, 10 C. B. 895; *Boldero* v. *E. I. Company*, 26 Beav. 816; 4 Jur. N. S. 1124, and 6 Jur. N. S. 5; *Shore* v. *Wilson*, 9 Cl. Fin. 355.

Draper, C. J.—The case of *Bambridge* v. *Wade*, though a strong authority to show that the circumstances attending the entering into a contract may be inquired into or received in evidence to explain the meaning of the language used, does not reach the point raised—that it is for the court to construe the contract, and not for the jury.

In *Hutchinson* v. *Bowker*, 5 M. & W. 542, Parke, B., lays down the rule, that it is the duty of the court to construe all written instruments; that if there are particular expressions used, which have in particular places and trades a known meaning attached to them, it is for the jury to say what the meaning of the expression is, but for the court to decide upon the meaning of the contract.

Although evidence of all the circumstances which surround the author of a written instrument will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the language of the instrument as explained by the extrinsic evidence. The duty of the court is to *interpret*, that is, to find out the true sense of the written words as the parties used them; and to *construe*, that is, when the true sense of the words is ascertained, to subject the instruments to the established rules of law (Tayl. Ev. sec. 1087). In all cases alike the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous both with reference to the context and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had any other intention (*ib.* sec. 1088). And again, in *Neilson* v. *Harford* (8 M. & W. 828), Parke, B., says: "The construction of all written instruments belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the court either *absolutely*, if there be no words to be construed—as words of art, or phrases used in commerce—and no surrounding circumstances to be ascertained, or *conditionally* when these words and circumstances are necessarily referred to them."

It appears to me that the plain import of plaintiff's tender to the defendant, as regards the matter in dispute, is, that he was to furnish bricks for the brickwork. It seems to have been conceded by the plaintiff himself, by what he did in performance of his tender when accepted, that "rubble masonry" included stone and mortar, and "cut stone" included mortar and labor in putting it into the place it was required for; and the inevitable inference is, that if we do not look out of the contract, "brickwork" must include bricks.

The plaintiff is, it appears, a sub-contractor, the defendant having taken the contract from the employer, whose architect had at first prepared a specification, in which the employer was to furnish bricks; but the architect swore this was changed before the tenders for doing the work were received; that he left a written notice, for persons who came to examine the specification, of that change. The defendant, as it would seem, tendered with notice that he was to furnish bricks, but it was not proved that the plaintiff knew or did not know how the matter was when he made his tender to the defendant. He made a tender for the original contract on the specification excluding the bricks.

If the plaintiff could establish that the defendant was aware that the plaintiff tendered on the understanding that the bricks were to be furnished by the defendant, it would probably have a material effect on the decision of the case.

The copy of the specification produced at the trial has not been brought before us.

We think, looking at all the circumstances, there should be a trial without costs.

Per Cur.—Rule absolute.

The Queen v. McLellan.

Felony—Right of reply.

Held, that a counsel for the Crown in Upper Canada (not being himself the Attorney or Solicitor General) has no right to reply in an ordinary prosecution for crime where no witnesses are called for the defence.

Richards, J., *dubitante*.

The defendant was tried at the last assizes for the united counties of Huron and Bruce, on a charge of burglary.

The indictment averred that defendant, on 26th September, 1862, about the hour of 2 o'clock in the morning of the same day, the dwelling-house of one Joseph J. Wright, situate in the town of Goderich, in the county of Huron, did feloniously and burglariously break and enter, with intent the goods and chattels of the said Joseph J. Wright, in the said dwelling-house being, feloniously and burglariously to steal, take and carry away.

The first witness for the Crown stated that there had been a large dinner party at his house (the Huron Hotel) on 25th September last; that the party broke up about 12 o'clock, and witness went to bed about 1 o'clock. He did not close the windows before going to bed, but left it to be done by a young man who was in charge of the dining room. That young man swore he closed the windows before he went to bed; and that it was about 4 o'clock in the morning when he went to bed. He could not say whether or not the windows were open up to 4 o'clock. He could not state the precise time when he closed the windows; but was positive that it was after 2 o'clock when he went to bed. He had himself put up the windows in order to air the room. He said there were no fastenings to the windows.

Another witness swore that, on the night in question, he drove up to the Huron Hotel between 12 and 2 o'clock, saw a boy of the name of John Ramsay jump out of the dining room window, and in consequence of what Ramsay said, witness got in at the window, and found prisoner crouching under a table. He asked prisoner what he was doing there. Prisoner said he had got in to get something to eat. This witness said he was quite satisfied it was between 12 and 2 o'clock, and not later, when he found prisoner in the dining room.

No witnesses were called for the prisoner, and his counsel accordingly addressed the jury.

The counsel for the crown then claimed a right of reply, and insisted that, as representing the Attorney General, he was entitled to reply, though no witnesses were called for the defence.

The counsel for the prisoner objected, but the learned judge, (McLean, C. J.,) allowed the counsel for the crown to address the jury, for the purpose of summing up the evidence brought forward on the part of the Crown.

The counsel for the prisoner objected that the only right to sum up was under the Common Law Procedure Act; and that the Common Law Procedure Act was inapplicable in a criminal case; and that at all events it was too late to sum up after he had addressed the jury on behalf of the prisoner.

The counsel for the Crown was, however, allowed to proceed, and did accordingly address the jury.

The jury found prisoner guilty, and he was afterwards sentenced to two years imprisonment in the Reformatory Prison of Upper Canada.

During Michaelmas Term last, *R. A. Harrison* obtained a rule calling upon the Attorney General or his agent to shew cause why the verdict of guilty, and all proceedings subsequent thereto, should not be set aside, and a new trial had, upon the grounds:

1. That the counsel for the Crown, not being the Attorney or Solicitor General, claimed a right of reply, was allowed to reply, and did reply, though no witnesses were called for the defendant.

2. That the verdict was contrary to law and evidence, in this, that there was no proof of the breaking and entering charged in the indictment.

3. That at the time of entering the window, through which defendant entered, was open, so that defendant was not guilty of the offence of burglary.

During last term *Richards, Q.C.*, shewed cause.

He contended that the counsel for the Crown, as representing the Attorney General, had the right of reply, though no witnesses were called for the prisoner; and also contended that, whether he had or not, the exercise of the supposed right was not a ground for a new trial.

Harrison supported the rule.

He contended that the right of reply in a criminal case, where no witnesses are called for the defence, is the personal right of the Attorney General, if it exists at all; and that being so it cannot be exercised by those whom he deputes to conduct criminal prosecutions.

Mr. Harrison admitted that an error of the judge in allowing the right of reply, in a case where it does not exist, is not *per se* a ground of application for a new trial; and submitted that in this case it had worked injustice, inasmuch as the evidence was wholly insufficient to sustain the conviction.

The following authorities were cited by counsel during the argument:—7 C. & P. 676, 677; *Rex* v. *Marsden*, M. & M. 439; *Rex* v. *Bell*, M. & M. 440; *Reg.* v. *Gardner*, 1 C & K. 628; *Reg.* v. *Blackburn*, 8 C. & K. 330; *Reg.* v. *Christie*, 1 F. & F. 75; S. C. 7 Co. 506; *Reg.* v. *Taylor*, 1 F. & F. 75; *Reg.* v. *O'Connell*, 11 C. & F. 155; Har. C. L. P. A. 308 note.

DRAPER, C. J.—I think there is no such right as that claimed by the learned counsel for the crown. I do not think any such right exists in England. In England the right may be said to exist in cases where the Crown is directly concerned, as in a state prosecution, or in a prosecution for an assault on a customs or other public officer. In ordinary prosecutions for crime I do not think it exists, except where the Attorney General himself prosecutes. I have always been of this opinion, and have always so ruled in cases before me. The erroneous exercise of that right is not, however, itself a ground for a new trial; but in this case I have no hesitation in saying that the evidence was not sufficient to sustain the verdict, and, therefore, think there ought to be a new trial.

RICHARDS, J.—I also think there ought to be a new trial; but I cannot say I am free from doubt on the first point to which the learned Chief Justice has referred. The learned judges (Talfourd, Bayley and Martin) who in England have decided against the right of a crown officer, not being attorney or solicitor general, to reply where no evidence is adduced for the defence, never held the office of attorney or solicitor general, and had not the same opportunity of forming a correct opinion on the question as Chief Baron Pollock who, in *Reg.* v. *Gardiner*, 1 C. & K. 628, ruled in favor of the right. There is nothing to show that any one of the learned judges who, in England, ruled against the right were aware of the rules published in 7 C. & P. 676. On the ground that the evidence in this case was wholly insufficient to support the verdict I concur with the Chief Justice in deciding that the rule ought to be made absolute.

MORRISON, J.—I concur with the Chief Justice in thinking not only that the evidence was insufficient to support the verdict, but that the counsel for the Crown had not the right which he claimed and exercised at the trial.

Per cur.—Rule absolute.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*)

HILL V. RUTHERFORD.

Composition deed—Effect of debtor failing strictly to fulfil terms of compromise.

The rule that the terms of composition deeds must be strictly complied with, considered and acted upon.

The creditors of an insolvent debtor, by deed, absolutely and unconditionally released their claim against him; but it appeared by a memorandum on the instrument, that such release was intended to be in consideration of the debtor delivering to them certain endorsed notes, which, however, he stated he was unable to procure, and in fact they were not delivered as had been agreed upon. *Held*, that the creditors were entitled in this court to enforce payment of their orignal claim, notwithstanding that the debtor offered to pay the sum, for which it was stipulated by the deed of composition that the notes should be given, or to give the notes agreed upon; although the court of common law had held the right of the creditors to recover was gone. SPRAGGE, V. C., dissenting.

The bill in this cause was filed by Daniel Hill, Jesse W. Benedict and William Vann; Benedict & Vann being merchants residing in New York, setting forth that on the 16th of September, 1859, defendant having become indebted to Benedict & Vann, (for goods sold to him), in the sum of $979 76, stated the account between them by signing the following;—

"$979 76 Guelph, September 16, 1857.

"Six months after date I promise to pay to the order of Benedict & Vann, nine hundred and seventy-nine dollars, seventy-six cents, at the Bank of Montreal, with current rate of exchange on New York."

Rutherford subsequently, and on the 9th of January, 1860, made an assignment to trustees for the benefit of his creditors, which contained a general release, unless the parties signing wrote "without release" after their signitures; that the deed was only executed by a few of defendant's creditors, and all without release; and the deed was afterwards abandoned, and a deed dated the 7th of August, 1860, was subsequently made; that in the interval, and in the month of June, defendant induced many of his creditors and amongst them Benedict & Vann, to believe that he was unable to pay his liabilities in full, when it was agreed between him and his said creditors, that he should pay them five shillings in the pound, payable in two equal instalments, in six and twelve months, from the first of July, 1860; and that he should give his promissory notes, satisfactorily endorsed, to secure such payments. That for the purpose of carrying this arrangement out, a document was prepared by the defendant, purporting to be between his creditors of the one part, and the defendant of the other part, which instruments defendant took to his several creditors, requesting them to sign it, on the agreement and understanding that he would deliver such promissory notes, as before mentioned; upon which understanding many did sign, amongst others, the plaintiffs Benedict & Vann; that afterwards defendants discovered he could not procure the notes to be endorsed by any one who would be satisfactory to his creditors, and thus to carry into effect in good faith the agreement for composition, and that he therefore abandoned it, and entered into a new arrangement with his creditors, which was carried into effect by an indenture dated 7th of August, 1860, purporting to be made between defendant, of the first part, Ross, Mitchell & Fisken, of the second part, the Bank of Montreal, the City Bank, and the Bank of Toronto, of the third part, and all his other creditors therein named (and among them, Benedict & Vann.) of the fourth part, which deed was transmitted by defendant to Benedict & Vann at New York, in a letter of the 28th of August, 1860, wherein he stated, in effect, "that he was unabled to get such sa-

tisfactory endorsers as aforesaid, and had had therefore abandoned the arrangement and composition in the said paper-writing of June 1860, referred to, and had resorted to the new arrangement contained in the said indenture of the 7th of August, 1860, and requesting the said Benedict & Vann to execute the said indenture and procure other creditors of defendant, resident at New York, to execute the same."

The bill further alleged, that after the abandonment of the arrangement of June, 1860, and before receipt of the deed of the 7th of August, Benedict & Vann, considering the paper of the 7th of September, 1859, a promissory note, sold and delivered the same to the plaintiff Hill, for the sum of twenty-five per cent. on the amount thereof paid by Hill to them, and therefore they declined to execute the deed of the 7th of August, and returned the same to defendant, at the same time informing him of the sale and transfer of the claim; that Hill being afterwards advised that this writing did not constitute in law a promissory note, and therefore could not be sued in his name, Benedict & Vann, authorised him to bring an action at law in their names, in which action the defendant in bad faith pleaded the release of the debt by the paper of June, 1860, and put the same in evidence, when, by consent of parties, a verdict was entered for defendant, with liberty to move to enter a verdict for the plaintiff, if the court should be of opinion, that, upon the facts stated, they were entitled to recover; but the court afterwards, upon argument of a rule obtained for that purpose, refused to disturb the verdict so entered for defendant. The case at law is reported in 11 U. C. C. P. 213.

The prayer was for an injunction to restrain defendant setting up the writing of June, 1860, as a valid document; its delivery up to be cancelled, so far as plaintiff was concerned; an account and payment of amount found due.

The defendant answered the bill at length, setting up, amongst other things, that by the deed of August, 1860, he was allowed two years to pay the compromise therein stated; but that such deed was not intended, neither did it, replace or in any manner do away with the release of June, 1860, except as to creditors who should be willing to give him the additional time and advantage allowed by the deed of August, and who should become parties thereto; that subsequently, and about the 18th of October, 1860, a letter was written to Hill, offering the security stipulated and agreed to be given, and submitted that plaintiffs by suing at law had precluded themselves from resorting to this court for relief, and that under all the circumstances, this court had no jurisdiction in the premises. The cause having been put at issue, the defendant and one of the trustees under the deed, were examined on behalf of the plaintiffs, but the evidence did not materially vary the statements in the pleadings.

The cause was originally heard before his Honour V. C. Esten.

McDonald, for plaintiffs.

Fitzgerald, for defendant.

Esten, V. C.—The evidence shews that the plaintiffs were assenting parties to the deed of January, which operated against them as a release in equity. Then the plaintiffs join in and execute the deed of June, which cannot stand with the deed of January, but supersedes it, with regard to such of the creditors as execute it.

The plaintiffs are therefore bound by the deed of June. This deed cannot be considered as abandoned, by the making of the deed of August, or otherwise, as to creditors not executing the deed of August.

Prima facie, therefore, the plaintiffs must claim under the deed of June, but they retained the note until the security should be given, or composition paid. It must be intended that the note was so retained, in order that if the security was not given or composition with punctuality paid, the original debt might be enforced. The plaintiffs are, therefore, remitted to the deed of January, but Rutherford having put an end to that deed, by the one of August, they are remitted to their personal remedy for their whole debt against Rutherford. This, however, is the operation only in a court of equity, and a bill is, therefore, the proper course.

The decree will, therefore, be, that Rutherford must pay the amount of the note, and costs. Rutherford never was in a position to pay, having stripped himself of all his property. It would now be a breach of trust in Moore to pay.

Rutherford renounced the deed of January by the deed of August, and the plaintiffs choose to adopt such renunciation. In this view their action was premature, but this did not dispense with the payment or tender of composition.

What was done was not equivalent to either, for Rutherford never was ready with money, and the action under such circumstances was no refusal to accept payment of the composition.

(The defendant feeling himself aggrieved by the decree thus pronounced, petitioned for a re-hearing of the cause before the full court: on the re-hearing,)

Proudfoot, for the plaintiffs, contended that the decision of the Court of Common Pleas in the case of *Benedict* v. *Rutherford* did not affect in any degree the questions raised in this suit. From the statements in the pleadings and evidence it is evident that Benedict and Vann never contemplated abandoning any rights they were entitled to under their original claim, unless and until the stipulations in reference to the agreement of June, 1860, were entirely fulfilled. By the deed of June no property whatever was conveyed, and there is nothing contained in it which should prevent it subsisting with the one of January previous; while on the other hand the deed of August cannot be taken to agree with that of June, but must be considered to have superseded it; and Benedict and Vann never having executed or agreed to execute the deed of August, and default having been made in payment of the amount agreed upon by the terms of the compromise, they are remitted to their original rights under the note signed by defendant.

The release being in the hands of the defendants and pleadable at law, this court has clearly jurisdiction to restrain him such use of it being against good faith.

Simpson v. *Lord Howden*, 3 M. & C. 97; *Flower* v. *Marten*, 2 M. & C. 459; *Gudgeon* v. *Bessett*, 8 E. & B. 986; *Hudson* v. *Revett*, 5 Bing. 368.

McMichael and *Fitzgerald* for the defendant.

The general rule in equity is that the court will relieve against a forfeiture which is caused by non-payment of money. Here the defendant is ready to pay the full amount agreed to be paid as a composition, and it is established that before suit commenced he offered either to pay or deliver the notes endorsed as agreed upon. Here, then, the court will be lending its aid to work a forfeiture, for the defendant is not seeking its protection against the effects of his default in payment, as at law he has been declared not liable. This court no doubt would restrain the defendant from setting up the release unless he pays the 5s. in the pound, but, under the circumstances of the case, that is unnecessary, as the defendant is willing and always has been to pay that. The original debt was absolutely released by the instrument of June, and the fact that the original note was allowed to remain in their hands was only to enable Benedict and Vann to enforce payment in the event of the composition not being paid. If the fact of failure to pay the composition had the effect of reviving the debt which had been released, such must be the effect at law as well as in this court, and in that view the plaintiff had no right to complain of the defendant setting up the release.

The fact that the defendant had executed the deed of August cannot possibly affect the rights of the original creditors; they might have chosen to come in under it, or they might have elected, as they did, not to come in under it, and remain under the instrument of June.

Hill, by his proceeding at law, declared his determination not to accept the notes or the stipulated composition, a tender was therefore unnecessary, and the fact that no tender was made cannot now give the plaintiff any additional right to relief. They referred to *Hockster* v. *De Latour*, 17 Jur. 972; *The Danube and B. Sea Co.* v. *Enos*, 8 Jur. N. S. 434; *Black* v. *Smith*, Peake's Rep. 88; *Harding* v. *Davis*, 2 C. & P. 77; *Wallis* v. *Glynn*, 19 Ves. 388; *Davis* v. *Thomas*, 1 R. & M. 506; *Leake* v. *Young*, 5 E. & B. 955.

Vankoughnet, C.—In this case the plaintiff Hill sues as assignee of his co-plaintiffs of an agreement by the defendant with them to pay them the sum of $979·76, on the 16th of March, 1860. The facts of the case appear in the judgment of V. C. Esten, which comes before us on this re-hearing.

I think the deed of the 18th January, 1869, may be left out of consideration, and that the right of the plaintiffs to recover depends upon the deeds of June and August, and the circumstances con-

nected with them. By the deed of June the defendant agreed to secure the payments in composition by his own promissory notes satisfactorily endorsed. This was executed by the plaintiffs Benedict and Vann. The defendant did not, as he subsequently explained, could not procure his notes to be endorsed. Now it cannot be doubted that the stipulation for endorsed notes was a material one; and though it only appears in the recital to the deed, and is not the covenanting or legally operative part of the deed, and could therefore form no defence at law, yet this court would not take so restricted a view of the deed, but would hold the stipulation as part of the agreement of the parties necessary to be observed. This being so, and the defendant finding he could not comply with it, abandons, as far as he can, the deed altogether, and proposes and procures to be executed by most of the parties to the de d of June, the deed of August already referred to. This deed differs in many respects from the other deed; and of course no creditor was obliged to execute it unless he chose. The plaintiffs did not execute it. In the interval between the execution by Benedict and Vann of the deed of June and the execution by the defendant of the deed of August, the assignment to the plaintiff Hill of the debt now in suit was made. Hill then and thereafter stood in no better or worse position in regard to it than his co-plaintiffs, and the question is, were or are they bound by the deed of June after what had occurred? In my opinion clearly not. The defendant did not, and admits he could not, comply with the stipulation for endorsation; he makes an entirely different arrangement for his creditors by the deed of August as a substitution for the deed of June, which he abandons both by his acts and his declarations, and yet he says the plaintiffs must be bound by it.

I think the effect of what has occurred is to leave the plaintiffs in possession of the original right to recover the full amount of the debt. It is of the essence of a composition of an existing debt that every term of the agreement for composition should be strictly observed and performed. Here not only was the stipulation in the deed of June not observed, but the defendant declares he does not intend to observe it. I do not think that the judgment of the Court of Common Pleas on the rights at law of these parties in the case presented to them raises any difficulty to the plaintiffs' right here.

The doubt I have felt is, whether the plaintiffs mignt not now recover at law; and whether, therefore, this court should in its discretion exercise its jurisdiction in favour of Hill, as the assignee of a chose in action. That this court has the jurisdiction, will, I suppose, not be questioned; its exercise is a matter of discretion. In the case for instance of a bond debt and an assignment simply, the court will leave the assignee to sue at law in the name of the assignor, (there being no obstacle to its use,) as in *Hammond* v. *Messenger*, 9 Sim. 327. Here, however, I think we may properly interpose. There is a complication of transactions affecting the debt, arising out of the acts of the defendant himself. The stipulation for endorsation could not be set up at law, and it is doubtful whether the abandonment by the parties of the deed of June, after it had gone into formal operation, would be an answer to it. There is no such difficulty in equity even when the deed may affect, or is intended to affect, the rights of a third party, a stranger to the deed. See the observations of the Master of the Rolls in *Hill* v. *Gomme*, 1 Beav. 544; and of the Lord Chancellor, on appeal, 5 M. & C. 254.

ESTEN, V. C., remained of the same opinion as expressed on the original hearing.

SPRAGGE, V. C.—The same thing was sought in the action at law as is sought in this suit, that is, the recovery of the original debt from Rutherford to Benedict and Vann, which debt it was the object of the several deeds of January, June and August to settle by a composition.

It is *res judicata* by the judgment of the Court of Common Pleas in *Benedict* v. *Rutherford*, 11 U. C. C. P. 213; that the legal right to recover for the original cause of action is gone; that Rutherford's covenant to pay the compositison was future; that the release operated as a present discharge of the old debt, and that the giving of the notes was not a condition precedent: none of these points are now open.

The plaintiffs must come into this court upon some equity independent of those points, and I understand their equity to be, that although the release is in terms absolute, unconditional, and immediate, still it was intended to be conditional upon the giving by Rutherford of endorsed notes for the amount of the composition; and that the endorsed notes not having been given, the plaintiffs have an equity to be remitted to their original cause of action, and that the composition deed of June was abandoned. The question is not whether if Benedict and Vann had a legal right to recover the amount of the original debt, this court would have interposed to restrict the creditor to the amount of the composition; but whether this court will interfere actively to give the creditor more than the amount of his composition. This court will ordinarily interfere to relieve from forfeiture, where it occurs from non-payment of money: but the case of composition deeds is in England an admitted exception; still I think there is no instance, certainly no case has been cited, of a court of equity enforcing a forfeiture even upon a composition deed.

It is certainly to enforce a forfeiture that the plaintiffs come to this court. Assuming that they are right in treating the release as conditional under the composition deed of June, Rutherford's right under that deed was to have a composition of twenty-five per cent. accepted by the creditors, parties to it, upon his giving the notes; and the plaintiffs case is, that they forfeited the right to have the composition accepted by not giving the notes; and they come into equity asking for the whole debt by reason of that forfeiture. It is true that the assumed condition was not the payment of money, but the giving of notes.

I find two English cases where notes were to be given upon a composition deed. They are both cases at law, the first, *Boothby* v. *Sowden*, 8 Camp. 75; was a *nisi prius* decision before Lord Ellenborough: the action was upon the original debt; the defence was, that the creditor had agreed to give time, and to take the debtor's notes, payable in London, for the amount. For the plaintiff, it was contended, that the giving of the notes was a condition precedent, but Lord Ellenborough said: "If the plaintiff could shew that the defendant had refused to give the notes according to the terms of the agreement, they might be remitted to their original remedy, but I think that remedy is suspended by the agreement, unless an infraction of the agreement is proved by the plaintiff;" and the plaintiff was nonsuited.

Doubt is thrown upon this ruling by the case of *Crewley* v. *Hilary*, 2 M. & S. 120. In that case also promissory notes were to be given; and the question was, whether it was the business of the creditor to apply for them, or for the debtor to give them. It was proved that the plaintiff might have had them if he had applied for them, but there was no evidence that the defendant had given or tendered them to the plaintiff. The action was not brought until after the time at which the composition notes were to be payable; so that there was default in payment of the composition money, as well as in the giving of the notes. The court evidently leaned to the opinion that the debtor was bound to give or tender the notes. But even in that case Lord Ellenborough observed: "If the defendant had offered the notes at the time of action brought, it might have bren a ground for staying the proceedings." Mr. Justice Bayley only observed upon the composition notes being past due. This case shews the reluctance with which the court, Lord Ellenborough especially, gave effect to the forfeiture, intimating the probability of the court exercising equitable jurisdiction if the notes had been tendered even after the time at which they ought to have been given, if not after they were due.

Again, supposing that a court of equity would interfere actively in behalf of the creditor under similar circumstances to those in which it would refuse to interfere with the legal right at the instance of the debtor, which I by no means concede, I doubt whether this is not a case in which the court would properly interfere with the enforcement of the legal right. In the English cases where the court has refused to interpose, there has been an express stipulation that upon default the original debt would revive; or at least a very plain and distinct agreement that payment should be made by a day specified. Now here there is no day specified for the giving of the notes; indeed the giving of notes at all was an after-thought; the whole composition deed is framed without reference to any notes being given, the only reference to notes being written in the margin in these words: "And for which said payments to give his promissory notes, satisfactorily endorsed,

and dated on the first day of July next, and at six and twelve months respectively."

No day being named for the giving of the notes, the cases in which the court has refused to interfere for the debtor do not in terms apply. But assuming that this court would regard an absolute refusal to pay composition money, or to give composition notes as equivalent to a default on a day named, has there been such refusal here? Rutherford was disappointed in getting his notes endorsed in the quarter that he expected, and thereupon proposed the composition deed of August as a substitute; and on the 28th of that month wrote to Benedict and Vann, asking them to become parties to it. In that letter all that he says about the endorsed notes is this: "I could not get the security wanted—the party that promised to become a partner drew back, so I went at once to the Bank of Montreal, they being the largest creditors, and told them; they said it was more than I could expect to get any party about here to go security, as the farmers about here are terribly afraid of being security."

Before the receipt of this letter, and I think before the deed of the 7th of August, Benedict and Vann had endorsed Rutherford's note to the plaintiff Hill. The plaintiffs put it in their bill, that Rutherford abandoned the composition of June, and refer to the letter of the 28th of August as evidence of it, yet say that the original note was endorsed to Hill, before the 28th of August, after the abandonment. It is to be noted that Hill purchased the note at twenty-five per cent., and that twenty-five per cent. was the amount to be paid under the composition deed of June. Benedict and Vann say that in endorsing the note to Hill they supposed it to be a negotiable instrument. Unless there was an abandonment of the deed of June, before the endorsement to Hill, of which there is no evidence, it was bad faith in Benedict and Vann to make that endorsement. It is agreed, I believe, that this original note was not a negotiable instrument; and if so, Hill took it subject to the equities that attached to it in the hands of Benedict and Vann.

If the note had been in the hands of Benedict and Vann at the time of the receipt from Rutherford of his letter of August, as Rutherford evidently expected it would be, their proper course was clear. The letter said not a word about abandoning the deed of June, but proposed another as a substitute; indeed, abandoning the deed of June without the consent of the parties to it, was out of the question. Benedict and Vann's proper course then would have been, if they declined the proposed substitute, to say so; and to say that they insisted upon the endorsed notes in accordance with the deed of June, and so have given Rutherford the opportunity of making another effort to procure them; rather than pay the original debt in full, it would have been to the interest of his other creditors to assist him in doing so. Benedict and Vann having parted with the note cannot place them in a better position; nor can Hill's position be better than theirs. I think the plaintiffs position may fairly be put thus: suppose Benedict and Vann, immediately upon the receipt of the letter of August, to have written to Rutherford to say that they would hold him to have abandoned the deed of June, surely Rutherford might with reason answer that he had merely made a proposal to them, which if they refused would leave it still open to him to comply with the terms of the deed of June. They should hardly be countenanced in snapping at that as an abandonment which was never intended to be such.

Rutherford's action was not very prompt with Hill. He probably thought, with Benedict and Vann, that the note was negotiable, and that Hill as the holder was entitled in law to the full amount in any event, and that he was without remedy. However, on the 18th of October following his solicitor addressed a letter to Hill offering to give the required security under the deed of June. This offer does not seem to have been accepted, and Hill, in the name of Benedict and Vann, sued upon the original note, before either of the notes to be given under the deed of June would have been payable. This seems material in reference to the language of Lord Ellenborough in *Crawley* v. *Hilary*

I do not think that Benedict and Vann's letter of the 8th of June can make any difference in the case, so as to bring it within the rule (taking it to be the rule) that a court of equity will only decline to interfere with the legal right, when in the composition deed it is expressly stipulated that upon default the original debt shall revive. That letter was written, as its contents shew, *before* the writers had seen the composition deed, and in ignorance as to whether the amount of the composition was to be secured or not; and the event in which they said they should want to hold the original note, was only in case of the deed, not providing that security should be given. The words are, "In reply to your proposition of 5s. in the pound, would say that you do not state whether it is to be secured or not. If not, we should want to hold the original note until the compromise paper was paid." As a fact the original note was retained by Benedict and Vann, but it was not in pursuance of any stipulation in the composition deed or the letter.

There is then, as it seems to me, nothing in the case but the original debt, and the composition deed, and the omission to give the endorsed notes; the same case that was before the Court of Common Pleas. The deed has been construed by that court, and there cannot of course be one construction by a court of law, and another by a court of equity. Neither, I apprehend, will a court of equity give a different effect to the various provisions of an instrument than is proper according to their legal construction: will not, for instance, make one a condition precedent to another, unless they are so upon a proper construction of the instrument, or treat covenants, as dependent, when upon a proper construction they are independent covenants. A case illustrative of this was decided by the Lords Justices. *Gibson* v. *Goldsmid*, 5 D. M. & G. 757.

Supposing it open to the plaintiffs to shew in this court that the giving of endorsed notes was intended to be a condition precedent to the release, or to the deed of June coming into operation, they have not shewn it. What evidence there is, that of Laurie, called by the plaintiff, a trustee under the deed of January, is the other way. He says: "I know no other arrangement or terms, with respect to the deed of June, than what appears on the face of the deed. I am not aware of any understanding that this deed was not to operate until the notes were given."

As to the alleged abandonment of the deed of June, I have already observed upon it; but I may add, that it was, I apprehend, equally open to the plaintiffs to urge it at law, as in this court, and as a piece of evidence, that it was not abandoned except as to those who accepted the deed of August in lieu of it. is the fact, that Gates, a party to the former, but not the latter, received payments of his composition according to the deed of June; he asked, indeed, for his debt in full, but this was refused, and he received his composition.

I think the plaintiffs' case fails, and that so far from having any equity to come into this court, their conduct throughout has been harsh and inequitable. I doubt, if the legal right had been with them, whether it would not have been a proper case for relieving the debtor from the forfeiture, for this reason, in addition to the case being outside the cases decided in England, that a decree for the plaintiffs would affect others besides the defendant, namely, his creditors; a reason which weighed with Lord Eldon in *McKenzie* v. *McKenzie*, 16 Ves. 372. I may observe too, what has probably had some weight with the court in refusing relief in England, that composition deeds are not favourably regarded there, it being considered that proceedings in bankruptcy are better for both debtor and creditor. But here, in the absence of a bankrupt law, they should be regarded favourably, and as far as possible carried out, as perhaps the only mode of making a final and equitable disposition of the effects of an embarrassed trader.

If Lord Ellenborough's view be correct, the defendant was in time in offering the notes in October, being two months and a half before the first would have been payable. I do not quote his lordship as an *authority* in a court of equity, but the view of so eminent a judge, as to what would have been just between the parties, is entitled to respect; and it is to be observed, that notes given in October would have placed the creditor (if he had not parted with the original note) in as good a position as if given contemporaneously with the execution of the deed. After refusing them, I cannot see his equity to recover the original debt in full.

But apart from these considerations, growing out of the particular facts of this case, I think that by sustaining this bill the court would make a precedent in discordance with the principles upon which courts of equity proceed. It is in substance and in

effect a bill to enforce a forfeiture for default in the payment of money. My own conclusion, therefore, is, with great respect to the opinions of the other members of the court, with which I have the misfortune to differ, that the bill should be dismissed. I have felt it to be due to his Lordship the Chancellor, and my brother Esten, to explain my views at large.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

IRVIN v. HAM.

Cognovit—Filing copy—Copy filed not true copy—Dispute as to amount due on judgment—Remedy—Con. Stat. U. C., cap. 22 sec. 237.

It is enacted by sec. 237 of Con. Stat. U. C. cap. 22, that no confession of judgment or cognovit actionem shall be valid or effectual to support any judgment or writ of execution, unless, within one month after the same has been given, the same or a sworn copy thereof be filed on record in the proper office of the court in the county in which the person giving such confession of judgment or cognovit actionem resides.

Held, 1. That immaterial discrepancies between the sworn copy filed and the original cognovit, constitute no ground for setting aside the judgment entered on such cognovit, and subsequent proceedings.

2. That that a defendant seeking to set aside a judgment on a cognovit, as not being filed in the county where he resided at the time of giving the cognovit, must show that he was not so resident.

3. That where parties dispute as to the balance justly due on a judgment, a reference may be made to the master, and costs be directed to abide the event.

(8th January, 1863.)

This was a summons, obtained by defendant, calling upon the plaintiff to show cause why the judgment in this cause, and all subsequent proceedings should not be set aside, on the ground that neither the cognovit given by the defendant nor a sworn copy thereof was filed in the office of the deputy clerk of the court in which the defendant resided at the time of giving the cognovit; or why the plaintiff should not be compelled to enter up satisfaction of the said judgment, and to withdraw the writ of execution in the hands of the sheriff, upon being paid the sum of $64 54, or to reduce the endorsement on the writ of *fieri facias* to the said sum of $64.54, on grounds disclosed in affidavits and papers filed.

The cognovit was given by defendant to plaintiff on 6th August, 1858. It was for the sum of £110, to secure to plaintiff payment of £99 15s. 1d., with interest from date. A copy of it was filed within one month after the cognovit was given in the office of the deputy clerk of the crown in the county of Perth.

The copy filed was not in all respects a true copy of the original. The original commenced, "I confess this action, and *that the plaintiff has sustained damages* to the amount of £110, besides costs and charges in this behalf to be taxed." The copy commenced, "I confess this action, and that the plaintiff *is entitled to recover in it* the sum of £110, besides costs and charges in this behalf to be taxed." The original proceeded, "And I do hereby agree that judgment for the same *may* be forthwith entered up of record against me." The word "may" was omitted in the copy filed." The copy filed concluded, "And that it shall not at any time or in any event be necessary previous to issuing the said execution to revive the said judgment or to sue out or execute any writ of *scire facias*." There was no such concluding clause in the original cognovit.

It did not appear on what day judgment was entered on the cognovit. Execution was issued on 29th September, 1858, and payments were made on the judgment, as well before as after issue of execution.

The balance due upon the judgment was not agreed upon between the parties. Defendant claimed that he owed at the time of the application only $64 54; while plaintiff claimed a much larger sum to be due him. Defendant, before making the application, tendered $64 54 to plaintiff in full of judgment, but the amount was refused.

Carroll shewed cause, referring to *Commercial Bank* v. *Fletcher*, 8 U. C. C. P. 181.

Moss supported the summons, referring to Con. Stat. U. C. cap. 22 sec. 237, and contending that it was no where shewn among the papers filed that defendant, at the time of giving the cognovit, was a resident of the county of Perth.

DRAPER, C. J.—Independently of any other consideration I should not set aside this judgment and execution at the instance of the defendant, when a paper intended to be, and sworn to be, a true copy of the cognovit was filed within one month, on the ground that it appears to have been in some particulars—not the most material, however—an incorrect copy.

As to the objection that it does not appear defendant was resident in the county of Perth at the time the cognovit was given, I think it rests upon him to shew he was not.

I refer to the case of *The Commercial Bank* v. *Fletcher*, 8 U. C. C. P. 181 for my views as to the construction of sec. 237 of Con. Stat U. C. cap. 22.

I do not think the plaintiff's attorney, or any one else, can enforce, under this cognovit, payment of more than what is stated to be the true debt and interest, and the costs of the cause, execution, poundage and sheriff's fees.

I refer the matter to the master to determine, on hearing the parties (on affidavit, if necessary), what has been paid, and what is the balance justly due, and, on payment of that balance, order all further proceedings on the execution to be stayed, and satisfaction to be entered on the roll. If the master find no more to be due than has been tendered and refused, the plaintiff must pay the costs of this application, and of the master's office; but if too little was tendered, defendant must pay these costs.

Order accordingly.

ALLMAN AND WIFE v. KENSEL.

Arrest—Omission of the court in affidavit—Slander—Right to review decision of County Court Judge.

The name of the court must be inserted in an affidavit to hold to bail at the time of suing out the process, and where it was not inserted until long after defendant had been arrested the arrest was set aside.

In this case the action was by husband and wife for a verbal slander of the latter not actionable without proof of special damage, and the affidavit stated only that persons *not named* had in consequence withdrawn their custom from the husband, who was a tailor. The learned judge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only, expressing no opinion as to his right to review the decision of the county court judge.

(December, 1862.)

This was an application to set aside the order for the defendant's arrest made by the county judge of Essex, with the writ and arrest, &c., on various ground—insufficiency of statement of any good cause of action, and the absence of any facts indicative of an immediate departure from Canada, the absence of any heading to the affidavit shewing what court it was in, and other minor grounds.

The defendant filed no affidavits except shewing his arrest on the 11th of December instant.

The only ground for the arrest was an affidavit of the plaintiff, Peter Allman, setting out that over three months before the application the defendant had verbally slandered his wife by calling her a whore in presence of several persons; that in consequence of such words various persons (not named) who formerly employed the plaintiff as a tailor had declined so to do, and his wife who worked with him also lost employment, and that he and his wife had also lost the society, &c., of persons, (not named,) and that he and his wife had suffered damage, and that they had a cause of action against the defendant for $100 and upwards: that the defendant kept a saloon in Windsor, had no ties to bind him to Canada, and could leave without inconvenience: that the plaintiff had been informed the defendant had offered his license for sale, intimating his intention "to leave the said town;" that there was good and probable cause for believing, and the plaintiff did believe that the defendant was about to quit, and unless forthwith apprehended that he would quit Canada with intent, &c., to defraud the plaintiff and his wife, and without satisfying him and her for the damage so occasioned.

This was sworn on the 8th of December, 1862, and on the 10th instant the learned judge gave a fiat to arrest for $100.

On the 11th December the defendant was arrested, and served with a copy of writ in the Queen's Bench, tested the 10th of December. On the 15th his attorney swore to the paper now produced being a true copy of the affidavit on which the order to hold to bail was issued; but that such affidavit was not filed in the de-

puty clerk's office when process issued, nor up to the time of his (the attorney's) affidavit. No name of any court appeared at the head of the affidavit.

On the 18th of December the summons for discharge was granted by Morrison, J. In shewing cause the plaintiff filed an affidavit dated 24th of December, annexing a copy of the judge's fiat, and stating that the fiat was filed in the deputy clerk's office when the writ was issued: that the affidavit was delivered to the judge, who retained the same till the 23rd of December, when he delivered it to the deputy clerk, and that in Essex it was customary in obtaining summonses and orders from the judge to file and leave the papers with him, and he delivered them to the clerk of the proper court; and that when the defendant was arrested he deposited $100 with the sheriff as bail, and the sheriff then let him go.

Spencer, for the plaintiff.

Blevins, contra.

HAGARTY, J.—I must, in the first place, express my great surprise and regret that any person should have been held to bail on such statements as were sworn to in this matter. It is the first time I have ever heard of an arrest being ordered for verbal slander. It is notorious that in such cases (however gross) the damages rarely exceed a few dollars, and that in all human probability the limit of £25 fixed as the lowest sum for which arrest is allowed, would never be reached. But here the words of themselves are not even actionable, and the plaintiffs could not recover except on proof of special damage clearly proved, and an allegation that persons unnamed had withdrawn their custom in consequence would hardly satisfy most minds. Such an allegation would not support a declaration, and where no cause of action exists without proof of the damage, it would seem only reasonable to expect to find the affidavit more explicit.

Again, no facts whatever are stated to raise the belief that the defendant was about to leave the province. His offering his license for sale, and talking of leaving the town of Windsor, cannot amount to anything unless connected with some other circumstance. If the belief of the plaintiff, unsupported by any reasonable ground therefor, is to be held sufficient, the statute is rendered of little avail.

I repeat therefore, my inability to understand how any man's liberty should be infringed on such statements.

When process was issued on the judge's fiat an affidavit was not filed in the clerk's office till nearly two weeks, nor was the name of any court put at the head of the affidavit for many days after the issuing of the process and the arrest, nor apparently up to the issuing of the summons. The act, ch. 24, Consol. Stats. U. C., sec. 6, declares that it shall not be necessary that it should be entitled in any court at the time of making it, but that the title of the court may be added at the time of making it, but that the title of the court may be added at the time of suing out the process; "and such style and title, when so added, shall be for all purposes, and in all proceedings, whether civil or criminal, taken and adjudged to have been part of the affidavit *ab initio*."

I quite agree with the views expressed on this point by Mr. Justice Richards in *Swift* v. *Jones* (6 U. C. L. J. 63,) and that our statute clearly points out the course to be adopted as to entitling affidavits. I think it was the plaintiffs' duty to see it properly entitled when suing out the process; then and then only, as it seems to me, can he avail himself of the privilege allowed by our statute. On this ground I think the arrest must be set aside.

There seems to be a difficulty in dealing with orders made by judges for arrest, after exercising their discretion on the materials before them. In this case I have no affidavits from defendant negativing the intention to leave, and am therefore asked to review the discretion so exercised.

Draper, C. J., in *Terry* v. *Comstock*, (6 U. C. L. J. 235,) says, "It was not pressed upon me to review the decision of the earned judge who made the order for the arrest upon any suggestion of the insufficiency of the affidavit before him to sustain such an order. If this had been done I should have referred the matter to the full court."

I had occasion to notice the law on this point in *McInnes* v. *Macklin*, (6 U. C. L. J. 14.)

As I can see my way to disposing of the case on the other ground, I do not feel called upon, in the absence of any affidavits from defendant, to discuss this point any further than has been done in the cases cited. If the defendant desires to rescind the order, I must refer him to the full court.

I direct that the writ and arrest of defendant, and all proceedings had thereon, be set aside, with costs to be paid by the plaintiffs, and that the sheriff do return to defendant the money deposited with him in lieu of bail, or if any bail-bond be given, that it be delivered up to be cancelled.

I desire to be understood as expressing no opinion as to my right to review the county court judge's decision in a case like the present.

IN RE IRA LEWIS, ONE, &c.

Reference of attorney's bill—Liberty to dispute retainer.

Where an application is made to have an attorney's bill referred to the master for taxation, and the affidavits in support of the application in no manner question the retainer, leave to dispute the retainer will be refused.

(January 24, 1863.)

W. F. Macdonald, on behalf of the Buffalo and Lake Huron Railway Company, made application to have an attorney's bill referred to taxation.

The affidavit was the ordinary one, shewing service of the bill, but in no manner disputing the retainer.

Mr. Macdonald desired to have leave reserved in the order to dispute the retainer. He referred to *Re Payne* 5 C. B., 407.

M. B. Jackson shewed cause, objecting that no leave to deny the retainer should be reserved, the same being in no manner questioned in the affidavits filed.

DRAPER, C. J., having taken time to consider the application, refused, under the circumstances, to reserve leave to the client to dispute the retainer; but gave permission to Mr. Macdonald on further affidavits to apply to a judge in Chambers to have his order varied.

IN RE IRA LEWIS, ONE, &c.

Reference of attorney's bill—Denial of retainer—Conflicting affidavits.

On an application made to a judge in Chambers for an order referring an attorney's bill to taxation, it is in the discretion of the judge to reserve leave to the applicant to dispute the retainer or not. In order to the proper exercise of that discretion, the judge may look to the affidavits before him, though conflicting.

(Chambers, Feb. 5, 1863.)

Mr. Macdonald afterwards, pursuant to notice, applied to have the order of Draper, C. J. so far varied as to reserve liberty to the client to dispute the retainer.

He filed affidavits in which it was, in effect, sworn on the part of the Buffalo and Lake Huron Railway Company, that Mr. Wood, of Brantford, was the only attorney of the Company, and that Mr. Lewis was never employed by the Company.

M. B. Jackson shewed cause, producing an affidavit of Mr. Lewis, to which was annexed several letters from officers of the Company authorizing him to act in several matters for and on behalf of the Company, and in which it was positively sworn that he was retained to perform the services in respect of which his bill was rendered.

Macdonald contended that the question of retainer could not be tried on affidavit, and submitted that he had shown enough to entitle him to the order referring the bill to taxation, and reserving leave to dispute the retainer.

MORRISON, J., held that it was in his discretion to reserve leave to deny the retainer or not, and that in order to the proper exercise of that discretion he could look to the affidavits before him, though conflicting. Under the circumstances of this application he refused to vary the terms of the order of Draper, C. J. He said the Railway Company must either dispute the retainer without a reference to the bill or taxation, or accept a reference and so admit the retainer. The Company accepted the latter alternative.

CHANCERY CHAMBERS.

Reported by G. SAMUEL G. W. WOOD, Esquire.)

BESSEY v. GRAHAM.

(2nd February, 1863.)

Error in Master's Report—Amendment—New upset price—Postponement of sale.

Wood, on behalf of plaintiff, made an *ex parte* application, under the following circumstances:

The bill had been taken *pro confesso* against defendant. Decree for sale. No subsequent incumbrancers. After the final order had been made and the advertisement of sale for 14th February published, it was discovered that the Master's clerk in making up the report had omitted to include two items of interest, amounting together to £141 14s. 5d., as set forth in plaintiff's affidavit of claim. The error appeared on the face of the papers filed, containing the clerk's calculation in pencil below the account as sworn to by plaintiff.

Upon an affidavit stating the facts, and production of the papers from the master's office, his honor V. C. Esten held there was no necessity for appointing a new day for payment, and granted an order referring it to the master to take a fresh account of plaintiff's claim, and to amend his report; and leave was given to fix a new upset price and to postpone the sale if necessary.

S. G. Wood for plaintiff.

DIVISION COURTS.

(In the Third Division Court, County of Elgin, before His Honor JUDGE HUGHES.)

DAVID STEWARD, Plaintiff v. ISAAC MOORE AND JESSE KIPP, Executors of the last Will and Testament of JAMES W. BOWLBY, Defendants.

Action on promissory note of the testator, who made his will, appointing the defendants and one David Harvey executors. All the executors took probate and administered, but Harvey alone managed the estate. The suit was brought, however, against Moore and Kipp (without noticing the name of Harvey in any way.) They were served with summons from this court to appear at the sittings on the 6th January, 1863. The plaintiff appeared on that day, but the defendants made default; judgment was, therefore given for the plaintiff for the amount of his claim.

On the 21st January (15 days after the trial) the defendant Kipp applied to the judge, upon affidavits, for a summons calling upon plaintiff to show cause why the proceedings should not be set aside for irregularity—

1st. Because the executor, David Harvey, had not been sued.

2nd. Because Harvey had had the management of the estate, and transacted all the business connected with it, and knew nothing of the proceedings.

3rd. That the defendant (Kipp) did not appear at the trial, because he was returning officer at the municipal election.

4th. That the executors were prepared to shew what assets had come to their hands, and how the same had been administered.

The other executor, Harvey, also made an affidavit substantiating these facts, and that he had no knowledge of the suit until after judgment was obtained, otherwise he would have been present at the trial, and would have been prepared to shew what assets had come to the hands of the executors, and how the same had been disposed of; and also setting forth what sums the executors had expended in proving the will and for legal advice, and other expenses in reference to the estate; and that there was not sufficient property in the hands of the executors to pay the judgment and costs, and the amount expended. Neither of the affidavits stated the actual sum received; nor the value of the estate; nor the sum actually expended in detail. The defendant, Moore, made no affidavit shewing what reason he had for not appearing to the summons; nor was it shewn why the defendants did not inform the other executor (Harvey) that they had been served with process.

Paul, for the defendants, cited Addison on Con., 1063; Chit. Arch. Prac., 1170, Action against Exr.; Williams on Exrs., 1750, 1824, 851; *Elwell* v. *Quash*, Strs. 20.

White, for the plaintiff, cited the 57th sec. of the D. C. Act, the 69th sec., the 107th sec.; and the rules of the Div. Courts, Nos. 40, 41 and 42.

HUGHES, Co. J., delivered the following judgment:—

1st. It is quite true that if there be several executors they should all be sued, in case they have all administered and have assets, or the defendant sued may plead the non-joinder of the others in abatement; but if one hath not proved nor administered, he may be omitted. 1 Chit. on Pl. (Greening's) 51; Toller, 367; 1 Moo. and P., 663; 4 T. R., 565. This is the rule of the superior courts.

2nd. Setting up the non-joinder, however, of a co-executor as a defence must, in the superior courts, be taken advantage of by a plea in abatement, and, in ordinary cases, such a plea must be put in within four days of the service of the declaration. In inferior courts it is no doubt necessary that such a plea must be made as soon as conveniently possible (as at the next court), and at all events before any next step is taken.

3rd. I think, therefore, that the non-appearance of the defendants at the trial, and no defence being made for them, ought to preclude my interfering to disturb the judgment given.

4th. The 57th section of the Division Court Act enacts—that any executor or administrator may sue or be sued in the division court, and the judgment and execution shall be such as in like cases would be given or issued in the superior courts. The 69th section enacts that any case not expressly provided for by that act, or by existing rules made under that act, the county judges may, in their discretion, adopt and apply the general principles of practice in the superior courts of common law to actions and proceedings in the division courts.

5th. The general rules of the court do not provide for an amendment in a case where it appears at the hearing that a *less* number of persons have been made *defendants* than by law is required. The 39th rule provides for a case where a *greater* number of persons have been made *plaintiffs* than by law required. The 40th rule, for a case where a *less number* of persons have been made *plaintiffs* than by law required. The 41st rule, for a case where *more* persons have been made *defendants* than by law required; and the 42nd rule for a case where *all who have been made defendants* have not been served with the summons, so that I must be guided by the general practice of the superior courts, and discharge this application because it was not taken advantage of at or before the trial, and because in the superior courts it would be too late to make such an application after verdict.

6th. The 85th section of the Division Court Act enacts that if on the day named in the summons the defendant does not appear or sufficiently excuse his absence, or if he neglects to answer, the judge, on due proof of service of the summons, &c., may proceed to the hearing on the part of the plaintiff only, and the order, verdict or judgment thereupon shall be *final and absolute*, and as valid as if both parties had attended.

7th. The 107th section permits the judge, upon the application of either party, within fourteen days after the trial, upon good grounds being shewn, to grant a new trial upon such terms as he thinks reasonable, and in the meantime to stay proceedings. I think under the ruling of the Court of Queen's Bench in *Smith* v. *Rooney*, 12 U. C. Q. B. 661, it is beyond my authority to disturb a verdict after the fourteen days, expressly limited by the Division Court Act, have expired. It has been ruled that the judge of an inferior court may grant a new trial for matters of irregularity, as where the proceedings have been contrary to the practice and rules of the court: (*Bayley* v. *Boone*, 1 Str. 392; *Jewell* v. *Hill*, 1 Str. 499.) A verdict may be set aside by motion for misconduct of the jury, as where they toss up, or draw lots, or otherwise determine by chance which way the verdict shall be, without further conference after such determination: (*Lord Fitzwalter's case*, 1 Freem. 415; *Foster* v. *Hawden*, 3 Lev. 205.) There is, however, no complaint of anything of that kind here, nor of anything which the superior courts would treat as an irregularity.

8th. Had the application been made within fourteen days after the trial, I should have ordered a new trial upon the merits upon payment of costs: as it is I think I have no authority to do so.

The summons must, therefore, be discharged.

GENERAL CORRESPONDENCE.

Unpatented lands—Liability to assessment and sale.

To the Editors of the Law Journal.

Gentlemen,—If it would not be against the rules which govern your published answers to correspondents, I would like to know, if *unpatented* lands—on which some instalments are due the Crown by the purchaser, and on which no one resides—can be assessed, or sold for taxes? Sec. 138, cap. 55, C. S. U. C. says, the *interest* of the defaulter may be sold, while Judge Draper, in *Street* v. *The Corporation of Co. Kent*, 11 U. C. C. P., says exactly the contrary. What is your opinion? Assessors and Municipal Councils through the country have no doubt at all on the subject, for they assess *all* lands on which an instalment may be paid. Your answer will confer a favor on many of your readers.

I am, your obedient Servant,

A Law Student.

Ottawa, Feb. 23, 1863.

[We do not understand Draper, C. J., in *Street* v. *County of Kent*, 11 U.C.C.P. 255, to say that no unpatented lands can be sold for taxes. All he does say is, that Street, the plaintiff in that case, was not either "the grantee or lessee of the lands in question, nor was there any license of occupation granted to him in respect thereof" (p. 258).

The section of the Assessment Act to which our correspondent refers was neither cited in the argument nor adverted to by the court. It provides that "if the sheriff sells any land of which the fee is in the crown, he shall only sell the interest therein of the *lessee* or *locatee*," and that "the conveyance shall give the purchaser the same rights in respect of the land as *the original locatee* or *lessee* enjoyed, &c."

Now, if the fee be in the crown, and the land though sold be neither *granted*, *leased*, nor *located*, it is not liable to be either taxed or sold for taxes. This is what we understand Draper, C. J., to have decided, and nothing more. Had Street been either *grantee*, *lessee* or *locatee*, we apprehend the decision would have been very different.

True it is many people suppose that Draper, C. J., has decided that no unpatented lands can either be taxed or sold for taxes. But there is nothing in the language of that learned judge to warrant such a conclusion. The general rule is, that lands vested in Her Majesty cannot either be taxed or sold for taxes. The exception is where the land is leased or located, in which case the interest of the lessee or locatee in the land may not only be assessed but sold for nonpayment of assessment, and the sale "be valid without requiring the assent of the Commissioner of Crown Lands."

Such is the express language of the legislature in the section to which our correspondent refers. Its meaning is clear and unmistakable. The decision to which our correspondent refers, so far from being in conflict with it, in our opinion supports it.—Eds. L. J.

MONTHLY REPERTORY.

COMMON LAW.

Q. B. Stallard v. Great Western Railway Co.

Bailment—Luggage—Railway Station—Cloak Room—Hours of Attendance—Reasonable—Question for the Jury.

A passenger arrived at the up terminus of a railway station on Saturday, and deposited his luggage in the cloak-room. On Sunday he proceeded to the cloak-room for his luggage but found no one in attendance, and in consequence of delay in obtaining his luggage, he missed the train by which he intended to leave the station.

Held, that the luggage was not deposited with the company as ordinary warehousemen, but that the contract on the part of the company was to deliver the luggage at a reasonable time, on a reasonable request.

C. C. R. Reg. v. John Jennison.

False pretences—Money obtained by a false representation of an essential fact with false promises.

A false representation by a married man—whereby a single woman is induced to part with her money to him—that he is a single man; that he will furnish a house with the money, and marry the woman, is sufficient to support a conviction for obaining money under false pretence; for although the two latter statements are mere false promises to do something in future, and, as such, are insufficient, the pretence of being a single man is a pretence of an essential fact.

C. P. Phene v. Popplewell and another.

Landlord and Tenant—Surrender by operation of law.

A was B's tenant of a house from year to year. A, being in insolvent circumstances during a current quarter, sold his effects, and sent the keys to B's office, who refused to accept them, but they were left at his office. In the next quarter B put up a board on the house, giving notice that it was to let, and used the keys for the purpose of shewing it to persons with a view to letting it. In the quarter after that B painted out A's name, which had before been painted on the premises, and had some cleaning and repairing done to the house, and the day after the last mentioned quarter expired demanded possession.

Held, that what took place before the last quarter might be coupled with the acts done in the last quarter, and the act demanding the premises, which referred back to the first quarter; that the whole constituted an acceptance by the landlord of the tenant's offers that it amounted to a surrender by operation of law, and A was consequently not liable for rent for the two last quarters.

EX. Holme v. Clark and another.

Practice—New Trial—Surprise.

A party to a cause, who has not been called as a witness, cannot have a new trial on the ground of surprise in regard to the effect of any conversation with himself; at all events, if he admits some conversation to have occurred, and the effect of it is not necessarily decisive of the case.

Webber v. Shaw.

Practice—Costs—County Court—Bill of Exchange—Indorsement.

In an action by a party as endorsee of a bill of exchange, after judgment by default for a sum less than £20, it is no answer to an application for costs, on the ground of the parties not residing within twenty miles of each other, that the bill was endorsed to the plaintiff to sue upon, as residing beyond that distance from the defendant, for the purpose of obtaining costs on that ground.

Q. B. EX PARTE WALLIS.

Attorney—Service of Clerk under articles—Death of Master—Assignment.

A clerk, duly articled to an attorney, served a portion of his time with his master. Upon his master's dying negotiations were entered into for the transfer of the business, and assignment of the clerk; but the assignment was not executed till about a month afterwards. During that time the clerk continued to serve in the office of his late master.

Held, that the interval between the death of the master and the execution of the assignment could not be allowed to count.

EX. GIBSON V. ORICK.

Contract—Agency—Right of Broker to commission.

Although the broker who introduces the customer is entitled to his commission, and it may be a question for the jury (partly upon custom) which of two brokers has in fact introduced the customer (*Cunard* v. *Van Oppen*, Fost. & Fin. 716), yet where the broker introduces a party who introduces another broker, through whom (by the intervention of another party) a charter is effected by the negotiations between him and the agent of the owner, the first broker is not entitled to recover commission, and witnesses cannot be asked as to the effect of a supposed custom in such a case to entitle him to claim commission, as his agency is too remote, so that the custom would not be legal or reasonable.

CHANCERY.

L. J. WILDE V. WILDE.

Practice—Staying proceedings—Costs.

Where a defendant satisfies the claim of the plaintiff before the hearing, the plaintiff cannot, on a motion to stay proceedings, make the defendant pay all the costs of the suit.

M. R. WEBSTER V. WEBSTER.

Foreign attachment—Lord Mayor's court—Assignment of moneys in hands of garnishees—Notice of attachment

A foreign attachment in the Lord Mayor's court only operates upon those moneys in the hands of the garnishees, in respect of which the debtor could have brought an action at the time of the attachment, or at any time between the issuing thereof and the entry of the pleas of the garnishees.

Where, therefore, before the attachment, the debtor had assigned all his interest in the property sought to be attached, and notice thereof was given to the garnishees, it was held that the attachment had no operation as against the assignee.

V. C.-S. SAUNDERS V. ROTHERSON.

Will—Sale of business—Residuary legates—Employment of manager.

A testatrix, after giving certain legacies, bequeathed her estate and effects to R. upon trust to sell the same except a certain leasehold house, in which she directed him to continue her business under the management of W. Then, after directing R. on the expiration of the lease, to sell the goodwill, &c., or, at his discretion, to defer such sale until payment of legacies, she gave the residue of the estate to S.

Held, that S. was not entitled to have an immediate sale.

V. C. K. FAULKNER V. LLEWELLYN.

Practice—Common order to elect.

Upon a bill filed for specific performance of a contract to take a lease, a motion is made for payment of a year's rent into court, and such motion is refused on the ground of possession not having been taken under the contract. The plaintiff then sues the defendant at law, and the defendant gets the common order to elect. On motion to discharge such order for irregularity—

Held, that the common order was the proper course, and on the undertaking of the plaintiff to abandon all relief in respect of rent prior to the contract, and to amend by striking out such relief, all proceedings under the order to elect stayed, the plaintiff paying the costs of the motion, and the defendant having the option of paying in the rent within a fixed time, the action being stayed.

V. C. K. FOX V. CHARLTON,—CHARLTON V. HALL, HALL V. FOX.

Will—Construction—Power—Election.

C. having made an feoffment of property at B., accompanied by livery of seizin, in favour of his daughter M., absolutely, she, by a declaration of trust of even date, agrees to hold such property in trust for herself and her two brothers and sister, in such shares as C. should by deed or will appoint, and in default of appointment, in trust for them, their heirs and assigns equally. C. continues in possession during his life, and by his will and codicil not referring to the power, leaves his property at B. to trustees, his son being one, upon certain trusts in favour of his daughter and his two sons and their children, with gifts of other property to his sons and to his grand-daughters. Suits being instituted to administer the trusts of the will and feoffment, it is found that the trusts of the latter were binding at the testator's death and he having very small property at B., besides that mentioned in the feoffment and declaration of trust, questions are raised as to whether the will is an exercise of power, and whether the two sons are not put to their election as between the feoffment and will.

Held, that the testator intended by his will to give the whole of his property at B., there being a good exercise of the power *pro tanto*, and that the two sons, but not the daughter, were put to their election.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

SKEFFINGTON CONNOR, LL.D. and Q.C., of Osgoode Hall, Esquire, Barrister-at-Law, to be a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, in the room and stead of The Honorable Robert Easton Burns, deceased. —(Gazetted, January 31, 1863.)

CORONERS.

GEORGE BELLINGTON, Esquire, M.D., to be an Associate Coroner for the County of Middlesex.—(Gazetted, February 7, 1863.)

Kennon L. Cook, Esquire, M.D., to be an Associate Coroner for the United Counties of Northumberland and Durham.—(Gazetted, February 14, 1863.)

JOHN GUN, Esquire, M.D., to be an Associate Coroner for the County of Grey. —(Gazetted, February 14, 1863.)

ALFRED E. ECKROYD, Esquire, M.D., to be an Associate Coroner for the County of Wellington.—(Gazetted, February 21, 1863.)

ALFRED E. ECKROYD, Esquire, M.D., to be an Associate Coroner for the County of Grey.—(Gazetted, February 21, 1863.)

JOHN N. REID, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel.—(Gazetted, February 21, 1863.)

NOTARIES PUBLIC.

ALEXANDER G. MACDONELL, of Morrisburgh, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 7, 1863.)

JOHN C STIKEMAN, of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, February 7, 1863.)

EDMUND JOHN SENKLER, the younger, of Brockville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 7, 1863.)

WILLIAM H. BEATTY, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 14, 1863.)

GEORGE GREER, of Brampton, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 21, 1863.)

BRITTON BATTE OSLER, of Dundas, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, February 21, 1863.)

TO CORRESPONDENTS.

A LAW STUDENT.—Under "General Correspondence."

CLERK 6TH DIVISION COURT, CO. NORFOLK.—ENQUIRER.—Under "Division Court Correspondence."

DIARY FOR APRIL.

3. Friday ..... *Good Friday.*
4. Saturday..... Last day for notice of trial for York and Peel Assizes.
5. SUNDAY..... *Easter Sunday.*
6. Monday ..... County Court and Surrogate Court Terms begin.
7. Tuesday ..... Chan. Sitt. Simcoe. Last day of notice Whitby & Woodstock.
11. Saturday..... County Court and Surrogate Court Terms end.
12. SUNDAY..... *Low Sunday.*
13. Monday ..... York and Peel Spring Assizes. [and Cobourg.
14. Tuesday..... Chy. Sitt. Guelph & Sarnia. Last day notice Barrie, Goderich,
17. Friday ..... Last day for setting down for Hearing in Chancery.
19. SUNDAY..... *2nd Sunday after Easter.*
20. Monday ..... Last day for notice of Hearing in Chancery.
21. Tuesday ..... Chan. Sitt. Whitby & Woodstock. Last day notice Belleville.
26. SUNDAY..... *3rd Sunday after Easter.*
27. Monday ..... Chancery Hearing Term commences. [Kingston.
28. Tuesday..... Chan. Sitt. Barrie, Goderich and Cobourg. Last day of notice
28. Thursday .... Last day for Comp. Assess. Rolls. Last day for Non-Residents to give lists of their lands.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

APRIL, 1863.

MR. SCATCHERD AND CHEAP LAW.

Cheap law, like cheap whisky, is a curse to a people. This is a trite remark, often made, but not always understood. There is a fascination about litigation, which some men cannot resist. The cheaper the cost of litigation, the greater is the fascination. Much and needless litigation is only productive of ill-feeling, malice and hatred.

What so much discourages the litigious as a wholesome dread of law costs? It has always been found that in proportion as law costs are reduced, litigation increases. Jones is angry with his neighbour Brown, because the latter, in a hasty moment, called the former "a scapegrace;" whereby Jones fell much in the estimation of his fellow-men; became sick, sore and much pained in body and mind. Jones would like to sue Brown for this great wrong; but the prospect, in the event of failure, of having to pay costs to the amount of $100, puts a damper on his intentions. Reduce the costs from $100 to $25, and Jones without doubt will have "a slap" at Brown. Win or lose, the costs cannot be much; so that, with little or no hesitation, he proceeds to gratify his appetite for revenge. Jones and Brown are fair specimens of the genus "homo" in matters of litigation.

Is it not within the experience of us all, that the immediate effect of the increase of the jurisdiction of our Division Courts, was to increase litigation to such an extent, that suits increased by tens and hundreds? Two or three hundred suits at one court was no uncommon occurrence. Why was this? Because before the change in the law, two hundred out of the three hundred suits could not be brought without the risk of County Court costs, or about $40 in each suit. The dread of such a consequence exercised its influence in pacifying the discontented, and led to compromises of a conciliatory kind, leaving men good neighbours instead of bitter enemies.

Why is it that the Judges of our superior courts are now so often called upon to try actions for malicious arrest, and maliciously suing out process? It is because of the increased facilities afforded to men for resort to courts of law for the mere gratification of their angry passions. Most of such suits are for the malicious issue of attachments or other process out of the inferior courts. When once the seeds of dissension are sown, one suit leads to another, till happy homes are rendered desolate, and well-to-do men are brought to the brink of poverty, if not of insanity.

The zealot for cheap law costs should ponder on things such as these; let him also consider how much peace between men is preserved by keeping up the respectability of the legal profession.

It is a fact, that respectable lawyers, so far from encouraging litigation, do all they can to prevent it. It is no part of a respectable lawyer's duty "to get his neighbours by their ears," in order that he may profit by their misery. No respectable lawyer is guilty of such conduct. Better, then, to pay lawyers well for what they do, than to make it their interest to increase the number of suits by fostering litigation, in order to make their gains, notwithstanding the decrease of law costs, correspond with former receipts. Reduction of law costs might have the effect of driving respectable men out of the profession of the law into other callings, where their talents and their learning would be better requited; but most assuredly their place would be supplied by vampires, who would prey upon the very vitals of the community, and whose number would be legion.

No profession exercises so powerful an influence on the community as that of the law. The influence may be for good or for bad, according to the description of the men who wield it. A liberal and learned profession is at once the pride and the glory of England. The profession in Canada, so far, has not been under the mark. But tell the able advocate, whose life has been spent in the study of his profession, that he shall not be paid for his services beyond the compensation allowed to the "negro minstrel," or "vendor of quack medicines," and what will become of

him? He will leave the profession in disgust, and his place will be taken by those whose moral faculties are more blunted, and appetite for plunder more craving. The result, in the language of the penny-a-liner, "may be more easily imagined than described."

In England it has not yet been attempted, as a rule, to limit counsel fees. The laborer there is worthy of his hire. One man is more deserving than another. While Mr. Addlepate might be delighted to receive the magnificent fee of ten dollars for pleading a case, Mr. Skilful would not accept the brief with less than fifty. And perhaps, after all, the services of Mr. Addlepate at ten dollars, would be dearer than those of Mr. Skilful at fifty. Why, then, attempt to put both these men on the same footing? Why say that no greater counsel fee shall be taxed than twenty dollars? What is the consequence? It is this: it compels the suitor to employ mediocrity, or else pay the difference between the fee for mediocrity and talent out of his own pocket. This is not as it ought to be. The rule is, that the party in the wrong should pay the penalty of his position by paying the costs of litigation. But if the fees of litigation are so small that no man of talent or respectability will accept them, then the party in the right, who employs a man of talent or respectability, must pay his counsel out of his own pocket, and so be a loser, no matter what the result of the litigation.

The principle of measuring a lawyer's fees by a tariff, and taxing them according to that tariff, is at best a doubtful one, and should not be stretched. Why should not the lawyer as well as the doctor be allowed to make his own bargain? There is no substantial difference between them. The one is employed to preserve and protect life; the other is employed to preserve and protect property. Each is a member of a liberal profession; each is licensed to practise that profession. There was a time when the Legislature of England endeavored to fix the value of different commodities, and of the services of different classes of the community, by acts of Parliament. That time is almost past. The only relic of it, in the case of commodities, is that of the usury laws or fixed price of money; the only relic of it, in the case of individual classes of the community, is that of lawyers. It is absurd to attempt to fix by law that which, owing to surrounding circumstances and lapse of time, must necessarily fluctuate. If money, like any other commodity, exceeds the demand, it will be cheap. If lawyers, like any other class of laborers, exceed the demand, their services will be cheap. Such is the law of supply and demand. It constantly adjusts itself to surrounding circumstances. But the attempt to fix the price of a thing fluctuating in itself, is as illogical as an attempt to curb the wind.

Lawyers must live. If they do not live strictly "by the sweat of their brow," they live by brain work—no less arduous. They are trained for a particular profession. For a consideration their services are offered to society. If the price for the services which the lawyer may at the instance of his fellow-men be called upon to perform are fixed by act of Parliament, why should not the price of services which he receives? He must eat, drink and live, like other men. If the shoemaker is not restrained by act of Parliament to a fixed price for his boots, why should the lawyer, who pays him for the boots? If the grocer, who supplies the lawyer with the necessaries of life, is not limited to a tariff, why should the lawyer, who pays for the groceries? If the laborer, who cuts the lawyer's wood, may charge less or more for his services, according to circumstances, why should the lawyer who pays be limited in his receipts? A fee of twenty dollars for pleading a cause, when provisions and other necessaries of life are cheap, may be a fair compensation, and yet no compensation at all if the price of provisions and other necessaries of life increase three-fold. If the prices of the necessaries of life increase three-fold, why should not the lawyer, whose expenditure is thereby increased, be allowed to make some corresponding increase in his charges? A tariff of fees for the services of lawyers is theoretically if not practically a rank absurdity. It is the remnant of absurdities which long since, as the statute book of England to this day testifies, have exploded.

Lawyers are eminently conservative in their views. Their whole course of duty is to administer the laws as they find them. Their whole training causes them to cling to conservative ideas. This is the reason why they still submit to fixed fees for specified services, centuries after others who were in like situation are released from the thraldom.

These remarks have been occasioned by the perusal of a bill, introduced last session, and again introduced during the present session of the Canadian Legislature, by Mr. Scatcherd—himself a lawyer of some little reputation.

This bill is entitled, "An Act to amend the law in relation to law costs in Her Majesty's Courts of Common Law and Chancery in Upper Canada." It is a most extraordinary bill. It professes to be a remedial measure. It recites that "the costs now allowed by law in actions and proceedings in Her Majesty's Courts of Common Law and Chancery in Upper Canada, are exorbitant and oppressive." Strange fact—that Upper Canada has been since its first settlement groaning under oppression, and that there has not been to this day one petition from one individual in support of this bill! But for the sake of argument, suppose the principle to be true, is the Legislature the proper tribu-

nal for deciding whether a lawyer shall receive fifty cents or twenty-five cents for an attendance at court? We thought that modern experience had taught the Legislature that it was much better for them to leave to the Judges, whose position gives them ample opportunity of deciding upon the necessity of changes in law tariffs, the power to regulate such tariffs. But no; this modern Daniel has got new light. He proposes to leave to a tribunal, nine-tenths of whom know nothing of the matter in hand, the power of deciding upon the necessity of changes, and the nature of the changes to be made; which changes, when made, are to be as fixed as if engraved on tables of brass.

Considering the boldness of the design, it does not surprise us to find much boldness in its execution. Mr. Scatcherd proposes to enact, that the table of costs framed by the Judges of the superior courts of common law, under the provisions of the Common Law Procedure Act, 1856; the table of costs framed in pursuance of the County Courts Procedure Act, 1857; and the table of costs framed by the Judges of the Court of Chancery on the 3rd June, 1853; and also every other table of costs, and every order for the allowance of costs now in force in the said courts shall be repealed and declared void.

If, after the repeal of these tariffs, he were to enact that lawyers, like other classes of the human family, should be allowed to charge for their services whatever their services are worth, "anything in any law to the contrary notwithstanding," there might be something in the bill which would at all events give it a claim to a respectful consideration; but instead of this, we find it gravely proposed to reënact the tariffs on a reduced scale, which perhaps would be quite adequate for the services of a man of Mr. Scatcherd's calibre, but intensely laughable if intended as a full compensation for the services of a lawyer of ability.

Let us take a few examples:

	s. c. £ s. d.	c. c. £ s. d.
TO THE ATTORNEY.		
Attendance at Judges' Chambers, at Crown Offices, at the Clerk's Office, and all other common attendances in course of a cause,	0 1 0	0 1 0
IN COURTS OF COMMON LAW.		
COUNSEL FEES.		
Fee on motion of course, or on motion for rule nisi, or on motion to make rule absolute in matters not special.....	0 5 0	0 2 6
On special motion for rule nisi (only one counsel fee to be taxed).....	0 15 0	0 5 0
To attend reference to Master or Clerk, where counsel necessary	0 10 0	0 5 0
For argument on supporting or opposing rule on return of rule nisi, or argument on demurrer, special case or appeal.....	1 10 0	0 15 0
Fee, with brief, on assessment.....	0 10 0	0 5 0
Fee, with brief, at trial in actions of a special and important nature (in Co. Court).	.....	1 10 0
Fee, with brief, at trial in cases of tort, or in ejectment	2 10 0	.....
For fee, with brief, in other cases	0 15 0	.....
For fee, with brief, in Queen's Bench or Common Pleas, to counsel in argument or examination in Chambers, to be allowed by the Judge at the time when he considers the attendance of counsel necessary, not less than.....	0 5 0	.....
Nor more than.....	0 12 6	.....
IN THE COURT OF CHANCERY.		
COUNSEL.		
On argument at Chambers.....	.....	0 5 0
Fee when cause at issue and set down for the examination of witnesses	.....	2 10 0

The framer of the bill, not thinking that he has so far made himself sufficiently ridiculous, proposes to enact as follows:

"No Judge in either of Her Majesty's Superior Courts of Common Law, or of any County Court, nor the Master, nor any taxing officer of the said Superior Courts, shall, after the passing of this Act, *increase* any counsel fee with brief at trial, or on argument of demurrers, special case, appeal or otherwise, *in any case whatever*."

He in like manner also proposes to enact as follows:

"No retainer shall be allowed or taxed in any bill of costs; and it shall be the duty of the Judge presiding at the trial of any cause wherein such charge is made, to disallow the same, whether such action is contested or not."

The remaining portion of the bill consists of some provisions, more or less absurd, for the taxation of bills of costs, intended, no doubt, as a substitute for the provisions now existing by law for the taxation of bills, though the existing provisions are in no way referred to, much less repealed. The machinery proposed, if intended as a substitute, will not be less expensive than existing machinery, and will be found to be clumsy and unsatisfactory. Our objection, however, being to the principle of the bill, we have no inclination to examine its provisions more in detail.

Some will say the bill must be a good one, as it is "fathered" by a lawyer. This does not follow. Mr. Scatcherd's motives in giving birth to such a bill are either good or bad. If his object be to pander to the popular prejudice against lawyers, and to gather political support because of claptrap against law costs, his motives are bad. If, however, his object be to do good by attempting to remove an imaginary evil, his motives at least are good. But he ought to take heed that in "casting out one devil," he does not take unto himself "seven other devils worse than the first." Perhaps he in his heart thinks that the fees which he proposes to enact as the only fees for the services indicated, are sufficient; perhaps he so thinks, because in his own practice he deemed them sufficient; perhaps his clients considered them enough, if not too much, for his services; but he ought to remember that all men in the profession are not to be judged by his standard. He was never, that we are aware of, entrusted with any cause of

importance. His responsibilities were light, and in all probability his fees were in due proportion to his responsibilities.

Much odium is unjustly thrown upon lawyers for their apparently large bills of costs. Those who pay them forget that a large proportion of the bill is made up of moneys disbursed to the officers of the courts in the course of the cause. The lawyers are the collectors of the court fees, and, like other tax collectors, bear much of the odium that properly belongs to those who impose the taxes, or for whose benefit they are intended. If Mr. Scatcherd's real object be to reduce law costs, so as to relieve suitors as much as possible, he should endeavor to do so without injury to the respectable portion of the profession. Let him reduce the "court fees," so as to allow the lawyer's bill to represent as nearly as possible the lawyer's receipts.

But we neither agree with Mr. Scatcherd in the object of his bill, nor in his mode of carrying that object into effect. His aim, we assume, is pure patriotism—the public good. We think the public good would be better consulted by the increase of law costs, than by the reduction of them. All admit that the less litigation in a community, the better. All know that in England the costs of a suit are four times what they are in Canada; and all know that suits in England, considering the difference in population, are not one-fourth the number they are in Canada. We fearlessly assert that the direct consequence of cheapening law is to increase litigation. All experience proves it. It may be asked—Why then do you, on the part of lawyers, oppose the reduction of law costs? Our answer is, that our opposition is not so much on behalf of the interests of lawyers, as what we conceive to be the true interests of society. Were we to consult the interests of unscrupulous lawyers only, we should advocate every measure that would have a tendency to increase litigation, and so would support Mr. Scatcherd's bill. But, representing as we do at the same time the interests of respectable lawyers and the interests of society, we advocate only such measures as will best preserve the rights of both. Their interests are, we think, in this respect identical. We say to society—have only respectable lawyers, and pay them well; and in so doing, while you maintain the standard of the bar, you discourage litigation—better far this course of action, than to have indifferent and unscrupulous lawyers at small fees, and wide-spread litigation—remember that if you lower the standard of the bar, you lower the standard of the bench;—remember also that upon the integrity of the bench, depends your most cherished and most valued rights—those of life, liberty and property. Sap not the foundation of the edifice, or you will ruin the superstructure.

PROPOSED AMENDMENT OF THE DIVISION COURTS ACT.

Among other proposed law amendments, we find a bill introduced by Mr. M. C. Cameron, to amend the Division Court Act. The following is a copy of it:

BILL.

An Act to amend the Act respecting Division Courts, Chapter 19 *of the Consolidated Statutes of Upper Canada.*

Whereas by the eighth section of Chapter nineteen of the Consolidated Statutes for Upper Canada, the Justices of the Peace in each County in General Quarter Sessions assembled, may, subject to the restrictions therein contained, appoint and from time to time alter the number, limits and extent of every Division, and shall number the divisions beginning at number one; but a less number of Justices cannot alter or rescind any resolution or order made by a greater number at any previous Sessions: And whereas more townships than one in many instances have been and may be included in one Division, and by reason of the increase of population in townships so included, the public convenience may require that the number of Divisions and Courts should be increased: And whereas in consequence of the difficulty experienced in effecting such increase by reason of the non-attendance at any General Quarter Sessions of as many Justices as were present when the Divisions were established, it is expedient for remedy thereof that the said eighth section should be repealed; Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada enacts as follows:—

I.—From and after the passing of this Act, the eighth section of the said Act cited in the preamble shall be repealed, and the following clause be read as forming part of the said Act in the place of the said eighth section:—

"A majority of the Justices of the Peace in General Quarter Sessions assembled in any County may, subject to the restrictions hereinafter contained, appoint and from time to time alter the number of Divisions or the limits and extent of any Division or Divisions, and shall number the Divisions beginning at number one; but a less number of Justices than five shall not alter or rescind any resolution or order made at any previous Session; nor shall a less number of Justices decrease the number of Divisions established in any County by an order or resolution made by a greater number at any previous Session."

II.—Notwithstanding anything in the one hundred and seventy-fifth section of the said Act, any party brought before any Division Court or any County Judge under the provisions of the said section, dissatisfied with the decision of such Court or Judge or the verdict of any jury, in respect to any claim to any property seized or attached under execution or attachment, where the property seized or attached shall exceed the value of fifty dollars,—whether seized under one execution or attachment, or several may appeal from such decision or verdict to the County Court of the County or United Counties in which such decision or verdict is made or rendered;—Provided always, that no such appeal shall be heard or allowed unless the party or parties appealing, shall within ten days after such decision or verdict shall have been given or rendered, give notice of his or their intention to appeal to the Clerk of the Division Court in which such decision or verdict shall have been given or rendered, and shall also, within the time aforesaid, file with such Clerk a bond to the said Clerk, executed by the party appealing, or by some other person, and two sureties to be approved by the said Clerk, in the sum of two hundred dollars, conditioned to prosecute the appeal with effect and without delay, and to pay all costs as well of the proceedings in the said Division Court as of the said appeal, in the event of the appellant not succeeding in the said appeal; And provided also, that the said bond be accompanied by an affidavit of justification

by such sureties, and an affidavit of the due taking thereof by a subscribing witness to the execution of the said bond.

III.—The question to be tried on the said appeal shall be the right of the claimant or claimants to the property seized or attached as against the plaintiffs in the execution or executions, attachment or attachments, and it shall be tried before a jury without formal pleadings, in the manner in which interpleader issues are now tried in the County Court; and it shall be the duty of the party or parties appellant to prepare an issue embodying such question, and a statement of the goods or property claimed, and to file the same in the office of the Clerk of the County Court of the County in which such issue is to be tried, within fifteen days after the decision or verdict appealed from is made or rendered, and to give notice thereof to the Clerk of the Division Court in which such decision or verdict was made or rendered; and in case the party or parties in whose favour such decision or verdict has been made or rendered, shall not object to such issue and give notice of such objections to the said Clerk within five days next after the expiration of the last day allowed to the appellant to file such issue, the issue so filed shall be tried by a jury of the County at the next sitting of the County Court for the trial of causes which shall happen not sooner than twenty four-days next after the decision or verdict appealed from shall have been given or rendered; Provided always, that it shall be lawful for the Judge of the County Court in which such issue is to be tried, to enlarge the time for the trial thereof, upon cause shown by either party as in ordinary cases.

IV.—The jury before whom the said issue is tried may render a general verdict in favor of the appellants or respondents, and for the whole of the goods and chattels or personal property seized or attached, or in favor of one or more appellant or appellants, respondent or respondents and against the other or others of them, or in favor of one or more as to some portion of the goods or property and of the others as to other portion or portions.

V.—Wherever the jury shall render a general verdict in favor of the appellant or respondent, or for the whole of the property seized or attached, the successful party shall be entitled to his costs; and in case of the verdict being apportioned, the costs shall be in the discretion of the Judge of the Court before whom the issue is tried, who shall make an order on the back of the issue directing by whom the costs shall be paid; and such costs shall, after taxation by the Clerk of the County Court in accordance with the tariff of fees, or practice in interpleader issues, be recovered by execution to be issued out of the County Court as upon a judgment in ordinary cases; and in case the appellant shall be directed to pay the costs, the respondant shall or may in his option proceed to recover such costs by execution as aforesaid, or action on the bond given as security aforesaid.

VI.—All parties giving notice of their intention to appeal shall be made appellants in one issue, and all parties in whose favor the decision or verdict appealed from has been given or rendered shall be made respondents, and shall be answerable for costs according to the provisions of the fifth section of this Act, unless he or they shall give notice of the abandonment of the appeal or of the decision or verdict in his or their favor appealed from, within twenty days next after such decision or verdict shall be made or rendered; and in case of the appeal being abandoned, the decision or verdict appealed from shall stand, and in case of the abandonment of the decision or verdict by the party or parties in whose favor the same has been rendered, the said decision or verdict shall be reversed with or without costs in the discretion of the Judge of the Court in which the proceedings appealed from was pending; such costs to be recovered and all further proceedings to be had in the said Court as if the decision had been originally in favor of the appellant.

VII.—The Judge of the County Court before whom any issue shall be tried under the provisions of this Act shall have all the powers of amendment and other powers of a Judge in the County Court in causes originated in such County Court.

DIGEST OF ACTS PASSED DURING SESSIONS OF 1860-1-2,

WHICH REPEAL, AMEND, VARY OR AFFECT, CONSOLIDATED STATUTES FOR UPPER CANADA.

(*By* J. S. Hallowell, *Student-at-Law.*)

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c. 3, p. 7, vide 23 Vic. c. 40, s. 2.

c. 3, sub-s. 6, p. 9, Townships of Raglan, Lyndoch, Radcliffe and Brudenell, added to County of Renfrew by 23 Vic. c. 39, s. 4.

c. 3, sub-s. 6, Nos. 10, 16, p. 9, Rep. by 23 Vic. c. 39, s. 2.

c. 3, sub-s. 6, 7, p. 9, Counties of Renfrew and Lanark, 24 Vic. c. 51, separates them.

c. 3, sub-s. 11, p. 10, Townships of Miller and Cannonto added to County of Frontenac by 23 Vic. c. 39, s. 2, 5; and vide s. 1 as to union of Frontenac with Lennox and Addington.

c. 3, sub-s. 12, p. 10, Townships of Effingham, Abinger, Ashby and Denbigh, added to County of Addington by 23 Vic. c. 39, s. 3, 5; and vide s. 1 as to union of Addington with Lennox and Frontenac.

c. 3, sub-s. 13, p. 10, vide 23 Vic. c. 39, s. 5; and vide s. 1 as to union of Lennox with Frontenac and Addington.

c. 3, sub-s. 15, p. 10, vide 23 Vic. c. 39, s. 5.

c. 3, sub-s. 18, 19, p. 11, 12, Counties of Peterborough and Victoria, vide 24 Vic. c. 50.

c. 3, sub-s. 20, No. 15, p. 12, Township of Robinson changed to Morrison by 23 Vic. c. 40, s. 3.

c. 3, sub-s. 30, p. 14, sub-s. 9, p. 15, Biddulph and McGillivray taken from the County of Huron and annexed to the County of Middlesex.

c. 3, sub-s. 36, County of Middlesex, by 25 Vic. c. 28, Townships of Biddulph and McGillivray added to this county.

c. 3, sub-s. 34, No. 8, p. 16, Township of Sandwich, by 23 Vic. c. 96, divided into two distinct Municipalities.

c. 3, s. 6, p. 19, this section not affected by 23 Vic. c. 21; vide 23 Vic. c. 21, s. 7.

c. 5, s. 1, p. 23, Repealed as to registered judgments by 24 Vic. c. 41, s. 10.

c. 10, s. 6, p. 32, as to rank of Chief Justice of Upper Canada, repealed by 25 Vic. c. 18, s. 1.

c. 12, s. 66, p. 59, s. 67, 68, p. 60, as to registered decrees and orders which bind lands, &c., repealed by 24 Vic. c. 41, s. 1.

c 13, s. 5, p. 63, as to President of Court of Error and Appeal, repealed by 24 Vic. c. 36; vide 25 Vic. c. 18, s. 1, 2, 3.

c. 13, s. 8, p. 63, Time of sittings of said Court altered by 25 Vic. c. 18, s. 4.

c. 15, p. 75, vide 23 Vic. c. 42, s. 4, cases in Superior Courts may be tried in County Courts; 23 Vic. c. 43, extends jurisdiction of County Courts; 23 Vic. c. 44, regulates the removal of causes from County Courts.

c. 17, p. 115, Court of General Quarter Sessions, by 24 Vic. c. 14, not to try treasons and felonies.

c. 17, s. 10, p. 117, as to Court of General Quarter Sessions apppointing Constables annually, repealed by 23 Vic. c. 8; and last mentioned act amended by 24 Vic. c. 48.

c. 19, p. 136, Division Court Act, c. 29, p. 825, Replevin Act, and 23 Vic. c. 43, to be read as one act so far as relates to cases within the jurisdiction of the Division Courts, vide 23 Vic. c. 45, s. 7.

c. 19, s. 151, p. 162, as to what may be seized under a Division Court execution against goods, part repealed by 23 Vic. c. 25, s. 2.

c. 19, s. 146, p. 161, certificate of Division Court judgment may be obtained for registry, repealed by 24 Vic. c. 41, s. 2.

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c. 22, s. 204, p. 228, how records to be endorsed, repealed by 23 Vic. c. 42, s. 1; 23 Vic. c. 42, s. 2, in lieu thereof.

c. 22, s. 205, p. 229, how records in town causes to be entered, repealed by 23 Vic. c. 42, s. 1.

c. 22, s. 205, p. 229, 23 Vic. c. 42, s. 3, in lieu thereof.

c. 22, s. 245, p. 238, Deputy Clerks may give certificates of judgments entered by them, which certificate may be registered in the proper county, and bind lands, repealed by 24 Vic. c. 41, s. 3.

c. 22, s. 254, p. 239, apparel, tools, &c., exempted from execution, repealed by 23 Vic. c. 25, s. 3, 4, vide s. 5, 6.

c. 22, s. 326, p. 254, suits within jurisdiction of County Courts may be brought in the Superior Courts, repealed by 23 Vic. c. 42, s. 1.

c. 22, s. 327, p. 254, but in County of York not without Judge's fiat of leave, repealed by 23 Vic. c. 42, s. 1.

c. 22, s. 333 to 341, p. 256-7-8, as to power of Judges to make rules, applied to 23 Vic. c. 45, s. 9.

c. 22, s. 339, p. 258, Judges may extend Superior Court rules to County Court, vide 23 Vic. c. 43, s. 5.

c. 24, s. 21, p. 281, decrees in cases of sequestration, when registered, to create a charge on real estate, repealed by 24 Vic. c. 41, s. 4.

c. 25, s. 3, p. 287, when writ of attachment to be marked "inferior jurisdiction," repealed by 23 Vic. c. 42, s. 1.

c. 27, p, 302, Ejectment Act, certain provisions thereof applied to County Courts and to 23 Vic. c. 43, by 23 Vic. c. 43, s. 3, vide s. 5.

c. 28, p. 323, Dower, vide 24 Vic. c. 40, as to assignment of dower; and 24 Vic. c. 40, s. 18, as to necessity of notice of action.

c. 29, p. 325, Replevin Act, c. 19, p. 136, Division Court Act and 23 Vic. c. 45, to be read as one act, by 23 Vic. c. 45, s. 7.

c. 33, s. 8, p. 409, Clerks of Crown and Pleas, &c., to render half yearly accounts, repealed by 23 Vic. c. 46, s. 1.

c. 33, s. 8, p. 409, 23 Vic. c. 46, s. 2, in lieu thereof.

c. 34, s. 1, sub-s. 2, p. 410, as to Graduates of three years' standing on books of the Law Society, amended by 23 Vic. c. 47, s. 1, and 23 Vic. c. 47, s. 2, to be read as an additional section to c. 34, s. 1, p. 410.

c. 35, s. 2, sub-s. 2, p. 411, not to apply to persons entered after 1st March, 1860; vide 23 Vic. c. 48, s. 1.

c. 35, s. 2, sub-s. 2, 23 Vic. c. 48, s. 2, to be read as an additional section to c. 35, s. 2, p. 411.

c. 40, p. 436, Medical Board and Practitioners, vide 24 Vic. c. 24, as to vaccination.

c. 49, p. 465, Joint Stock Companies for Roads amended by 23 Vic. c. 54, 24 Vic. c. 18; vide 23 Vic. c. 31 and 24 Vic. c. 20.

c. 50, p. 492, Joint Stock Companies for Piers, Wharves, &c., amended by 24 Vic. c. 18; vide 23 Vic. c. 31, 24 Vic. c. 20.

c. 51, p. 498, Joint Stock Companies for Agricultural purposes, amended by 24 Vic. c. 18; vide 23 Vic. c. 31 and 24 Vic. c. 20.

c. 52, p. 503, Mutual Insurance Companies. See as to Foreign Insurance Companies, 23 Vic. c. 33, 24 Vic. c. 47; vide 23 Vic. c. 31 and 24 Vic. c. 20.

c. 54, s. 60, 61, 62, 63, 64, p. 536-7, certain provisions as to dissolution of union of counties applicable where an incorporated village separates from the township in which it is situated, 24 Vic. c. 39.

c. 54, s. 135, p. 554, as to election of Reeves and Deputy Reeves, amended by 24 Vic. c. 37.

c. 54, s. 223, p. 574, Municipalities may pass by-laws creating debts, by 23 Vic. c. 9, s. 8, the County of Middlesex, in consolidating its debt, exempted from the formalities of s. 223.

c. 54, s. 224, p. 575, such by-laws to be assented to by ratepayers, by 23 Vic. c. 9, s. 8, the County of Middlesex, in consolidating its debt, exempted from the formalities of s. 224.

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c. 54, s. 246, p. 583, By-laws as to tavern licenses amended by 23 Vic. c. 53, which last statute and the sub-sections of the 246th section of the 54th chapter, are repealed as regards cities by 25 Vic. c. 23, s. 1; vide s. 2, 3, 4, 5, 6, 7, 8.

c. 54, s. 247, p. 584, sums to be paid for licenses, &c.; vide 25 Vic. c. 6, s. 3, and c. 23, s. 5.

c. 54, s. 249, 250-1-2-4-5-6, p. 584-5-6, these sections applied to unorganized tracts, by 23 Vic. c. 6, s. 5; vide 25 Vic. c. 6, s. 5.

c. 54, s. 259, p. 586, appointment of Inspectors of Licenses, partly repealed by 25 Vic. c. 23, s. 4; vide s. 5, 6.

c. 54, s. 260, 262, 263, 264, p. 587-8, as to licenses, amended by 25 Vic. c. 23, s. 5.

c. 54, s. 370, p. 638, power of Recorder's Court to try treason and capital felonies, by 24 Vic. c. 14, revoked.

c. 54, s. 377, p. 639, Sessions of the Recorder's Court, repealed by 23 Vic. c. 50, which is itself repealed by 25 Vic. c. 19; and see section there substituted for s. 377.

c. 55, p. 649, Assessment Act, amended by 23 Vic. c. 52.

c. 55, s. 9, sub-s. 10, p. 651, as to public institutions, amended by 23 Vic. c. 51.

c. 55, s. 28, p. 655, real property to be estimated at full value amended by 24 Vic. c. 38, s. 1.

c. 55, s. 29, p. 655, what deemed vacant land and how valued amended by 24 Vic. c. 38, s. 2.

c. 55, s. 31, p. 656, assessment of lands of non-residents; vide 24 Vic. c. 38, s. 3.

c. 55, s. 63, p. 663, appeal from Court of Revision; vide 24 Vic. c. 38, s. 4, 5, 6.

c. 61, p. 701, Game Laws, repealed by 23 Vic. c. 55, which act is substituted for c. 61.

c. 64, p. 728, Common School Act, vide 23 Vic. c. 49.

c. 64, s. 17, p. 730, challenging votes, amended by 23 Vic. c. 49, s. 3.

c. 64, s. 23, p. 731, penalty for refusing to serve as trustee, vide 23 Vic. c. 49, s. 18.

c. 64, s. 45, p. 740, union sections of two or more townships, how formed and altered, amended by 23 Vic. c. 49, s. 5.

c. 64, s. 46, p. 740, such union to be deemed one section, amended by 23 Vic. c. 49, s. 5.

c. 64, s. 84, p. 749, difference between teacher and trustees to be settled by arbitration, vide 23 Vic. c. 49, s. 8, 9.

c. 64, s. 85, p. 750, power of arbitrators to examine, vide 23 Vic. c. 49, s. 8, as to auditors.

c. 64, s. 86, p. 750, warrant of arbitrators, vide 23 Vic. c. 49, s. 8.

c. 64, s. 95, p. 754, when more than one grammar school, amended by 23 Vic. c. 49, s. 24.

c. 64, s. 140, p. 767, how penalties recoverable, vide 23 Vic. c. 49, s. 19.

c. 69, s. 1, p. 780, when lands may be vested in trustees for churches, amended by 24 Vic. c. 43.

c. 72, s. 1, p. 787, marriages, amended by 24 Vic. c. 46.

c. 78, s. 8, p. 807, limitations of certain actions, &c., amended by 25 Vic. c. 20.

c. 80, p. 810, claims to lands for which no patents have issued, vide 23 Vic, c. 2, s. 19.

c. 86, s. 12, p. 859, word "judgment" struck out, vide 24 Vic. c. 41, s. 5.

c. 86, s. 27, p. 863, words "judgment or" and "judgment" struck out, vide 24 Vic. c. 41, s. 5.

c. 87, s. 1, 2, 3, p. 867-8, mortgages, amended by 24 Vic. c. 41, s. 6.

c. 88, s. 45, p. 879, limitation of actions, &c., amended by 25 Vic. c. 20.

c. 89, s. 8, p. 883, Registry vaults, offices, amended by 24 Vic. c. 42.

c. 89, s. 17, sub-s. 4, 5, p. 884, judgments and decrees for payment of money, repealed by 24 Vic. c. 41, s. 7, sub-s. 2.

c. 89, s. 17, sub-s. 7, p. 885, words "judgment and" struck out by 24 Vic. c. 41, s. 7, sub-s. 3.

c. 89, s. 17, sub-s. 8, p. 885, discharges of decrees, &c., repealed 24 Vic. c. 41, s. 7.

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c. 89, s. 17, sub-s. 9, p. 885, rules and orders for payment of money to be registered by 24 Vic. c. 41, s. 7.

c. 89, s. 18, p. 885, how judgments, &c., registered, repealed by 24 Vic. c. 41, s. 7, sub-s. 4.

c. 89, s. 36, 37, 38, 39, p. 889, as to judgments and certificates thereof, repealed by 24 Vic. c. 41, s. 7.

c. 89, s. 41, p. 890, registration of decrees for payment of money to bind lands, repealed 24 Vic. c. 41, s. 7.

c. 89, s. 42, p. 890, court may confine effect of registration, repealed by 24 Vic. c. 41, s. 7.

c. 89, s. 47, p. 892, words "judgment," "rule or order," struck out, 24 Vic. c. 41, s. 7, sub-s. 5.

c. 89, s. 48, 49, 50, 51, 52, p. 892-3, effect of judgments, decrees, rules and orders, &c., repealed 24 Vic. c. 41. s. 7.

c. 89, s. 53, p. 894, amended as to judgments and decrees, 24 Vic. c. 41, s. 7, sub-s. 6.

c. 89, s. 54, p. 894, judgments no lien on lands until registered, repealed 24 Vic. c. 41, s. 7.

c. 89, s. 55, p. 894, judgment creditor not registered need not be a party to foreclosure, repealed 24 Vic. c. 41, s. 7.

c. 89, s. 56, p. 894, amended as to registered judgments and certificates 24 Vic. c. 41, s. 7, sub-s. 7.

c. 89, s. 58, p. 895, discharge of judgments, repealed 24 Vic. c. 41, s. 7, sub-s. 8, which is itself repealed by 25 Vic. c. 21, and see section there substituted for repealed s. 58.

c. 89, s. 60, p. 895, form of certificate of discharge, repealed 24 Vic. c. 41, s. 7.

c. 89, s. 61, p. 896, proof of certificate, repealed by 24 Vic. c. 41, s. 7.

c. 89, s. 62, 63, p. 896, registry of judgments, decrees may be otherwise discharged, repealed by 24 Vic. c. 41, s. 7.

c. 89, s. 64, p. 896, registered judgments to bind lands for only three years, repealed 24 Vic. c. 41, s. 7.

c. 89, s. 71, p. 897, separate register for judgments, &c., repealed by 24 Vic. c. 41, s. 7.

c. 89, s. 74, sub-s. 4, p. 899, Fee for certificate of judgment, repealed 24 Vic. c. 41, s. 7.

With reference to registered judgments, &c., it is enacted, "that all other statutes, parts and clauses of statutes, authorizing the registration of judgments, decrees and orders for the payment of money in Upper Canada, are hereby repealed." 24 Vic. c. 41, s. 9.

c. 90, s. 11, p. 904, judgments to bind lands, &c., repealed 24 Vic. c. 41, s. 8.

c. 93, s. 35, p. 923, allowances for roads laid out by private owners amended by 24 Vic. c. 49, vide Con. Stat. C. c. 77, s. 91, p. 882.

c. 96, p. 929, apprehension of fugitives escaping from foreign countries, repealed 23 Vic. c. 41.

c. 105, s. 1, p. 947, petty trespass, penalty, repealed 25 Vic. c. 22, vide that act for section there substituted.

c. 106, s. 1, p. 948, as to duties of County Attorney at Quarter Sessions and Recorders' Courts, with reference to treasons and capital offences, repealed 24 Vic. c. 14.

c. 114, p. 963, appeal in cases of summary conviction, vide 23 Vic. c. 29, s. 8.

c. 125, p. 988, inquests by coroners, vide 24 Vic. c. 33, as to fire inquests.

c. 128, p. 997, administration of justice in unorganized tracts, vide 23 Vic. c. 6.

Indictments for perjury—Subornation of perjury—Conspiracy—Obtaining money or other property by false pretences—Keeping a gambling house—Keeping a disorderly house, and any indecent assault, not to be presented or found, except under certain circumstances, or with certain official sanction—24 Vic. c. 10.

As to forfeited estates in Upper Canada, vide 24 Vic. c. 44.

Certain certificates issued by County Court judges to insolvents, under 19, 20 Vic. c. 93, confirmed by 24 Vic. c. 45.

24 Vic. c. 53, separation of Toronto from York and Peel, amended by 25 Vic. c. 24, 25 Vic. c. 27, repealed 23 Vic. c. 95. These acts, although local, are of sufficient importance to be here noticed.

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The last three lines of s. 14, p. 35, c. 10, Con. Stat. U. C., although not affected by any of the Legislative enactments of 1860-1-2, have become effete owing to the death of the much lamented Sir J. B. Robinson.

c. 11, s. 13, 14, p. 43, and s. 16, 17, 18, p. 44, applying only to W. A. Campbell, have (since his death) become inoperative.

SELECTIONS.

SHAKSPERE AS A LAWYER.

Regret has often been expressed that we know so little of the life of William Shakspere. The facts of his biography were not reckoned of sufficient value to be collected, till they had mainly undergone the "rasure of oblivion," and then the busy gleaner's hand could only gather the meagre details which have come down to us. One consolation for the loss is, that he wrote his life most expressively on the monuments of his genius. The framework of events through which he passed, might add very little to the record of his works. Sometimes, unfortunately, the life and the productions of genius, when they are both known to us, are not found to be of a piece. We look in vain in the former for the genius which animates the latter; and are fortunate if the life picture do not prove the ugly reverse of the charms which adorn the work of art. This we realize in reading the painful details of Beethoven's life. He may be called the Shakspere of music. His works are sublime and deep, with the intellect as well as the poetry of music. They exhibit a mind of gigantic power and originality, an imagination unsurpassed, and the profoundest sensibilities. But the record of his life is an unpleasant jargon, and displays a man whose wayward temperament and gusts of passion were a torment to himself and others. Would it not, at least, be more pleasant, if the memory of Beethoven's life were cancelled, and the imagination were left free to surmise such a life as we think suitable to such a genius? Perhaps the same observation may be made respecting the life of Shakspere. What we do know of him is scarcely consistent with our admiration of the great dramatist, whose words have become the vocabulary of all speaking the English tongue, and whose impressive thoughts and images are familiar to every educated mind. That such a person should have become involved with Ann Hathaway, eight years his senior, and been obliged to marry her when he was but eighteen; that he was driven to London by his deer stealing, and to this circumstance the world may be indebted for his dramatic works, which else had shared the fate of the might-have-been lays of the "mute, inglorious Miltons" described in Gray's Elegy: all this is so inconsistent with the dignity of his genius, that some might reckon it as well unknown. Could we see "the immortal" in his daily walks delineated with the graphic fidelity of a Boswell, it might be no agreeable picture for those who are foolishly bent on worshipping human genius.

One advantage, certainly, has been derived from the scantiness of our knowledge of the life of Shakspere; and that is, the field for ingenuity which has thus been opened, and has been fruitful with so much of pleasing speculation. Shakspere has almost got to be a myth: and "the myriad-minded" has shared the honor with Homer of being indefinitely multiplied in personality. As with the latter, so with the former, it is matter of ingenious dispute whether he wrote all the plays ascribed to him; whether indeed all such were not the combined work of a club of writers. If the latter be true, it must be admitted that each was a Shakspere; and not only have such brilliant stars seldom shone in one constellation, but never elsewhere have their beams been confluent in one individuality of style and sentiment.

Not the least pleasing, to our mind, among these ingenious researches in the biography of Shakspere, is the exploration of

a period of his life, during which the literary world are divided in opinion whether he was an attorney's clerk, an assistant schoolmaster, or an assistant *butcher!* The time in question is from about 1579, when he probably left school, to 1586, when he is supposed to have gone to London.

If he ever was connected with the business of an attorney, he held some subordinate relation to it; for the court rolls would bear witness to the fact, if he had been admitted to practice as an attorney. Had he even been an attorney's clerk, he would probably have attested many deeds, some of which would be likely to be extant: yet none such have come to light. The only extrinsic evidence that he was ever an attorney's clerk, consists in an alleged libel upon Shakspere by Thomas Nash, which alludes to him as one of those who "learn the trade of *noverint*, whereto they were born." The libel does not name Shakspere, but it describes its subject as one who could "afford you whole Hamlets," &c. The trade of *noverint* no doubt designates a deed maker, this being the opening word in such instruments, "*Noverint universi per presentes.*" This libel was published by one Greene, whose business, with that of Nash, had been diminished by the popularity of Shakspere. Greene afterwards gave vent to his spleen in a direct attack upon Shakspere; whom he calls *Shakscene*, and seeks to stigmatize as a ranter. But Greene's libel does not renew the fling of abandoning the attorney's business. The phrase of being "born" to the attorney's trade, would imply that his father was also an attorney, which Shakspere's certainly was not. The chain of argument is therefore frail as a gossamer in several of its links. First, that Shakspere is alluded to in Nash's libel is inferred from Nash's supposed jealousy of Shakspere as a more successful author. This again is inferred from the evident spleen of Greene, Nash's publisher, exhibited in a subsequent libel by Greene; which spleen is supposed to be founded on a diminution in Greene's profits from another writer eclipsing the author who furnished copy for his press. Something had vexed him, clearly, as the ill-temper of the libel proves, and competition is supposed to be the cause which makes most "doctors disagree." Greene was bitter on Shakspere; but that it was because he did not have Shakspere's publishing, and that his own publishing was undone by Shakspere's eclipsing his writer, Nash, is a mere speculation of ingenuity. Then, supposing it proved from Greene's ill-humor that Nash was thrown into the shade, from this premise we are to infer that Nash also is bitter upon Shakspere, with no corroborative circumstance except the phrase, "whole Hamlets." Hamlet was not published, in its perfected form, till after the libel; but we are at liberty to imagine, if we will, that it may have been previously written in the first draft, and thus performed on the stage. This reasoning in proof of Shakspere having been an attorney's clerk is hardly sufficient to warrant us in annexing, as Spinosa does, often with no better warrant, to his statements of argument—Q. E. D. *questio est demonstrata.*

We must resort to other evidence; and to clear the way for it, let us dispose of a preliminary objection in the supposed incompatibility of poetry and law. Among other popular disparagements of the legal profession, it is said to be hardening to the sensibilities and narrowing to the mind. Thus, Wordsworth, in his lines upon a poet's grave, requests the attorney, with "the keenness of his practised eye," to keep his distance, as being altogether incapable of appreciating the æsthetic beauties which once adorned the sleeping bard. We suspect, however, this popular allegation against lawyers of insensibility, is founded, like the charge against them of want of conscience, on mere vulgar prejudice. That there are numbered among the profession unscrupulous and narrow minds, it would be idle to deny, as it would be impossible to prove that there are not such in every department of life. But that the general character of the profession is far different, is constantly proved by the noble lives of large-minded, liberal-hearted, and conscientious lawyers. It is supposed that presenting the merits of one side of a case furnishes a temptation to swerve from veracity: if this be so, it is not necessary to yield to the temptation; and many are the lawyers whose word is reliable as a bond. And it is equally true that the merchant, vending goods, represents only one side of the case, namely, the interest of the seller; and quite as great is his temptation, and not better resisted, to exaggerate the merits and cover the defects of his commodity. So, too, while the practice of law trains the mind to nice intellectual distinctions, and may tend to narrow and harden it; this is likewise true of other persuits to which the division of labor in society has concentrated the powers of mind and body. Undoubtedly, if the lawyer dedicates himself simply to the law, without stepping outside into the fields of moral, intellectual, and religious culture, the effect will be to develop his powers in the single direction of jurisprudence, and dwarf them in all other departments. But this is not true of the practice of law alone. It is even more applicable to all other departments of business, because scarcely any of them involve so large a field of acquisition. The merchant need know nothing but markets; while the lawyer, to become proficient in jurisprudence, must acquire an extensive knowledge of history, by which the system of law has been gradually moulded, and must study to understand the human social character as manifested in a great diversity of circumstances and periods of time; for it is this character which has given a shape to the common and statute law. Nor is this enough. To be able to apply his legal knowledge, after he has got it, to successful forensic practice, he must make a study of eloquence, which involves largely the culture of the fine arts and extensive acquaintance with *belles lettres;* and he must also become an adept in human character, so that he can read men through as they rise on the witness stand, or sit in the panel. He must also have a knowledge of practical arts and mercantile and maritime usages; for these are continually involved in the trial of causes. A narrow mind will scarcely hold so much as all this; and hence we find the successful lawyer, in any distinguished sense of the term, to be ordinarily a man of large and varied acquisition.

It is capable of proof, too, that the study of the law may furnish an excellent discipline for the literary mind, even in the department of poetry. Milton, it is well known, studied law at one period in his career. For a more modern instance, Bailey, the author of Festus, may be cited, as one who has not found the cultivation of the poetic art inconsistent with the active duties of a successful practice of law. A part of this practice calls into play the same faculties which are excercised in composition. Invention is developed in the preparation of arguments to support legal propositions; and in jury trials the imagination may have large and effective scope. The advocate sometimes presents lively pictures to the minds of the jury of facts which he contends have transpired; and this mode of proving that such facts have actually occurred, is often most impressive. Rufus Choate frequently adopted this method of satisfying the jury that certain facts had occurred, by a dramatic sketch of the events and the state of mind of those concerned in them. Thus, we remember in a trial for perjury, where Choate represented the government, he described the struggle of the culprit's mind when tempted to commit the offence, the memory of his mother's early counsels and prayers making him for a moment hesitate, before he took the fatal step. The oratorical picture, which was deeply impressive, and overwhelmed the jury with conviction that the facts in the criminal's mind did indeed occur as represented, and which secured his conviction, had no other foundation than that a witness had said the defendant hesitated when giving in the testimony alleged to be false. Perhaps no forensic orator could be referred to who brought more of imagination and dramatic representation into the argument even of dry points

of law than Choate. Nothing was dry with him. Musty parchments and black letter lore acquired for a moment a charm fresh as spring, when set off with the flowers of his rhetoric. Nor was he less sound and logical, for his exercise of the imagination. An adversary once tauntingly recommended that he should pluck some feathers from the soaring wings of his imagination, and add them to the tail of his judgment, to give steadiness and safety to his oratorical flight. But the verdicts of the jury showed that the orator had carried them with him; and the adversary was as much baffled to answer the subtle reasoning as to do away with the impression which had been made upon the imagination.

Discipline of mind is eminently secured by the study and practice of law; and discipline is as necessary to the success of the poet as of any other artist. It has been fashionable, indeed, to speak of poetry as thrown off without effort in some happy moment. But, in truth, it holds good in this as in any other art, that what is for a long time must be a long time in preparation. "I am long in painting," said the old artist, "for what I paint is to be permanent." The current maxim, *poeta nascitur non fit*, is only half true. "The vision and faculty divine" must indeed be innate; but the fruits of this faculty will be perfect in proportion to discipline and labor. Artists, indeed, do not always acquire culture by the standard routine. "Books in the running brooks" they may have studied more closely than printed volumes; "sermons in stones" more than treatises of theology. But studied they have, deeply and intently, or they never attain to much excellence. What are called self-made and self-taught men must be harder students than others, because they acquire by force of will without the adventitious aids which universities afford. By force of genius a gifted mind may be its own teacher. But to say that learning hurts genius, unless it be inappropriate to the mould in which genius is cast, is contradictory to reason and experience. We should expect, then, the study and practice of the law rather to foster than hinder a poetic bent of mind; for it would furnish ample range for imagination in subtle invention and in the graphic representations which may be made so telling in a jury argument, as well as in the scope it affords for eloquence, an art very near akin to poetry. Where a man has no poetry in him, we by no means contend that the profession of law is calculated to impart the *Afflatus divinus*. But we think there is abundant evidence that when the gift exists it need not be smothered by the law, but may find a scope for itself in adorning legal practice with its own vivid coloring; and it may emerge from the practice of law to the legitimate sphere of poetry, not ill-trained by law experience for the culture of the muses.

Thus we have disposed of one preliminary obstruction to the theory that Shakspere was an attorney's clerk. It remains to deal with another, consisting of the rival theories, on the one hand, that he was a school teacher, and on the other, that he was a butcher, during the time in dispute.

It must seem strange indeed to the traveller in Stratford-upon-Avon, that these important years of Shakspere's life should be involved in such obscurity. There is still to be seen his father's house, where the bard was born and brought up. The edifice indeed is not identical in material, the veritable mansion having yielded to the assults of time; but it occupies the same site, and is of the same style of architecture, and the interior finish the same, if we except the butcher's shop in the basement. We may still walk, too, the long narrow path, with which the poet's feet must have been familiar, conducting to the house of Ann Hathaway's father, which is still standing. The grand interest of all this scene, is, that here England's great dramatist had his birth and early training: and yet the world is divided as to the occupation pursued by Shakspere as he here entered upon manhood! There is, however, a good deal of negative evidence. Here we know that Shakspere resided during the years in dispute; for here are the records of the christening of his children. There was no school in Stratford but the endowed grammar school, where he himself had been a pupil. We have a record of its masters, of whom he was not one. There is no trace of any usher having been employed in the school, or of Shakspere's occupying this position. It is too much to assume gratuitously that the school had an usher, and then to take the further gratuitous position, that such usher was at one time Shakspere.

The butcher theory is a figment of the brains of those lovers of the marvellous who delight to make great men, as if by magic, out of the most unpropitious circumstances and the most unsuitable material. A butcher might make a Cromwell, possibly; but we think the scale of possibilities would not admit of a transmutation to the authorship of Romeo and Juliet. We know, too, that Shakspere's parentage was highly respectable. There is no probability that, in his father's day, a butcher's stall made part of the family mansion, for the father was one of the aldermen of Stratford and presided over the board. He became, it is true, much reduced in circumstances; but it cannot be doubted that one who had enjoyed his station would be unwilling to make a butcher of his son, and would be much more likely to place him in an attorney's office.

We may now adduce the evidence that Shakspere was employed in an attorney's office; and this evidence, beyond Nash's libel, already alluded to, consists in the description of law proceedings, the legal phraseology and the reference to legal principles scattered throughout the productions of Shakspere's pen.

Shakspere's sketch of Justice Shallow is so truthful a picture, as to be hardly exaggerated or caricatured. The original of that picture is confined to no age, not even to old England, and is too frequently realised in the assuming wisdom of lay justices in our own land. One would think Shakspere had tried forty-shilling cases before these worthies, and had striven to beat law into their brains, but found the rebound of the legal points invariably more distressing to himself than effective upon the well-walled cranium of the self-taught magistrate. What lawyer has been so happy as never to try a cause before Mr. Justice Shallow? We think the advocate who has gone through with this painful ordeal, will confess that it is a far easier and less embarrassing task to pilot a cause through our highest courts, presided over by deep and erudite judicial minds, rather than try to furnish eyes to the presumptuous but blind Dogberry or Shallow, or force such stolid brains to comprehend a legal principle. The honesty of the lay magistrate, which very generally no doubt characterises his judicial proceedings, cannot make amends for his lack of knowledge of legal principles: and legal science the layman cannot possess.

We think nothing of the knowledge Shakspere evinces in the first scene of the second act of *Taming the Shrew*, of the wager of battle and the signification of the word "craven," as evincing that he studied with an attorney, more than we should of some knowledge of the pugilistic contest as proving a practice in the ring; although the passage in *Taming the Shrew* has been adduced in support of the attorney theory. Not only had the wager of battle become in practice nearly or quite obsolete in Shakspere's time, but it is of so public a nature, and so calculated to draw the crowd, that its principal features would be generally as well known as the order of a tournament when that material exercise was in vogue. But such a passage as "Be it known to all men by these presents," from the lips of fair Rosalind, in *As You Like It*, would indicate a habit of legal phraseology cleaving to the pen of the writer. This legal phrase is so out of place in the dialect of a woman, that a writer would certainly be unlikely to go out of his customary sphere to fetch such an expression.

In the first scene of the third act of the last-mentioned play, the exact technical word for a levy on real estate is used:—

"Make an *extent* upon his house and lands."

There is an impropriety, it is true, in expressing the *house* in this order; for whenever a house is so detached from land as to be personal property, it is not the subject of an extent, and in other cases it is only an incident to the ownership of real estate, the title to which embraces what is beneath it in converging lines to the earth's centre in the one direction, and *usque ad cœlum* in the other. But that Shakspere was aware of this familiar legal maxim, appears in the second scene of the second act of *Merry Wives of Windsor*, where Ford says, "I have lost my edifice by mistaking the place where I erected it."

In the second scene of the fourth act of the same play Shakspere mentions fee simple with fine and recovery as the strongest species of title, combining as it does the most complete form of grant with the confirmation of a judgment of court. The ex-attorney, in these cases, would seem to flourish a little his law learning, which probably was not half so agreeable to him when reducing its redundancies to parchment, as when laid aside and afterward floating dreamily through the memory of the successful dramatist.

In *All's Well That Ends Well*, Act 4, scene 3, Parolles says: "He will sell the fee simple of his salvation * * * and cut the entail from all remainders." This refers to the mode of barring the entail by a proceeding in court, which was devised to enable the tenant in tail to convey the estate in fee.

In *Antony and Cleopatra*, Act 1, Scene 4, Lepidus says of Antony:

> "His faults, in him, seem as the spots of heaven,
> More fiery by night's blackness; *hereditary*
> Rather than *purchased*."

Here a peculiarly technical law phraseology is used, which classifies the acquisition of property under two heads; that which comes by inheritance on the one hand, and that acquired in all other modes which is styled "purchase." The last term in the ordinary vernacular, would be confined to property obtained by paying money for it; while the law term would include also a legacy, a gift absolutely gratuitous and without consideration, or founded on a degree of blood relationship constituting a good consideration, or by barter trade, or as remuneration for services. One uninitiated in the law would be exceedingly unlikely to use the term "purchase" in its technical sense, as Shakspere manifestly does in the passage cited; because such a use would not only be unknown to general literature, but would actually conflict with the sense of the expression as interpreted in common language. The other word, inheritance, or descent, is nearly as technical: for it not only embraces property which comes down from an ancestor, which sometimes proves a descent indeed; but also an ascent, in cases where the parent is heir of the child.

Hamlet's speech, on taking in his hand what he supposed might be the skull of a lawyer, abounds in legal terminology used in an appropriate sense.

"Where be his quiddets now, his quillets, his cases, his tenures and his tricks? Why does he suffer this rude knave now to knock him about the sconce with a dirty shovel, and will not tell him of his action of battery? Humph! This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries; is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures?"

An acquaintance with the terms of real estate law, and the roundabout processes with which, in England, titles were often perfected, would seldom or never be obtained by the general reader. Not only is this sort of learning distasteful and repulsive, but it is so mazy and difficult of comprehension that even "the soul of Shakspere," which Tennyson refers to as endowed with pre-eminent intelligence, would find it no easy matter to understand it. The knowledge of it can only be obtained by becoming imbued with it, at the expense almost of a life sacrifice. Unless the waters of this spring be thus deeply drunk, they are bitter to the taste; so that any cursory acquaintance, by way of a literary accomplishment, with the mysteries of this department of law, is out of the question. Had Shakspere occasionally impressed upon his pages a complex figure of trigonometry, had he run his reasoning, at times, in the mould of geometrical demonstration like Spinoza, especially had he now and then broken out in the jargon of algebra, with its A, B, C, and X, we should consider this as satisfactory evidence that he had, in some part of his career, had to do with mathematics, perhaps been a pedagogue, as some of his admirers insist that he in fact was. His knowledge of the terminology of that driest department of all jurisprudence, real estate law, seems a still stronger argument to show that he had some time or other such a familiarity with it as might be acquired by an attorney's clerk. That he learned this lore for amusement is not to be imagined; for real estate law, like vice, is

> "——A monster of such hideous mien,
> That to be hated needs only to be seen."

The knowledge in a superficial way, of other departments of law, with the processes and forms of judicial proceedings, are by no means so satisfactory evidence of professional training, because this knowledge is often impressive and attractive, and is such as would be acquired more or less by every experience, and especially by a quick observer of men and things.

Thus we cannot argue much from such a passage as this in one of Shakspere's Sonnets:—

> "But he contented; when that fell *arrest*
> *Without all bail*, shall carry me away."

It is indeed a very striking image of the imperative claim of mortality; and implies a knowledge that while some processes admit of bail, in cases of life or death it could not be admitted. Yet to presume that well-informed laymen would be likely to know this item of law, we do not need to appeal to the charitable legal presumption on which the law rigidly insists, that it is known to all men.* The same may be said of the following passage in the second scene of the fourth act of *The Comedy of Errors*, in which, to the question "Where is thy master, Dromio? Is he well?" Dromio replies:

> "No, he's in Tartar limbo, worse than hell:
> A devil in an everlasting garment hath him,
> One whose hard heart is buttoned up with steel;
> A fiend, a fairy, pitiless and rough;
> A wolf; nay worse, a fellow all in buff;
> A back-friend a shoulder clapper, one that countermands
> The passages of alleys, creeks, and narrow lands:
> A hound that runs counter, and yet draws dry foot well;
> One that before the judgment † carries poor souls to hell.
> *Adr.*—Why, man, what is the matter?
> *Dro. S.*—I do not know the matter, he is 'rested on the case.
> *Adr.*—What, is he arrested? tell me at whose suit.
> *Dro. S.*—I know not at whose suit he is arrested, well,
> But he's in a suit of buff which 'rested him, that can I tell.
> * * * * * * *
> *Adr.*—This I wonder at:
> That he, unknown to me, should be in debt.
> Tell me, was he arrested on a *band?*
> *Dro. S.*—Not on a band, but on a stronger thing:
> A chain, a chain!

A graphic description might be given of an officer by a lay man as well as an attorney. Indeed, the acquaintance of the former with this executive personage is often such as to make a more vivid impression, than on his employer the attorney. Literary men have, perhaps, had as much familiarity as any class with the men in buff; not, indeed, in a very gratifying

* Ignorantia non excusat legem.
† An arrest on *mesne process*.

way, or as society of their own seeking, if we may judge from the style in which they have photographed the officer in literature, in seeming revenge. Shakspere's familiarity, in particular, may have sprung in part from his deer poaching adventure, as he was actually pursued by the emissary of law, or pictured the man in buff behind him in his flight to London.

We have thus alluded to Shakspere's apparent familiarity with the phraseology of law forms, and with processes and officers of justice. We may next advert to his allusions to the courts, where justice was administered. It may be remarked, however, that even a familiar acquaintance with the ceremonials of the courts, which in Shakspere's day were more imposing than at present, would go but little way to prove a participation in them. A solemnity of interest has always attended the administration of justice, especially in grave criminal cases. Scenes of this kind, where the magistrate is calmly but earnestly applying all the powers of a gifted and learned mind to dealing out the profound and delicate principles of jurisprudence on which hang the issues of life and death, have always proved attractive to every class of observers. This interest was heightened by the impressive paraphernalia of justice, many of which are now abandoned. Shakspere alludes to some of them in the following lines—

> "Not the king's crown, nor the deputed sword,
> The marshall's truncheon, nor the judge's robe,
> Becomes him with one-half so good a grace
> As mercy does."

The occupation of the dramatist would place the day at his disposal, during much of which he must be observing men and things, to obtain *farrago libelli;* and the courts of justice would be sure to receive their share of his attention. What he then witnessed would impress his mind, and furnish him with a powerful and expressive imagery of thought. The figure of the court of justice, the impartial judge, the suitor with vital interests at stake, has been held up even by inspiration, to convey most impressively upon the mind the divine retribution upon the sinner and the justification of the saint. Secular writers have constantly resorted to the same figure: and hence their pages will often afford evidence of some acquaintance with law proceedings. This has been illustrated in an article in the London Jurist upon Lord Campbell's Treatise on Shakspere's Legal Acquirements. The writer cites passages from Massinger, and Beaumont and Fletcher, to show that law phrases in Shakspere are no evidence of legal training. So far as these passages only relate to the public administration of justice, we think the position of the writer in the Jurist is well taken.

Shakspere's descriptions of law trials do not give evidence, we think, of much familiarity with them, and are less impressive than like sketches from the pen of Sir Walter Scott, who actually received a professional education. In Sonnet XLVI. occurs this description of a jury trial between Heart and Eye on a claim of title to a fair lady—

> * * * * * * *
> "My heart doth plead that thou in him dost lie
> (A closet never pierced with crystal eyes),
> But the Defendant doth that plea deny,
> And says in him thy fair appearance lies.
> To 'cide this title is impanelled
> A quest of thoughts, all tenants to the Heart;
> And by their verdict is determined
> The clear Eye's moiety, and the dear Heart's part;
> As thus; mine Eye's due is thine outward part,
> And my Heart's right, thine inward love of heart."

Here Shakspere sets forth the pleadings which make up the issue, the empanelling of the jury and the verdict. But the sketch is less accurate than the description by Cowper, who was educated a lawyer, of the suit between the nose and eyes, in which the only unwarranted proceeding is the tongue's "shifting his side as a lawyer knows how." Lawyers have been reproached, we hope falsely, with accepting retainers on both sides; but courts have never permitted them to act in this double capacity. Shakspere calls the allegation of the Heart, who goes forward, the "plea," instead of the declaration; whereas that term is correctly given only to the defendant's averment. He represents the case, too, as a *real* action, whereas the subject of it is the *ideal* of romance, a lady, and so much an affair of fancy that the ownership would hardly constitute real estate. Then the plaintiff is not, as he should be, a demandant complaining of disseisin; but avers that he already has what he brings the action for. The Eye sets up title in himself accompanied with possession. Then for the jury are empanelled the "tenants of the Heart." Here is first an inaccuracy of expression; since "tenant" is the denomination of the defendant in a real action: but what is worse, the tenants derive title from and are the party identical in interest with the Heart, the plaintiff—a gross outrage upon impartial justice. Finally, the verdict is not relevant to the issue framed; but produces a result only pertinent to a suit for partition. We think these considerations make it clear, that if Shakspere was an attorney's clerk, it did not fall to his lot to frame the pleadings.

Lord Coke, who was as dwarfish in æsthetic sentiment as he was developed in "the perfection of reason," *scilicit*, the law, in charging a Grand Jury, on one occasion, declaimed against dramatists as vagrants. Shakspere may have been revenging himself for this, when he makes Lear constitute Mad Tom "the robed man of justice," and the fool his "yoke fellow of equity:" an association, by the way, of law and equity judges, which would not occur in England, except, in a special commission.

The trial of Othello in the third scene of the first act, is a very irregular proceeding. After the accusation of Brabantio, without waiting to hear Othello, the excited Duke cries—

> "* * the bloody book of law
> You shall yourself read, in the bitter letter,
> After your own sense."

Thus giving the plaintiff *carte blanche* to perform the judicial function of interpreting the law.

We may now advert to law figures and phrases of a general character, profusely scattered through Shakspere's writings. We do not think, however, that they furnish very satisfactory evidence of his apprenticeship to an attorney. A great writer would not be wholly ignorant of that important department of literature which is made up of law writings, especially of important judicial opinions; and he would naturally be attracted by the terseness and vigor, the forcible and carefully guarded expression, which characterize the best law style; and he would be very likely to transplant some of its terms and figures to his own department.

As specimens of Shakspere's legal figures and phrases, we may refer to the third scene of the third act of *Othello*, where he says thoughts in the breast

> "Keep leets and law days, and in session sit."

And in the Sonnets he uses the same trope—

> "When to the sessions of sweet, silent thought
> I summon up remembrance of things past."

He often uses the figure of a lease, and denominates the expiration of the term in language of technical accuracy, the *determination*. Thus in the Sonnets—

> "So should that beauty, which you hold in lease,
> Find no determination."

Also—

> "And summer's lease hath all too short a date."

Here the word "date" is not accurately used; as it signifies commencement and not continuance.

In the first scene of the fourth act of *Macbeth*, the figure of a bond is expressively referred to—

"———I'll make assurance doubly sure,
And take a bond of fate."

Here Shakspere personifies fate as he always delights to, mental abstractions, thus presenting them in picture, and clothing them with vivid reality. This may be noticed as a peculiar charm and an element of power in the graphic style of the immortal dramatist.

In the sixth scene of the fifth act of *King Henry VI.*, Part Third, is the striking figure—

"Suspicion always haunts the guilty mind;
The thief doth fear each bush an officer."

In the first scene of the second act of *King John*, the kiss is expressly styled the seal of the indenture—

"Upon thy cheek lay I this zealous kiss,
As seal to this indenture of my love."

The force of the seal as imparting strength and solemnity to a contract, is alluded to in the sacred scriptures. Thus it is said, "He hath set to his seal that God is true:" that is, he has adopted this affirmation of God's verity as the motto of his seal, which he is in the habit of using in the most solemn transactions. Christ is also described as sealed by the Father: that is, he had a commission confirmed by the seal of the King of kings. And the New Testament is said to be sealed with the blood of Christ; that is, it derives its validity as a testamentary instrument from the solemnity of this sacred seal. The term "indenture" is very aptly used in the above quotation from Shakspere, as expressive of the mutuality of love. It was not a mere grant on one side, as is the case with a deed poll, requiring to give effect, only acceptance on the other side. Rather, like the indenture, each party is giver and receiver, and each enters into obligations to the other. In the first scene of the third act of *King Henry IV.*, Part I., the phrase is again appropriately used—

"And our indentures tripartite are drawn,
Which being sealed interchangeably," &c.

The peculiarity of the indentures that they are interchangeably delivered, each party being grantor and grantee, is here developed.

We have heard that by a very modern contrivance the condemned criminal may be allowed to furnish a substitute at the gallows; that is to "die by attorney," as in the following quotation from the first scene of the fourth act of *As You Like It.*

"*Ros.*—No, faith, die by attorney! The poor world is almost six thousand years old, and in all this time, there was not any man died in his own person, *videlicet*, in a love cause."

Here is the principle *qui facit per alium facit per se*, which will apply to facing almost anything. But in *Venus and Adonis* the phrase attorney is used in its restricted sense, as applicable only to a substitute or agent in a court of justice. Thus—

"But when the heart's attorney once is mute,
The *client* breaks as desperate in the suit."

Whatever evidence the foregoing quotations, and many others that might be adduced, furnish of Shakspere's acquaintance with law forms and phrases, we think he often evinces a want of familiarity with legal principles.* So that, if he was a lawyer, we cannot set him down as a good lawyer. His apparent ignorance of law principles is strikingly evinced in the *Merchant of Venice*. A bond is given to the Jew by the merchant for a pound of flesh next the heart; and the Judge feels obliged to give judgment for the flesh, but forbids to take a drop of blood with it, inasmuch as the bond did not so stimulate. Thus the Jew is baffled; and presently he is proceeded against as violating the law by machinations against life. This is throughout a tissue of bad law. To begin with, the grant of the flesh next the heart, if valid, would imply whatever was requisite to obtaining the flesh: for a grant always implies, under the head of appurtenants, whatever is necessary to its usufruct. So that the right to shed blood would be incident to the right to take the flesh; for *incidentum sequitur principale*. But this bond being in contravention of the statute forbidding machinations against life, would be against public policy, and wholly void. This it would be, if there were no such statute. The contract was therefore illegal and void. Finally, in a suit at law to recover the penalty of a bond for a specific article, and not for money, the judgment would be not to recover the specific article, but its measure in money. As the merchant's heart would have no market value in money, the Jew would be jewed in this suit. In an equity proceeding, judgment might be rendered for specific performance; but equity would not enforce an unconscionable contract. So here again the Jew would be nonplussed. The truth is, the heart cannot be so hypothecated as to furnish ground for a suit, except in the court of love.

We think, in view of Shakspere's jurisprudence, that if he was apprenticed to an attorney, his heart was not in the office of his employer, but was roaming in quest of Ann Hathaway, or "chasing the deer." That he was a diligent apprentice to the last named pursuit, we have beautiful evidence in the touching lines addressed to the poor wounded deer, weeping in the stream, in the first scene of the second act of *As You Like It.*

"———Thou mak'st a testament,
As worldlings do, giving thy sum of more
To that which hath too much."

So, too, in the second scene of the fourth act of the *Comedy of Errors*, he describes the officer of justice as

"A hound that runs counter, and yet draws dry foot well."

One other illustration of Shakspere's legal acquirements it may be well to advert to—his will; which is supposed to have been drawn up by himself. He left a wife and children. But he remembers one child only in his testament, Susanna, the wife of Dr. Hall, to whom he devises his lands. His wife is only mentioned in the interpolated sentence—"I give to my wife my second best bed, with the furniture." Did Shakspere expect his wife to accept a legacy so trifling, as to look like an insult in lieu of her dower? Or was he not aware that his wife was entitled to a life estate in one-third of his lands, so that his will, giving the whole to his daughter, could be only partially executed? Again; why did he mention no other child? Was he ignorant that such child not being cut off with a shilling, the law would presume that the omission was through inadvertence, certainly in the absence of controlling proof, and the omitted child could claim as heir as if no will had existed? It would seem that principles so familiar as these, must have been learned by one employed in an attorney's office.

But how shall Shakspere's frequently correct legal terminology be accounted for, if he was not in the office of an attorney? We think a great, original mind like his, cannot be judged in this respect, like an ordinary person. Faculties like his could rifle sweets from every source, and derive material and gain instruction from all quarters. Emerson has described an original mind as one that draws most largely from the learning and experience of others. Such a writer is not a plagiarist in appropriating the acquisitions of others,

* Many legal principles, which are not technical, nor necessarily acquired from books, but rather are derived from keen observation and the intuition of genius, of course may be found in the writings of Shakspere, without leading us to suppose that he learned them in an attorney's office. Thus in *Best on Evidence*, 3d edit., the text states, "So what a person has been heard to say while talking in his sleep, seems not to be evidence against him," and, as authority, he cites *Othello, Act* 3, *Sc.* 3.

"There are a kind of men so loose of soul,
That in their sleep will mutter their affairs,
* * * * * *
———nay, this was but a dream.
But this denotes a foregone conclusion."

because in his mind they take new forms and combinations, and produce new results. The most original mind, if shut out from the world of nature and of books, could produce little or nothing in the form of literature, for lack of material. On these genius feeds; and, without them, starves. It would be as hard to say where such a writer as Shakspere got his knowledge, as where a bee got his honey.

We are also to remember that Shakspere mainly re-wrote old plays, or put romances into the dramatic form. He rebuilt his structures, in a new and beautiful architecture, from old edifices, or ruins, or from material which had belonged to other buildings. How shall we know whether these law phrases were the old brick or the new, which Shakspere added in his combination? Till we do know this, we can scarcely draw safe inferences from the law phraseology.

It is also important to notice the period in the history of language, in which Shakspere wrote. Law instruments and pleadings were not as yet couched in English. It would seem that much of his legal phraseology formed at that time a part of the common stock of language; and was not till afterward relinquished to the peculiar province of law by vernacular usage. There has been since Shakspere's day a division of much language, which was held in common then. Many words have either become wholly obselete, or lost some of the significations which then attached to them by common usage. Such wor ls occur, in their former sense, only in literary productions of that period, which have not suffered by time. The Bible was then translated; and much of its language has a sense, then general, but now peculiarly scriptural. Shakspere's phraseology admits of the same observation. Words are now peculiarly Shaksperean, which then belonged to everybody. A comparison of such works as Shakspere and Saint James' version of the Bible, brings this fact strongly to light; many words being used in both with the same sense, and a signification not now attached to them by general usage. This comparison between the language of Shakspere and the Bible forms the subject of an interesting article in *The Bibliotheca Sacra* for July, 1862. From such comparison we may be led to infer that in Shakspere's time many words were in common use which have since become obsolete, except in law language. And, therefore, from the use of legal phrases by Shakspere, we have not the same reason to infer his acquaintance with law, that we should have if the expressions were used by a writer of the present day; inasmuch as phrases now restricted to law usage may then have been a part of the common vernacular.

We have thus glanced at some items of evidence, and adduced some reasons pertinent to the question, whether Shakspere was ever the clerk of an attorney. The conviction produced upon our mind by examining the subject, is, that Shakspere had a knowledge of real estate forms and phrases, which he might have acquired in the employ of a conveyancer, and would not probably have gained otherwise. We think, however, that he did not take to the business, and never imbued his mind with the great principles of jurisprudence. He has somewhere made one of his characters declare that it would be well if a young man could sleep away the period of his life, when the wild oats are sown: and we are inclined to think that "glorious Will" was rather reckless at this period of his own career, when we suppose him to have been with an attorney; and that he gave little heed to the grave doctrines of law, while, at the same time, some of its peculiar maxims and phrases indelibly stamped themselves upon his memory. They were such scraps of learning as the unwilling classic scholar carries away from its field, when liberated from constraint, and do not embody those principles which only deep study can master.

We would refer those who may be disposed to pursue further this interesting theme to *Shakspere's Legal Acquirements* by Lord CAMPBELL, a pleasant and readable disquisition in the simple, direct and attractive style which characterizes the writings of the late Chief Justice of England.

R. F. F.

SELECTIONS FROM OLD REPORTERS AND TEXT WRITERS.

Let the following be a warning to all bad cooks. *Trin.* 8 Hen. 4. Rot 47. Willielmus Milburn recuperat per juratam per billam suam, in quâ queriter versus Johannem Cutting Cook de eo quod epse Johannes apud Westmonasterium vendebat dicto Willielmo unum caponem pistum corruptibilem et recale factum, qui capo assatus per quatuor dies in Hospicium Domini Regis et iterum calefactus et pistus extitit de quo postqualm edit vomitum horribilem fecit, ita quod infirmabatur per quas septimanas recuperate inquam viginti solidos per damnis. And Rolle says he was informed that it appears upon the record at large that the judge increased the damages, (1 Roll. 89).

A guest comes into a common inn, and the host appoints him his chamber, and in the night breaks into his guest's chamber to rob him: this is burglary (Dalton, cap. 151, *in nota*).

The wearing of a sword, after one is bound to his good behaviour, no breach of good behaviour now, as perhaps it was heretofore, (See Comp. Just. Peace, 119, 126), when swords were not usually worn but by soldiers; for then they struck as great a terror in people as a blunderbuss does now. But since at this day swords are usually worn by all sorts of people, this cannot now be construed a breach of the good behaviour; so that which heretofore was a crime, is now by custom became none, (Hawle's Remarks, &c. p. 81). So that it would seem, that as swords are now not ordinarily worn, except by soldiers, it would, at the present time be considered a breach of the peace to wear a sword.

A Danish writer assures his readers that the taste for hanging is so prevalent in England, that criminals, who are to be hanged, go laughing and singing to the gallows, and, in the absence of the executioner, hang themselves. "*Ad loca supplicii non ducuntur Angli, sed currunt, ridendoque cantando, facetiis spargendo, et circumstantibus insultando moriuntur; ubi desunt carnifices se ipsos sæpe suspendant,*" (Holbergii Opuscula, tom. 2, 118).

When Lord Coke was presented by Lord Bacon with a copy of the *Novum Organum*, with the title of *Instauratio Magna*, he wrote under the handwriting of Bacon—

"Auctori consilum,
Instaurare paras veterum documenta sophorum
Instaura legis justitiam que prius."

And over the devise of the ship passing under the pillars of Hercules—

"It deserved not to be read in schools,
But to be freighted in the ship of fools."

In the time of Alfred he ordained, that all false judges, after forfeiting their possessions, should be delivered over to false Lucifer, so low that they should never return again; that their bodies should be banished and punished at the Kings's pleasure; and that for a mortal false judgment they should be hanged as other murderers. And he gives a list of the judges executed by the King's order. In one year we are told, that forty-four judges were hanged. He hanged Cole, because he judged Ive to death when he was a madman. He hanged Athelf, because he caused Copping to be hanged before the age of twenty-one years. He hanged Diling, because he caused Eldon to be hanged, who killed a man by misfortune. He hanged Horne, because he hanged Simen at days forbidden. But not only did Alfred hang for hanging; he maimed his judges for not maiming their prisoners. Thus, he cut off the hand of Hanlf because he saved Armock's hand,

who was attainted before him, for that he had feloniously wounded Richbold. And he judged Edolf to be wounded, who feloniously had wounded Aldens, (Mirror, c. 5; and see 3 Inst).

A gentleman is by descent; yet, says Lord Coke I read of the creation of a gentlemen; and thus it was: A French knight came into England, and challenged John Kingston Yeoman, a good and strong man at arms, but no gentlemen. at certain points and deeds of Arms, &c. *Unde Rex* (saith the report) *ut dictus Johnnes honorabilius in præmissis accipiatur ipsum Johannem in ordinem generosum adoptavit et armigerum constituit et cætera cohortis insignia ei concessit*, (2 Inst. 565 & 668).

There are some things personal, and so inseparable connected to a man's person, that he cannot do them by another; as the doing of homage fealty. So it is holden, that a lord may beat his villein, for cause or without cause, and the villein is without remedy; but if the lord command another to beat him without cause, who does accordingly, the villein shall have an action of battery against him. So if the lord distrain his tenant's cattle, when nothing is behind, yet the tenant, for the reverence and duty that appertains to the lord. shall not have trespass *vi et armis* against him; but if the lord command his bailiff or servant to distrain, *secus*, (Comb's case, 9 Co. 76 a).

An action of false imprisonment brought against a constable, who pleaded not guilty, the defendant did show in evidence, that he came to search in time of the plague for lodgers in the town, and he found a stranger and questioned him which way he came into the town; who answered over the bridge, and the judge conceived this to be a scornful answer to an officer, and because he had no pass, but travelled without one, and gave such an answer, the defendant did offer to apprehend him, and the plaintiff thereupon being present said to the defendant he shall not go to prison, but yet offered to pass his word for his forthcoming, upon which the defendant did commit the plaintiff, and it was ruled upon evidence, there was good cause to commit the plaintiff, for opposing the constable, though but verbally, in his office, who is so ancient an officer of the Commonwealth, (Sheffeld's case, Clayt. 10).

The judge did put back the jury twice, because they offered their verdict contrary to the evidence, as he held and set a hundred pound fine upon one of the jury, who had departed from his companions; but after, upon examination it was taken off again, for that it did appear, it was only by reason of the crowd, and some of his fellows were always with him, (Clayt. 50).

Memorandum. One Mr. Guye Faux, of the parish of Leathley a cavillier, had a cause heard about a plunder, upon Monday this week after dinner, and was well in court, and damage against him a hundred pounds, and he was found dead next morning upon the conceit of it, as was supposed, (Clayt. 116.)

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page 69.*)

THE CLERK'S DUTIES.

The clerk of every court is required to have an office at such place within the division for which he is clerk as the judge may direct: (Rule 3.) The days when the clerk is to attend in his office is not provided for either by the statute or rules; but reasonable attendance should be given; and what would be such would, doubtless, depend greatly on the amount of business in the court. For public convenience every office, however small the number of suits entered, should have set days on which the principal or some one authorized to act for him, will be in attendance for the transaction of business.

Certified copies of the entries in the clerk's books are admitted in all the courts and places as evidence of such entries, and the proceedings referred to thereby, without any further proof (sec. 43); and orders and judgments as they appear on the books, are conclusive between the parties: (sec. 55). A very important part, therefore, of the clerk's duty is to keep the books of his office in the manner prescribed by law. The general rules expressly provide what books are to be kept, namely, two, in addition to the fee-fund book provided by the government under sec. 36, and the book required to be kept under sec. 139.

One of these books is to be called "The Procedure Book," and the other "The Cash Book."

In "The Procedure Book" the clerk is required to enter a note of all summonses issued; of all orders, judgments and decrees; warrants, executions and returns thereto, and of all other proceedings in every cause, and at every court.

In "The Cash Book" he is to enter an account of all suitors' monies paid into and out of court. Both books are to be according to forms given (which will be found in an appendix), and must be kept, as nearly as may be, in manner shewn therein: (Rule 4).

In "The Fee-Fund Book," it is provided by section 36, the clerk shall enter an account of all court fees, and fee-fund monies. A form for this book has been given by the Government, and the book itself has been provided at the public expense. The other books clerks must provide at their own expense, and this though the books do not belong to them, but are public property, and records, so to speak, of the courts.

Sec. 139 requires a book to be kept in which transcripts of judgment sent from other divisions are entered, and may be called "The Trancripts of Judgments Book."

The four books named, viz.: *The Procedure Book*, *The Cash Book*, *The Fee-Fund Book* and *The Transcripts of Judgments Book* must be procured and kept by every clerk. They are the only recognized books, and in them must appear every proceeding in every cause.

There can be no objection to other books as well; and where a large amount of business is done in a court, other books, for facility of reference, may be necessary or advisable. So far as prescribed by the statute or rules, when a

form of entry is given it must be followed; but in general a brief note of the proceeding will be sufficient. In respect to judgments it is important that the very words given in the forms should be followed.

The duties of the clerk in respect to proceedings in the courts will be treated of in detail as each proceeding comes under notice: here it will be sufficient to make general reference to them.

The duties of clerks, then, in respect to proceedings are to receive, number, and enter all claims left for suit; to issue summons thereupon, and subpœnas for witnesses when required by either party; to receive and notify special defences; to summon juries when required; take confessions; attend the several sittings and register all orders and judgments of the court; to administer oaths and affidavits when necessary; attend to applications for new trials; tax costs; issue all warrants, precepts and writs of executions, interpleader summons, and judgment summons; and to receive and secure goods taken under attachment.

The clerk's duties in respect to fee-fund and fee-fund monies, are to keep an account of all court fees and fines payable or paid into court, and enter an account of the same in the book kept for the purpose, and to submit his accounts for examination to the judge: (sec. 36.)

The following sections further provide on this head:—

37. The clerk, at the periods from time to time appointed by the Governor, shall submit his said accounts to be audited or settled by the county attorney.

38. The clerk of every division court shall, from time to time, as often as required so to do by the county attorney of his county, and at least once in every three months, deliver to him, verified by the affidavit of such clerk sworn before the judge or a justice of the peace of the county, a full account in writing of the fees received in his court, and a like account of all fines levied by the court, accounting for and deducting the reasonable expenses of levying the same, and any allowance which the judge may make out of any such fine in pursuance of the power hereinafter given.

39. The fees from time to time received by such clerks respectively and payable to the general fee-fund, shall be by them paid over from time to time to the county attorney, and at least once in three months, and shall form part of a fund to be called the General Fee-Fund, and shall be applied towards the payment of the salaries of the judges of such courts.

40. The clerk of each division court, when required by the judge shall, from time to time, furnish him with a like account, verified by the oath of the clerk sworn, before the judge or a justice of the peace, of the monies received into and paid out of the court, by any suitors or other parties under any orders, decrees or process of the court, and of the balance in court belonging to any such suitors or parties.

41. The clerk of every division court shall, half-yearly at least, furnish to the judge of his court a detailed statement of all fees and emoluments of his, which statement shall be sworn to before such judge; and it shall be the duty of such judge to require such statement, and to file such statement with the county attorney.

42. The clerk shall cause a note of all summonses, orders, judgments, executions and returns thereto, to be from time to time fairly entered in a book to be kept in his office, and shall sign his name on every page of such book, and such signed entries, or a copy thereof, certified as a true copy by the clerk, shall be admitted in all courts and places as evidence of such entries, and of the proceedings referred to thereby without any further proof.

43. The clerk shall, annually in the month of January, make out a correct list of all sums of money belonging to suitors which have been paid into court, and which have remained unclaimed for six years before the last day of the month of December then last past, specifying the names of the parties for whom or on whose account the same were so paid.

A copy of such list shall be put up and remain at all times in the clerk's office, and during court hours in some conspicuous part of the court house or place where the court is held.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—Your opinion is desired as to whether a bailiff can be sued in his own court for negligence. It is a hardship on parties to go to another court to sue, and often a hardship on the clerk of the original court to have to travel to the next court, bring papers, and give evidence about the case. It is generally considered that the statute prevents a bailiff being sued in his own court; but could not the Judge make order for it.

Yours obediently, T. S.

[If there be a second bailiff in the Court to effect service, we have no doubt that an action as of right may be brought against the officer in the court of which he is bailiff. Sec. 83 provides where an officer *may* sue and be sued, viz., in the next adjoining Division; that is, as we read the statute, the plaintiff may, if he pleases, bring his action where the cause of action arose (in the bailiff's own Division), or, if for any cause he prefer to have it entered elsewhere, he may sue (irrespective of residence of defendant or where the cause of action arose) in the next adjoining Division.

If there be not a second bailiff, we have no doubt the Judge, on being applied to, would direct service to be made by the clerk, or appoint a bailiff *pro hac vice* to make the service. An order to change the venue would not be necessary.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—Please answer the following question. Is a defendant sued on a bank note, and where defence in part is usury, obliged to give notice to the Bank. And oblige

A Clerk Co. W.

[We assume that the note meant by our correspondent is a note discounted by a Bank. A written notice of defence must be given, the defence of usury being grounded on a statute. The notice is to be served in the manner provided for in sec. 93. Any other defence may be stated in the notice.—Eds. L. J.]

M.—The bailiff who purchased the horse "at a sale under execution by his brother bailiff" acquired no property in the animal. Such purchases are absolutely void by sec. 157. The party claiming the horse may, after demand and refusal, sue in trover, or get hold of the horse at once by writ of replevin. Moreover, the illegal purchase is a misbehaviour for which the Judge, if he did not remove the bailiff on complaint, would probably require him to compensate a party injured as a condition to his being retained in office. We have deemed it unnecessary to copy our correspondent's letter (which is unnecessarily prolix), the facts appearing in our answer.—Eds. L. J.

M. P. (*London*).—Costs in the Division Courts do not necessarily follow the result of the cause, and if a defendant by his own deceitful conduct and misrepresentation led the plaintiff to suppose the existence of facts (of which he alone was certainly informed) necessary to support his action, and which facts had really no existence, a Judge would not give him costs.—Eds. L. J.

UNIFORMITY OF PROCEDURE IN THE DIVISION COURTS.

According to our promise in the March number, we resume the subject of procedure in the Division Courts, and will allow our correspondent to tell his own story as to procedure in different counties, taking up one subject at a time, and premising that unless we had just ground for believing that the communication before us is not overdrawn we would not have made it the foundation for remark.

"In one county, the Judge places such a construction upon the judgment summons clauses (sections 160 to 173) of the Division Courts Act, in cases where the defendant pays no attention whatever either to the first or second summons, that he holds the plaintiff (notwithstanding defendant's failure to appear) bound to prove that defendant is in a position to pay the debt, or some part of it, otherwise he (the Judge) will not make an order for defendant's commitment."

"In another county, the Judge sometimes requires the defendant to be brought to his chambers in the county town for examination upon a judgment summons; whilst at other times (and nobody knows why or where the distinction is made) he will examine him or them at the different Division Court sittings."

"In another county, in order to obtain a judgment summons *to be issued at all* the plaintiff must first make affidavit that judgment has been rendered in the cause, that an execution has issued which has been returned, and stating what the return was, and, lastly, that the plaintiff has good reason to believe that if a judgment summons '*be allowed*' to issue, the plaintiff will be able 'to get an order for payment'! This affidavit must be sent to the Judge, and *if he sees fit* he will order a summons to issue returnable in all cases *at his chambers* in the county town. The plaintiff to be notified by the clerk of the Judge's determination."

"On another occasion, the Judge of a certain court had a great number of judgment summonses to dispose of, the parties were all present waiting to be heard, but the Judge briefly and summarily disposed of them by one order applicable to the whole batch, without hearing one word of evidence, viz., that the defendants respectively should all pay the amounts against them by the next court."

Our present purpose is not to animadvert upon these rulings, but to point out briefly what seems to us the correct view of this branch of the Division Court law, inviting free criticism from all quarters, as our only desire is to have the law known and the proper practice pointed out.

We do not know and do not desire to know the names of the Judge's referred to. It will be sufficient, just now at all events, to discuss the practice.

The first question is, *in what cases and how the judgment summons may issue?*

Sec. 160 enacts that "any party having an unsatisfied judgment or order" in any Division Court for payment of any debt or damages, may procure from the Court, &c., a summons in the form prescribed by the rules of practice. When therefore the judgment appears on the face of the procedure book to be unsatisfied, and in force without revival as between the parties, it seems quite plain that the judgment creditor may of right obtain the issue of the summons, upon payment of the proper fees. Rule 17 shows how he is to proceed, namely, by entering an application in writing, according to form 54 in ordinary cases, and "thereupon" a summons shall issue according to the form given.

The provisions of rule 23 shows how and within what time this summons is to be served.

We can see no ground to dispute that this is the regular course, and no warrant for requiring a previous order from the Judge to allow the issue of the summons. True, Sec. 164 makes provision for a Judge's order under particular circumstances, but this rather confirms the right to issue

before an examination and discharge. The effect of Sec. 164 is that a judgment debtor once *discharged* by the Judge, *after examination*, cannot be again summoned, unless it be shown to the Judge that proper grounds exist for again calling the party up before the Court; and in *such* cases an order must be first obtained, before the issue of the judgment summons.

What is to be done at the hearing, on a judgment summons? Upon the return day, the defendant makes default or appears in obedience to the summons. If default be made, the judgment creditor may call witnesses to show that the non-attendance is wilful, that the debtor might have been present if he would; and if the Judge be satisfied on this point, the creditor is entitled to an order to commit the defendant for non-attendance. If the judgment creditor is unable to furnish such proof, the non-attendance under that summons is noted, and the creditor sues out another summons. If the debtor be so twice summoned and fails to attend on both occasions, and no sufficient reason is alleged for non-attendance, he is liable to commitment for default (see secs. 165 and 166). Until recently, a single default without explanation or excuse authorized a commitment. Now, as already noticed, under sec. 166, the non-attendance must be shown to be wilful, or the defendant must have been twice summoned. We can see no authority for holding the creditor "bound to prove that the defendant is in a position to pay the debt, or some part of it," as a condition to granting an order to commit. It is certainly requiring more than the statutes require.

If the debtor appears, where is he to be examined? Sec. 162 says the examination shall be held in the Judge's chambers, unless the Judge shall otherwise direct. The simple object of the enactment is to prevent needless exposure in open court, and to give authority to hold the examination in private; and the practice in every Court we have knowledge of is to allow the general public to depart after the ordinary business is over, and to make the court room the judge's chamber for the time being. There is nothing either in the language used, or the context, to show that the examination is to be made in the Judge's chambers at the county town, and it would be a great hardship to bring parties there for the purpose, if a discretion existed. But it does not. The party is summoned to be and appear at the place where the Court is held, in the Division in which it issues; and there is no authority to require him to appear elsewhere, for the order in respect to the matter must be entered by the clerk in like manner as any other order of the Court.

But we have now reached our available limits, and must postpone further notice till next number.

UPPER CANADA REPORTS.

IN APPEAL.

[Before the Hon. Sir J. B. Robinson, Bart., President; The Hon. Archibald McLean, Chief Justice of Upper Canada; The Hon. William H. Draper, C.B., Chief Justice of the Court of Common Pleas; The Hon. Vice-Chancellor Esten; The Hon. Mr. Justice Burns; The Hon. Vice-Chancellor Spragge; The Hon. Mr. Justice Hagarty; and The Hon. Mr. Justice Morrison.]

ON APPEAL FROM A DECREE OF THE COURT OF CHANCERY.

(*Reported by* Alexander Grant, Esq., *Barrister-at-Law.*)

McQuesten v. Thomson.

T. K. & Co. carrying on business as gas-fitters and plumbers, contracted verbally with D., an hotel-keeper, to supply a new hotel he was erecting with various articles in the way of their trade, which were to be paid for as the work progressed. D. afterwards left this Province, on account of ill-health, having previously executed a power-of-attorney to one S., authorizing him to carry on his business during his absence. T. K. & Co. having discovered that D.'s estate was greatly involved, refused to proceed with their contract, unless secured for their work and materials. Whereupon S., with a view of inducing T. K. & Co. to complete their contract, in pursuance of a previous arrangement, executed, as such attorney, a chattel mortgage of the goods furnished by them, securing T., K. & Co. payment of their demand. At the time of the execution of this instrument, D. was dead, but this fact was not known to the parties until some time after the completion of the work. *Held*, reversing the decree of the court below, that T., K. & Co. were not, under this mortgage, entitled to remove any of the fittings put up in the hotel; their only remedy being for the price of their work and material under their contract with D. [Esten, V. C., & Hagarty, J. dissenting.] *Jacques* v. *Worthington*, 7 Grant, 192, commented on, distinguished from the present case, and approved of.

The bill in the court below, as amended, was by James E. Thomson, David S. Keith and Charles C. Thomson, against Geo. Worthington, Calvin McQuesten and others, praying, under the circumstances therein stated, and which are clearly set forth in the judgment of the court, that the personal representatives of Thomas Davidson (defendants to the bill) might be ordered to make and execute a mortgage similar to the one which had been executed by Stevenson as his attorney, and pay off certain incumbrances due to others of the defendants; and that defendant McQuesten (a mortgagee in possession) might be ordered to deliver to the plaintiffs all the goods put or placed by them in or on the hotel and premises in the bill mentioned, subsequently to the death of Davidson; that the defendants might be restrained from using or permitting to be used the said goods and materials, and for further relief.

On the cause coming on to be heard, before His Honor Vice-Chancellor Esten, a decree was pronounced directing "that the defendants to the original as well as to the amended bill do forthwith deliver to the plaintiffs at the Royal Hotel in the city of Hamilton in the pleadings mentioned, all the goods placed by the plaintiffs or their servants or agents in or about the Royal Hotel subsequent to the 30th day of December, A. D. 1857, and which remain in the condition of mere chattels; such goods to be ascertained by the master of this court at Hamilton, in case the parties differ about the same. And this court doth declare that the said plaintiffs are also entitled to such goods as, having been so delivered subsequent to the said date, and having been affixed to the freehold, can be removed therefrom without injury to the inheritance. And it is further ordered, that the plaintiffs be at liberty, at their own expense, to remove the same, restoring the premises as nearly as circumstances will admit to their former condition. And this court doth declare that the said plaintiffs are not entitled to such of the said goods as cannot be removed without injury to the inheritance as against the defendant Calvin McQuesten, until he is paid his debt and costs. And it is ordered, that the defendants, George Worthington, Anthony Copp and James Miller [the administrators of Thomas Davidson], do forthwith pay to the plaintiffs their costs of this suit, up to and inclusive of the former hearing of this cause, to be taxed by the master of this court at Hamilton; and as to the proceedings subsequent to the original hearing of this cause, this court doth not think fit to give costs to any of the parties hereto; and all parties are to be at liberty to apply to this court, as occasion may require, and the costs of the reference hereby directed as to the said goods are reserved until after the

master makes his report. And as to such goods as cannot be removed without injury to the inheritance, this decree is without prejudice to any question of compensation or otherwise as between the plaintiffs and the estate of the late Thomas Davidson."

From this decree the defendant McQuesten appealed, making the other defendants to the bill and the plaintiffs respondents, assigning as reasons for such appeal—1st, because, as to the pure chattels, the only and sufficient remedy of the respondents, Jas. E. Thomson, David S. Keith and Charles C. Thomson, is at law, and the Court of Chancery has no jurisdiction to interfere, or, if it have such jurisdiction, this is not a proper case for the exercise thereof; 2nd, because, as to all fixtures, the same upon their fixture became the property of this appellant, whose title thereto was not and could not be affected by the alleged agreement under which the same were affixed; 3rd, because the alleged mistake in fact upon which the said decree is founded, could not affect the legal result of such fixture, and the parties are practically in the same position as if there had been no such mistake in fact; 4th, because the agreement for a chattel mortgage was as to fixtures manifestly void in law against this appellant, and therefore no equity can be raised in favor of the respondents, Jas. E. Thomson, David S. Keith and Charles C. Thomson, on the ground that the said agreement turned out void on other grounds; 5th, because the respondents, James E. Thomson, David S Keith and Chas. C. Thomson, affixed the said goods with a full knowledge of the appellant's legal rights, and of his intended assertion thereof, and they should not be relieved against such rights and their assertion; 6th, because the said decree is founded on rights alleged to arise in respect of an agreement dated on the 6th day of January, A.D. 1858, and the relief granted should have been confined to goods supplied on or after that date, whereas the said decree extends to all goods supplied on or after the 30th day of December, A. D. 1857; 7th, because the said decree should have directed an account or inquiry as to what, if anything, is due the said respondents, James E. Thomson, David S. Keith and Chas. C. Thomson, in respect of the goods supplied by them, and should not have directed their unconditional restoration, but should have reserved that question until after the state of the accounts had been ascertained; 8th, because the said decree should have directed the respondents, James E. Thomson, David S. Keith and Charles C. Thomson, upon removal of any of the said goods, to place the premises in the same condition in which they formerly were; 9th, because the said decree should have provided, but does not provide any, means for carrying out its provisions, by ascertaining what fixtures, if any, can be removed without injury to the inheritance.

The plaintiffs assigned, in support of the decree, the following reasons:—1. There is jurisdiction in equity as to the pure chattels, and this is a proper case for the exercise thereof; and if there is a remedy at law, it is not an adequate remedy under the circumstances of this case; and even assuming that there were no jurisdiction in equity in the case of pure chattels, there would be jurisdiction in this case, because of part being fixtures, and not pure chattels, by reason whereof jurisdiction is given as to the whole. 2. The fixtures did not, nor did any of them upon their fixture, become the property of the appellant, but the property always remained in the respondents by virtue of the agreement under which the same were affixed. 3. The mistake in fact could and did affect the result of such fixtures, and but for such mistake the fixtures would not have been affixed or the goods forming such fixtures been delivered, and consequently the parties are not in the same position as if there had been no mistake in fact. 4. The agreement for a chattel mortgage showed the intention to preserve the subject matter as chattels, and not to allow the property to pass; and such intention must be carried out, not only between the parties, but also as against the appellant; for, among other reasons, he did not lend his money nor was he otherwise induced to alter his position because of the subject matter being supposed to become fixtures, and particularly the appellant would have been in as good a position as he is if the said subject matter had never been put upon the mortgaged premises. 5. The respondents were not aware of the appellant's legal rights, or of his intended assertion of them; but if they were, they ought not, under the circumstances of this case, to be precluded from the relief granted by the decree. 6. The relief is not founded solely on rights in respect of the agreement of the 6th January, 1858, but the same relief would have been granted under the circumstances of this case if no such agreement had been made; and the respondents, James E. Thomson, Charles C. Thomson and David S. Keith, relied and still rely on the circumstances of this case to entitle them to the relief granted; and they also relied and still rely on the said agreement, together with the other facts in the case; and in either case the said respondents are entitled to the relief as to all goods supplied after the 30th December, 1857. 7. The mortgage to the plaintiff did not operate to vest in him any property which was not the property of Thomas Davidson; and the goods in question, whether fixed or not, never were the property of said Thomas Davidson; nor were these respondents wrong-doers in affixing or placing them upon the premises. 8. Even if the said goods did become at law the property of the appellant, these respondents are in equity entitled to a redelivery of them, unless the appellant elects to treat them as goods sold and delivered to him, which he has not done.

The administrators of Davidson also assigned reasons against the decree, in addition to those assigned by McQuesten—that they, being mere tenants-at-will of McQuesten, had no power or authority to deliver up the said fixtures; and that they were improperly ordered to pay costs before it was ascertained whether the property was put into the hotel before or after the 30th December, 1857 (the date of Davidson's death), and before the final result of the suit.

Proudfoot and *Blake* for the appellant; *McMichael* and *Fitzgerald* for the respondents, Thomson & Co.

Sir J. B. ROBINSON, Bart.—In *Jacques* v. *Worthington* (7 Grant, 192), which was referred to in the argument of this appeal, the case was, that Thomas Davidson, the proprietor of the City Hotel in Hamilton, which was built and prepared for occupation at the time of his death, had been in negotiation with those plaintiffs for a large quantity of furniture, to be placed in the hotel; but he had not entered into a contract with them, or given any order for the work, before ill-health obliged him to leave Canada and go to Cuba, leaving Stevenson, his general agent, to manage his affairs for him in his absence, and "in particular to do what might be necessary in regard to the conduct and management of the City Hotel."

After he had gone, Stevenson, acting under his power-of-attorney, and in ignorance of Davidson's death, continued to negotiate with Jacques & Hay for the purchase of furniture; but before the delivery of the furniture, in January, 1858, there was no binding contract between them. In the meantime Davidson had died in Cuba; and the question was, whether the contract which Stevenson had made in January or February, 1858, when he gave a chattel mortgage, in the name of his principal Davidson, who had died on the 30th December before, was binding upon Davidson's estate. The Court of Chancery determined that it was not. The prayer of the bill was, that it should either be declared that the title to the furniture had not passed out of the plaintiffs, and that the defendants might be ordered to restore the same to them, or that the defendants (the administrators) might be ordered to execute a mortgage upon the furniture such in its terms as Stevenson had executed in the name of Davidson, but while Davidson was in fact not living.

The judgment in that case was, that although the court could not decree specific performance of a void contract, yet they must consider that the contract was void only in consequence of a mistake common to both parties; that the defendants (the administrators of Davidson), who had set up that defence, could have no right to retain the furniture, which had been delivered to them under a void contract; and that justice required that the plaintiffs should be placed as far as possible in *statu quo;* and they ordered the administrators, who had taken possession of the goods, to deliver them back to the plaintiffs, the vendors, and to pay their costs of the suit.

There can be no doubt that that decree was just, and that the only question in the case was, whether the aid of a court of equity was required or could properly be given. It was contended that the plaintiffs should be left to their remedy at law.

Here we have a question of a similar nature in some degree, but varying in its circumstances, growing out of the supply by these plaintiffs of labour and materials for fitting up the same hotel, and supplied in part before Davidson's death, upon a contract made with himself, and in part supplied after his death, upon a contract, as the plaintiffs contend, made by his agent Stevenson with the plaintiffs after Davidson had died in Cuba, but before information of his death had reached Canada.

In this case also other considerations present themselves, from the circumstance that the goods supplied by these plaintiffs were put up by them in the hotel, and in such a manner that, it is contended, they are fixtures, and have become the property of the appellant McQuesten, to whom Davidson had long before mortgaged the hotel for advances. This difference between the present case and that of Jacques & Hay against the administrators of Davidson, gives rise to several questions.

The labour and materials applied by these plaintiffs, were applied in fitting up the new hotel with gas-lights, steam fittings, bells and water closets. The work, it appears, was begun upon a contract made with Davidson, which the plaintiffs were engaged in executing at the time of his departure from Canada. Soon after he left Canada his insolvency became generally known; and the plaintiffs not being paid, as they should have been, according to the contract, for what they had done, suspended their work, and would not go on, till Stevenson, the agent, on the 6th January, 1858, agreed to give them, as he afterwards did, on the 28th January, a chattel mortgage on the articles they were to supply, and to allow them to remove them from the building if they should not be paid according to the agreement which he had made with them in Davidson's name.

Davidson having died some time before this in Cuba—viz., on the 30th December, 1857—though neither the plaintiffs nor Stevenson were aware of that fact till the 4th February following, the question is, what are the rights of the parties under these circumstances, first, as to the articles not affixed to the realty (if there were any which should not be so regarded), and next as to those which are fixtures?

We do not see the deed executed on the 28th January; but that cannot be material, since it is clearly void and of no effect, being executed in the name of Davidson by Stevenson as his attorney, under a power-of-attorney which had been revoked nearly a month before by the death of the principal. The written agreement or understanding, however, between Stevenson and these plaintiffs, which this chattel mortgage was intended to fulfil, was signed by Stevenson in his own name, and is as follows:

"Hamilton, 6th January, 1858.

"To James E. Thomson:

"Sir,—I undertake that for whatever work and materials you do and find for Mr. Davidson's new hotel after this date, I will give you a chattel mortgage on the materials for the value of the work and materials, and also assign to you sufficient rents, and also the chattels to be sold by auction, as collateral security to cover said work and materials.

(Signed) "James Stevenson."

The mortgages which Davidson had given upon the hotel and premises to McQuesten, are not shown to us. From what appears in the case, and was said on the argument, I assume them to be mortgages in fee, given some time before (in fact in 1855) to secure advances that had been made, and that should thereafter be made, to Davidson, for enabling him to erect and furnish the hotel. Davidson's interest in the hotel I assume was a freehold interest, but I do not find that stated.

First, then, as to any articles, affixed or not affixed to the freehold, which were delivered in Davidson's lifetime, for which the plaintiffs have not been paid, they must of course take the chance of recovering from Davidson's estate. They have no lien on the goods, having delivered them, and not, as appears, upon any agreement with Davidson that they should have a right to reclaim them if not paid for.

2ndly, as to any delivered after Davidson's death occurred, and before it was known in Canada, I gather from the statements in the bill that the plaintiffs, on account of Davidson's failure to pay, and the apprehensions of his insolvency, had ceased to do work or supply articles for the hotel before or just about the time (30th December) that Davidson died in Cuba; but that, on and after the 6th January, when the written undertaking was given by Stevenson, or perhaps a few days before, upon a verbal agreement to the same effect, the plaintiffs had resumed work and continued to supply materials. In doing this they must be looked upon, I think, as proceeding under the contract made with Davidson in his lifetime, being content to do so upon receiving Stevenson's written guarantee, and thus waiving their right to rescind this contract, and stop in its execution on account of default in payment.

Whatever materials they put in after Davidson's death and up to the completion of their work, must in my opinion be considered as work done and materials found upon the contract made with Davidson himself, just as if no such interruption of the work had occurred. It was, as we may suppose, work necessary to be done for carrying the contract to a completion, and entitling them to be paid for it, and necessary for rendering that portion of their work of value which they had executed in Davidson's lifetime, and on account of which they had received payments.

The contract of plaintiffs with Davidson is stated in the bill to have been verbal only, but particular in its terms—"that is, to furnish, put up and supply the hotel in the manner required by Davidson, with all the materials and articles which could be furnished by the plaintiffs in the way of their trade, which consisted of plumbing, bell-hanging, gas and steam fitting, to be paid for as the work should progress, and as the goods to be furnished should be delivered at the hotel."

No objection is taken that this contract was not binding upon Davidson, under the Statute of Frauds, nor could have been taken, I apprehend, with success. The administrators have in their answer admitted it, and on the side of the plaintiffs it has been fully carried out. It was binding also upon Davidson's administrators as well as upon himself.

The plaintiffs have doubtless their remedy against Davidson's estate by action against his administrators, just as they would have had for any amount of ordinary moveable furniture supplied by them partly before and partly after the death of Davidson, upon a contract made with him in his lifetime, but which during the progress of it they had for a time hesitated to proceed in, but had resumed on receiving assurance from himself or his agent that their payment would be made secure. And so long as they did waive their objection and go on with the contract, it would make no difference, I think, as regards their claim upon Davidson's estate to be paid for the whole of their demand, to hold his administrators liable, that their security for payment had failed in consequence of Davidson's death having occurred before the new stipulation was entered into. I do not think that the plaintiffs could be told that what they did after they resumed work, about the end of December or beginning of January, was upon a new contract with Stevenson, and that they could look only to him, and had no claim upon Davidson's executors. Stevenson, by his written engagement of the 6th January, may have rendered himself personally liable to the plaintiffs—that is, I mean, may have incurred by the terms of that writing a personal liability, from which the death of his principal would not relieve him. But the plaintiffs may have good reasons for not being content to be referred to their common law remedy against the personal representatives of Davidson, or against Stevenson, and for desiring the aid of a court of equity to obtain a remedy more likely to be productive. If they should not be found entitled to any such remedy as the decree appealed from gives them, or as they have asked for, their case will be a hard one, if there is a large sum due to them for the work and materials which they have supplied. McQuesten, in his answer, expresses his belief that there is in fact little or nothing due to them; and it is an objection to the decree, that it does not, as must have been intended, provide for ascertaining what debt, if any, is really due to the plaintiffs for labour and materials, before they can obtain the restitution of the materials. Whatever may be the truth in this respect, and admitting even that there is such a large sum as $12,000 still due to the plaintiffs, as they assert, and that they have little certainty of being paid if they are confined to their legal remedy against the administrators of Davidson or against Stevenson, still their case would not be

harder than cases which are constantly happening, where a merchant sells goods upon credit, and before the credit is expired, or before they are paid for, they are seized by other creditors of the vendee, and sold to pay his debts to them; or where a man has built a house for another, who dies before it has been paid for, leaving an estate which turns out to be worth nothing.

And at any rate we cannot strain the law in order to protect the plaintiffs from loss arising from the common cause of the insolvency of the person with whom they had contracted.

There are well-founded objections to what the plaintiffs have prayed for, and to what has been decreed in their favor.

The case of *Jacques & Hay* v. *Worthington*, was free from any such difficulties as occur in this. It was found there that the articles had not been sold and delivered upon a contract with Davidson, but on a contract made with Stevenson, supposed (it is true) to be made with him as the agent of Davidson; but not so, in fact; for his principal was dead, and could no longer be represented as a contracting party.

It was assumed, therefore, that his estate could not be made liable. Whether Stevenson could not have retained the goods, if he had chosen to pay for them, was not made a question; nor whether he could not have been made personally liable under the circumstances, which I think he could be. If the goods had been of a perishable nature, and had perished in the meantime, so that they could not be restored, the case of the vendors would have been hard indeed, if neither the estate of the principal nor the agent could have been made to pay. But no such questions were made; and as the estate was held not to be liable, and to have no interest in the goods sold, and as Stevenson did not take them, nothing could be more just than that the vendors should, at least, get the goods back, for which no one was held liable to pay.

But in the case now before us, there was a contract made with Davidson that extended to and covered all that has been furnished, and though the executing of that contract was suspended for a few days by the plaintiffs, and though it appears that Davidson had been in default upon it, so that the plaintiffs might have declined finally to go on with it, yet on being made secure, as they thought, they did in a short time go on with it; and upon such an agreement as shews that they were executing the work not for Stevenson but for Davidson, as they supposed, that is, upon their *contract with him*, which they might do notwithstanding his death. The writing of 6th January, 1858, shews that Stevenson only intended to make the plaintiffs secure by undertaking to give them, on behalf of Davidson, a chattel mortgage on the things *as collateral security*—collateral with what? with the contract between them and Davidson, on which they had hitherto proceeded—so far as the being able to give this collateral security depended upon Davidson continuing in life, who was then in a distant country—the plaintiffs must be taken to have trusted to that. The proposed collateral security was, at all events, security in addition to what they had before; and, according to the statements in the bill, nearly 8,000 dollars was due to them for what they had done and supplied in Davidson's life-time.

Then comes the question, when the plaintiffs, trusting to their agreement with Stevenson, went on and completed their contract and their work, did or did not the materials which they put in become the property of the estate of Davidson, in the same manner as the materials which they had put in in his life-time become his as soon as they had set them up in the building, or had delivered them? I think they did.

The plaintiffs endeavor to treat the work done after the end of December as done upon a new contract, and in no manner in execution of the former; but I do not look upon it in that light. If Davidson had been in default in his payments, as is alleged, that put it in the power of the plaintiffs to rescind the contract and stop where they were; but they did determine not to do so, and they went on, as I consider, under the contract, having received the collateral security that satisfied them.

It seems to me that the property in all the materials put into the hotel, by the way of fitting it for the reception of gas or water, putting up bells, heating furnaces, or other work of that kind, became the property of the estate, as being furnished upon a contract with Davidson which did not cease with his life, but on which his personal representatives are liable, and these plaintiffs liable to them, on the principles which govern all such contracts.

And I do not think that the property can be divested by any order of a court, and such things or parts of things as were delivered and put up after the death of Davidson, separated from those which had been in part or wholly put up before. Such a separation in regard to work of this kind might be destructive of the vaue of that which remained, as well as of that taken away, or, at least, very injurious to it; and though this would be no reason for denying the equitable relief, if the plaintiffs were right in what they had contracted for, yet it furnishes a strong reason against going contrary to strict legal principles, in order to protect them against a loss that all persons in business of that nature are subject to.

If the materials furnished since the death of Davidson belong to his estate, as, for the reasons I have stated, I think they do, save only as to the claim of McQuesten and others, in respect to their being fixtvres, the plaintiffs' bill should be dismissed; and it is incumbent to consider the case in reference to McQuesten's interest.

I will only, therefore, say as to that part of the case, that at present I consider that McQuesten, as mortgagee of the hotel, now in his possession, is as much entitled to insist on being protected in the enjoyment of whatever has been affixed to the hotel, so as to form part of the realty, as he would be if he held the absolute estate, which in law, at this moment indeed, he does; and that he would be so entitled in respect of fixtures put in since he took the mortgage, as well as in regard to any that were in at the time. And I apprehend that right of his would be found to interfere with the relief intended to be given by the decree to a greater extent perhaps than was contemplated by the learned judge who disposed of the case; for in a question concerning fixtures in a case of this kind, not involving the condition of trade fixtures as between landlord and tenant, and relating to fixtures of such a description as those under consideration, I question whether we should find ourselves warranted by the doctrines which are now maintained—in treating all articles as chattels that have not been actually affixed to the freehold—or, that having been affixed to the freehold, can be removed therefrom without injury to the inheritance. We should be bound I think to consider that many things that are in common use, as parts of some machinery or contrivance that is affixed to the freehold, and without which it would be incomplete, may and must be held to partake of the legal character of the machine or contrivance as a fixture, and this also in some cases where they are not in actual and constant contact one with the other; and still more, that parts of the machinery or contrivance which are really fixtures, from being actually affixed to the freehold, are not the less fixtures and property of the owner of the estate, merely because they can be removed without injury to the inheritance—that is, I mean without breaking or destroying the building. I am now again speaking of the law of fixtures as between vendor and vendee, mortgagor and mortgagee, heir and executor, and not of trade fixtures as between landlord and tenant.

The chattel mortgage given by Stevenson after the death of his principal, Davidson, cannot affect the case, as it was simply void, and it can be of no consequence as far as regards McQuesten's interest, on these grounds, to contend that that deed and the agreement made on 6th January between Stevenson and the plaintiffs; was only void because the parties acted under a mistake in supposing Davidson to be alive when he was not, because if he had been alive at this time, and had even been present in Hamilton, and made such an agreement himself with the plaintiffs, nothing done between him and the plaintiffs could destroy or impair McQuesten's right as mortgagee, so long as he was not an assenting party; and I agree in the conclusion come to by the Vice-Chancellor, that the evidence shows that he was not assenting, but gave fair notice that he would insist upon his legal rights as mortgagee, and that they must act at their peril in removing any fixtures from the hotel. And this was no unreasonable line of conduct to take, if Mr. McQuesten advanced his money, as it appears he did, for the purpose of enabling Davidson to put up and complete a large and valuable hotel upon the land mortgaged, for he would naturally rely upon all that was to be done towards erecting and finishing the building and rendering it habitable and convenient was enhancing the value of his security.

The plaintiffs' bill should, in my opinion, have been dismissed, but not with costs.

DRAPER, C. J.—Concurred in the opinion of His Lordship the President, except on the question of costs. [His Lordship the Chief Justice thought the bill should be dismissed with costs.]

ESTEN, V. C.—It appears to me immaterial to consider many points that were raised in the case. It may be safely said that there was no confirmation or adoption of the agreement alleged in the bill, on the part either of the personal representatives of Davidson or McQuesten.

This point being settled, it seems immaterial whether the goods delivered after the 6th January, 1858, were delivered in pursuance of the original contract with Davidson, or of some contract supposed to have been made before his death with his agent Stevenson, or of the contract of 6th January. That no property vested in the goods till delivery, seems clear. In the two former cases the delivery should have been to the personal representatives of Davidson. But at that time he had no personal representatives. The delivery was to Stevenson, the agent of Davidson. There was therefore no delivery to Davidson, who was dead; no delivery to his personal representatives, as he had none; no delivery to Stevenson in his individual capacity; no delivery to McQuesten, with whom there was no contract and who was not in possession at the time. The only doubt that could be suggested, as appears to me, would be whether what occurred would not operate as a delivery to the administrators when they were appointed by a sort of relation. But whatever conclusion might be arrived at, if such delivery had been made with full knowledge of Davidson's death, it seems unjust to apply such a principle when the plaintiffs were totally ignorant of that fact when the delivery occurred. They might have acted very differently had the fact been known. But at all events it seems very clear that the goods delivered after the 6th January were delivered in pursuance of the agreement made on that day, although the plaintiffs may have laid themselves open to an action for not performing the original contract, or for not performing the contract supposed to have been made on the 24th December or on some other day before the 6th January.

The result seems to be that the plaintiffs' goods are in the house of Davidson, mortgaged to McQuesten, who is in possession, excepting that the fixtures have probably vested at law in McQuesten; and the question is, what are the rights of the parties under such circumstances—McQuesten having refused to permit the plaintiffs to remove their goods. As to the chattels I presume that no doubt can exist. If one person place his goods by mistake in the house of another, the latter must permit him to remove them at proper times, and cannot treat him as a trespasser for entering his house at such times for the purpose. The only question would seem to be, whether a sufficient remedy does not exist at law. The withholding the goods would be, I presume, a wrongful conversion, and an action of trover could be maintained, probably also an action upon an implied contract. But in the case of *Eyre* v. *Eyre*, 2 Ves. sr. 86, relief seems to have been given in equity, although a sufficient remedy existed in law on the ground of mistake. The question is whether a different rule applies to the fixtures. I see no reason for treating the mortgagee and heir as standing in a different position. No doubt the mortgagee is entitled to all fixtures subsequently annexed to the estate, and so is the heir, and so is the owner of the estate, whoever he may be; but it is absurd to consider the mortgagee as a purchaser for valuable consideration of these fixtures not annexed, with any intention to augment his security, although doubtless the mortgage debt forms a sufficient consideration to support his title as a purchase for value to every thing which properly belongs to the security. But if the goods are affixed by mistake, he must be treated like any other owner of property, to whose freehold, goods have been affixed by mistake. Suppose A. to order goods to be affixed to the freehold of his house, and the tradesman by mistake to affix them to the house of B., supposing it to be A.'s house, it could make no difference in his rights and remedies that B.'s house was in mortgage and the legal estate vested in a mortgagee. The question is what are his rights and remedies under such circumstances. In the present instance, no doubt, the plaintiffs delivered the goods under an agreement to have a chattel mortgage of them for their security. They relied more on this chattel mortgage probably than on Davidson's personal responsibility. This agreement would have been binding on Davidson and his real and personal representatives even as to the goods which became affixed to the freehold, if he had been alive when it was made. It was not binding on the mortgagees, who could have insisted on holding the goods affixed to the freehold until their claim should be satisfied.

The plaintiffs, however, stand in a very different position from what they would have held had Davidson been alive when the agreement was made. Supposing the mortgage satisfied, they appear to be without remedy unless the goods be specifically restored, or unless they would be entitled to proceed at law against the heir, in case of his refusal to permit the removal of the fixtures. They could maintain no action against the personal representatives of Davidson, or against Stevenson. If the goods were delivered in pursuance of the contract of the 6th January, which was clearly the case, the mortgagee and heir are in *pari materia*, because the heir is no more bound by the contract than the mortgagee, the contract being totally void as made with a dead person.

In short, it appears to me that the plaintiffs having, under a mistake of facts, placed their goods in a position in which but for that mistake they would not have been placed, are entitled to be relieved against the effect of the technical rule which vests the property of the affixed chattels in the legal owner of the freehold. With regard to the chattels which remain in that state, whether the contract were made in Davidson's lifetime, or after his death, as there was no delivery, the property did not pass and the plaintiffs are entitled to relief. With regard to the chattels which have become part of the freehold, and of which the property has vested for that reason, I think they are entitled to be relieved against the effect of the technical rule; the mortgagee being placed in the same situation as if no mistake had occurred; that is to say, the property being placed in as good a position at the expense of the plaintiffs as if the goods had never been affixed; it being as I think clear that the contract under which the goods were delivered and affixed was made after Davidson's death, it was therefore void. I think that the decree is right in all essential respects and ought to be affirmed and the appeal dismissed with costs. The plaintiffs have an equity to be relieved against the effect of the mistake, and this equity constitutes the legal owner of the inheritance, whether mortgagee or heir, a trustee for them. Of course they must be placed in the same position as if the accident had not happened, and if they cannot be the plaintiffs must bear the loss.

HAGARTY, J.—I have rarely had a case before me in which I have found it so difficult to arrive at a satisfactory conclusion, and feeling, as I do, fully impressed with the justice of the decree that has been pronounced in the Court below, and in absence of direct authority to the contrary, I think the decree should be affirmed and the appeal dismissed.

Per Curiam.—Appeal allowed and bill in court below dismissed with costs. [ESTEN, V. C., dissenting.]

QUEEN'S BENCH.

Reported by C. ROBINSON, Esq., *Barrister-at-Law, Reporter to the Court.*

GLASS v. WHITNEY.

Warehouse receipts—Endorsement of—Consol. Stats. U. C., ch. 54, secs. 8 and 9,—Construction of.

The plaintiff declared that one G. had deposited with the defendant certain wheat, and obtained from him a warehouse receipt therefor; that by the course of trade such receipt was transferable by endorsement, and the property in the wheat would pass to an endorsee: that G. sold said wheat to the plaintiff, and endorsed to him the receipt; but that when he presented it to the defendant the latter refused to deliver to him the wheat. Defendant pleaded that before he had any notice or knowledge of such transfer or sale, the wheat was taken out of his warehouse by G.

Held, a good defence, for at common law the endorsement and transfer of the receipt would clearly not pass the property, and the Consol. Stat. C., ch. 54, relied upon by the plaintiff, has no application to an absolute sale of goods, but to pledges only, to secure payment of a bill or note negotiated, or a debt contracted when the receipt is endorsed over.

[Hilary Term, 26 Vic.]

This was an action brought to recover from the defendant the value of a quantity of wheat.

Plaintiff declared as follows:—"That the defendant, carrying on business under the name and style of F. A. Whitney & Co., as a warehouseman, did, on the 14th of October, 1862, as such warehouseman receive in store for A. L. Groundwater, 777 $\frac{33}{60}$ bushels of fall wheat, and did thereupon give unto the said A. L. Groundwater a receipt for the same, known as a warehouse receipt, to the effect following:—

No. 138. Toronto, Oct. 14th, 1862.

Received in store, for A. L. Groundwater, the following property, in apparent good order and condition, subject to storage, seven hundred and seventy-seven $\frac{33}{60}$ bushels fall wheat.

F. A. WHITNEY & Co.

777 $\frac{33}{60}$ bushels.

And whereas by the course of trade in this province such warehouse receipt was and is transferable by endorsement, and the property in the wheat mentioned therein by such course of trade would pass to an endorsee and holder of such receipt, the plaintiff says that the said A. L. Groundwater afterwards, and before the commencement of this suit, sold to the plaintiff the said 777 $\frac{33}{60}$ bushels of wheat mentioned in said receipt, and duly endorsed and delivered the said receipt to the plaintiff, whereby the said wheat became, was, and is the property of the plaintiff; and thereupon the defendant became liable by such course of trade to deliver the said wheat to the plaintiff upon presentation by him of said receipt; yet the plaintiff says that the defendant did not deliver the said wheat mentioned in the said receipt to the plaintiff, although the plaintiff duly presented the said receipt to the defendant, and requested him to deliver the said wheat, but the defendant wholly neglected and refused, and still does neglect and refuse so to do."

The second and third counts were upon similar receipts for other wheat.

The fifth plea, to all the counts, was, that after the making of the said several receipts, and the receipt by the defendant of the several quantities of wheat therein respectively mentioned, and before the defendant had any knowledge or notice of the transfer of the said receipts respectively to the plaintiff by the said A. L. Groundwater, or of the sale of the said wheat to the plaintiff, as in those counts alleged, the said A. L. Groundwater, took, had, and received to his, the said A. L. Groundwater's own use, out of the warehouse of the defendant, the several quantities of wheat in the said several receipts respectively mentioned.

To this plea the plaintiff demurred, on the grounds, that after the making of the several receipts by the defendant, and the transfer of said receipts by the said A. L. Groundwater to the plaintiff, it is no answer to the plaintiff's claim that the said A. L. Groundwater took and received from the plaintiff the said wheat as in said plea mentioned, as the defendant does not aver that the said A. L. Groundwater was at that time the holder of the said receipts.

Galt, Q. C. for the demurrer, relied on Consol. Stats. C., ch. 54, sec. 8; ch. 59, sec. 7; ch. 92, secs. 68, 69; and cited *Holton* v. *Sanson et al.*, 11 C. P. 606.

M. C. Cameron, contra, cited *Deady* v. *Goodenough*, 5 U.C. C.P. 173; *Proudfoot* v. *Anderson*, 7 U. C. Q. B. 573; *McEwan* v. *Smith*, 13 Jur. 265; *Goodenough* v. *The City Bank*, 10 U.C C.P. 51; *The Wisconsin, &c., Bank* v. *The Bank of British North America*, 21 U.C. Q.B. 284; *Bentall* v. *Burn*, 5 D. & R. 284.

MCLEAN, C. J.—It was contended for the plaintiff that by the course of trade the certificates endorsed by Groundwater passed their respective contents, and that the plaintiff thereby became the owner of the wheat: that being the owner he was entitled to receive the same from the defendant on production of the endorsed receipts, but that the defendant alleged that he had delivered the same again to Groundwater, and that without the receipts being produced the defendant had no right to re-deliver the wheat to Groundwater.

Had there been an advance of money by the plaintiff to Groundwater, and the receipts endorsed to him as collateral security for the amount of advances, the argument of the plaintiff's counsel might well be sustained, for under ch. 54 of the Consolidated Statutes of Canada, section 8, it is provided that "notwithstanding any thing to the contrary in the charter or act of incorporation of any bank in this province, any bill of lading, any specification of timber or any receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares or merchandize, stored or deposited, or to be stored or deposited in any warehouse, mill-cove or other place in this province, or shipped in any vessel, or delivered to any carrier for carriage, from any place whatever to any part of this province, or through the same, or on the waters bordering thereon, or from the same to any other place whatever, and whether such cereal grains are to be delivered upon such receipt in species or converted into flour, may, by endorsement thereon by the owner of or person entitled to receive such cereal grains, goods, wares or merchandise, or his attorney or agent, be transferred to any incorporated or chartered bank in this province, or to any person for such bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, or any debt due to such private person or persons, and being so endorsed shall vest in such bank or private person from the date of such endorsement all the right and title of the endorser to or in such cereal grains, goods, wares or merchandize, subject to the right of the endorser to have the same re-transferred to him, if such bill, note, or debt be paid when due; and in the event of the non-payment of such bill or note when due, such bank or private person may sell the said cereal grains, goods, wares, or merchandise; and retain the proceeds, or so much thereof as will be equal to the amount due to the bank or private person upon such bill or note, or debt, with any interest or costs, returning the overplus, if any, to such endorser."

The ninth section provides that "no such cereal grains, goods, wares or merchandize, shall be held in pledge by such bank or private person for any period exceeding six months; and no transfer of any such bill of lading, specification of timber or receipt, shall be made under this act to secure the payment of any bill, note or debt, unless such bill, note or debt, be negotiated or contracted at the same time with the endorsement of such bill of lading, specification of timber or receipt; and further, no sale of cereal grains, goods, wares, or merchandise shall take place under this act, until or unless ten days' notice of the time and place of such sale has been given by registered letter transmitted through the post-office to the owner of such cereal grains, goods, wares or mechandise, prior to the sale thereof."

It is, I think, evident that this act was first introduced for the purpose of enabling banks to take collateral security for advances made to enable parties to purchase grain or timber. Its title is "An act respecting incorporated banks," but by the eleventh section its provisions are extended to all banks chartered during the session of the year 1859, and they are also extended by the eighth section to private persons in respect to any debts due to such private persons. Individuals could before the passing of that act have taken collateral security upon any property in the hands of a debtor, but they could not do so merely by the endorsement of a bill of lading or specification of timber, or any receipt given by a warehouseman, or miller, or other person, as pointed out by the eighth section of the act.

It is not alleged that the certificates or receipts for wheat given by the defendant to Groundwater were endorsed for the purpose of giving collateral security to the plaintiff for a debt due to him. On the contrary the plaintiff's absolute right to such wheat is rested on the endorsement of these receipts. They could not possibly have any effect as a transfer at common law. The defendant, as bailee, would be bound by them to Groundwater, as affording evidence of the receipt into store of the quantities of wheat specified, and, notwithstanding what is alleged to be the course of trade, Groundwater alone could enforce the re-delivery of the wheat, unless indeed he made a transfer more formal and more substantial than the mere endorsement of the several receipts.

In the cases cited in the argument it is evident that the plaintiff had taken an assignment from the parties holding the receipts, besides taking the endorsed receipts of the wharfingers or warehousemen.

In the case of *Holton* v. *Sanson et al.* (11 U.C., C.P. 606,) and *Deady* v. *Goodenough* (5 U.C., C.P. 173) it is evident that the right to recover did not rest upon the mere endorsement of the warehouse receipts. In the latter case a delivery order was given with the

wharfinger's receipt to the purchasers of the flour by the defendant Goodenough, who acted as broker in the sale of the flour, and it was for negligence in giving up these documents, by which the vendees were enabled to get possession of the flour without payment of the amount agreed upon, that the action was brought. With respect to these, Macaulay, late Chief Justice of the Common Pleas, observes in his judgment in that case, at page 176, "The delivery of such instruments was not a constructive delivery of possession of the flour itself, either to the defendant himself when he received them, or by him when he parted with them. They do not pass the property in goods like bills of lading, at all events until presented and acted upon.

In the former case, Richards, J., in delivering the judgment of the court, says; "As to the first court count," (trover for a quantity of wheat) "assuming that the wheat belonged to Clarkson, Hunter & Co., and as "all in the defendants' possession separated from any other wheat, the quantity being exactly that bought, namely, 500 bushels, then the property in the wheat passed to the plaintiff by virtue of the bargain and sale. The endorsing of the receipt was nothing more than a direction to the defendant to deliver the property to the person who had become the owner, and who had a right to it independently of that endorsement." In *Dixon* v. *Yates*, 5 B. & Ad. 340, Parke, J., says: "I take it to be clear that by the law of England, the sale of any specific chattel passes the property in it to the vendee without delivery."

In that case, *Holton* v. *Sanson et al.*, Galt, Q. C., for the plaintiff, in opposing a rule for a new trial, contended that as to the count for trover the property passed by virtue of the sale, and the transfer of the receipt was merely an order to the defendant to deliver to the plaintiff what he had purchased from Clarkson & Hunter, and what the defendant acknowledged they had in store for them. So in this case the endorsement of the receipts only amounted in fact to such order; the sale being an absolute one, the certificates and the endorsements upon them could not operate as a collateral security for a debt which did not exist.

The 59th chapter of the Consolidated Statutes of Canada, on which some reliance seemed to be placed on the argument, only relates to the dealings of factors with other parties in certain cases, and none of its provisions assist in making out a title for the plaintiff to the wheat mentioned in the defendant's receipts.

The 68th, 69th, and 70th sections of ch. 92, Consol. Stats. C., are by the tenth section of chapter 54 of these statutes made applicable to all false bills of lading, receipts or documents mentioned in the eighth section of the latter act, and prescribe the punishment of persons offending against their provisions. Whether any of them apply to the conduct of Mr. Groundwater in selling a quantity of wheat for which he held the receipts after the whole had been withdrawn by himself (if the plea of the defendant speaks truly) it is not necessary to enquire, but the defendant should not be guilty of anything criminal in giving back to the depositor the wheat stored by him, and which he had a right to withdraw at any time he thought proper.

The plaintiff relied upon the honesty of the person from whom he purchased, and certainly the possession of the receipts was strong presumptive evidence that the wheat was still in the defendant's warehouse. If notice of the purchase had been given to the defendant, accompanied by an offer to pay the storage, and he had subsequently allowed the wheat to be withdrawn, there can be no doubt that as the purchaser of the wheat the plaintiff could recover its value from the defendant, but it would be very unjust to hold the defendant liable for delivering the wheat to Groundwater at a time when he was in utter ignorance that the defendant had any claim whatever upon it.

I think defendant entitled to judgment on the demurrer.

HAGARTY, J.—The argument for the plaintiff seems to concede that at common law the plea would be a good bar: that in fact a bailee receiving goods in store for the owner, and giving a receipt acknowledging such fact, must be protected if he give up the goods to the owner on demand, in good faith, unaware of any sale or disposition of them by the bailor, and that the law would not impose upon the bailee any duty to insist, as a condition of such re-delivery, on the return of his receipt.

This would seem to be the law. As Willes, J., remarks in *Sheridan* v. *The New Quay Company*, (4 C. B. N. S. 659,) a case relating to carriers, "The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment, without notice of his claim." The principle here recognised runs, I presume, through all classes of bailees. Delivery to the original bailor, the only person known as owner, or as having any title or interest, will be a good discharge; and as to the effect, independently of statute law, of warehouse receipts transferred by endorsement from vendor to vendee, as is remarked by Macaulay, C. J., in *Deady* v. *Goodenough* (5 U.C.C.P. 176) "The delivery of such instruments was not a constructive delivery of possession of the flour itself, either to the defendant when he received them, or by him when he parted with them. They do not pass the property in goods like bills of lading, at all events until presented and acted upon." The well known case in the House of Lords, *Smith* v. *McEwan*, (13 Jur. 265,) is also in point.

But the plaintiff relies on the statute (Consol. Stats. C. c. 54), the provisions of which have been stated at length by the learned Chief Justice.

Ch. 59, Consol. Stats. C., sec. 7, also relied upon, merely applies to dealings with factors and those dealing with them in certain cases, and does not seem to affect this case.

Chapter 92, Consol. Stats C., secs. 68 and 69, provides for the punishment of warehousemen and others giving false receipts for goods not actually received, and to punish fraudulent dispositions of goods by owners on which consignees have made advances.

I am of opinion that the act chiefly relied on by the plaintiff has no application to this case: that it does not affect any direct sale or purchase of property, such as the plaintiff sets up in this case, but only applies to pledges of property to secure payment of a note, bill, or debt, discounted or contracted at a time when the receipts are endorsed to the bank or private person: that the latter only acquire a limited and not an absolute right, that of retaining the property for a period not over six months, and if the note or debt for which it is so deposited be not paid when due, then to sell, after certain notice to the owner, sufficient to pay the claim, and account for the surplus. The transaction before us is one of absolute sale and purchase, unconnected with any giving of time or security.

It is pressed upon us that, as alleged in the declaration, the custom of trade here is to endorse these warehouse receipts, and to treat the property as passing thereupon to the endorsee. This may be so, and the endorsee may generally perfect his title by notice to the bailee or holder of the goods. In the case before us the receipts do not even profess to be negotiable, (if they could be made so,) but are simple acknowledgments that the defendant had received certain specified property in store for Groundwater. I know of no principle of law, in the absence of some express statutable declaration, which could warrant us in holding the giver of this receipt answerable in this action to a plaintiff of whose claim he never heard until after he had in good faith re-delivered the goods to the only person he ever knew as owner. We are asked to annex to his contract as bailee the condition that he shall not be bound to re-deliver these goods unless and until the receipts given by him be first handed back to him.

I think the defendant is entitled to judgment.

CONNOR, J., concurred.

Judgment for defendant on demurrer.

ROBERTSON v. FREEMAN.

Clerk of the peace—County attorney—Consol. Stats. U. C., ch. 106, sec. 7.

In 1858 the plaintiff was appointed county attorney for Wentworth. In May, 1862, following, the person who had for many years been clerk of the peace for that county died, and in July, defendant was appointed to succeed him in such office.

Consol. Stats. U. C., ch. 106, sec. 7, enacts that any clerk of the peace appointed after that act "shall be *ex-officio* county attorney for the county of which he is clerk of the peace."

Held, that defendant upon his appointment as clerk of the peace became also county attorney, although the plaintiff's commission had been not otherwise revoked, and he had received no notice of any change in his position.

[Hilary Term, 26 Vic.]

SPECIAL CASE.

This is an action brought by the plaintiff against the defendant, to recover the sum of $500, alleged to have been received by the defendant for the use of the plaintiff, between the first day of

September, 1862, and the twelfth day of November of the same year, being the alleged amount of certain fees and emoluments received by the defendant, and alleged to be due and of right payable to the plaintiff as county crown attorney for the county of Wentworth.

By consent of the parties, and by the order of Mr. Justice Morrison, dated 21st of November 1862, and granted according to the Common Law Procedure Act, the following case has been agreed upon, and is now stated for the opinion of the court, without any pleadings:

1st. On the 19th of June, 1857, the provincial legislature passed an act entituled "An Act for the appointment of County Attorneys, and for other purposes in relation to the local administration of justice in Upper Canada," 20 Vic., ch. 59; Consol. Stats. U. C., chaps. 37 and 106.

2nd. When the above act became law one Peter Bowman Spohn was, and continued to be until his decease hereinafter mentioned, clerk of the peace for the said county.

3rd. On the 6th of April, 1858, by commission under the sign manual of the Governor-General of this province the plaintiff was appointed county attorney for the said county, "to have, hold, receive and enjoy the said office of county attorney as aforesaid, together with all and every the privileges, rights, powers, and profits, emoluments and advantages, to the said office belonging, or which ought to belong to the same, unto him, the said Thomas Robertson, for and during pleasure and his residence within the province."

4th. On the ninth of April, 1858, the plaintiff appeared before the judge of the county court of Wentworth, and took the oath of office before him, prescribed by the sixth section of the statute 20 Vic., ch. 59, and continued to discharge the duties of the office of the office of county attorney for the said county until hereinafter mentioned.

5th. On the 28th of May, 1862, the said Peter Bowman Spohn died, and the office held by him became vacant.

6th. On the 22nd of July, 1862, the Honourable the Attorney-General of Upper Canada wrote to the defendant as follows: "I am now in a position to offer you the clerkship of the peace for the county of Wentworth, vacant by the death of the late Mr. Spohn. By law the office of county attorney goes with the former office:" which offer the defendant by letter, addressed to the said Attorney-General, accepted, which letter was as follows; "Not having applied for the office of clerk of the peace for Wentworth, I cannot too highly appreciate the consideration you have extended towards me in offering it to me. I cannot allow myself to stand in the way of those whom I have recommended for the appointment, but as you give me to understand if I take the office I will not thereby prevent either of them getting it, I thankfully accept your offer."

7th. On the 1st of August, 1862, by a like commission as aforesaid, the defendant was appointed to the office of clerk of the peace of said county, "in the room and stead of Peter Bowman Spohn, deceased, to have, hold, exercise and enjoy the said office of clerk of the peace as aforesaid, together with all and every the powers, rights, privileges, profits, emoluments and advantages to the said office belonging, or which ought to belong to the same, unto him, the said Samuel Black Freeman, for and during pleasure, and his residence within this province."

8th. This commision was sent to the defendant, with the following letter, addressed to him: "Secretary's office, Quebec, August 12th, 1862. Sir, I have the honour to inform you that his Excellency the Governor-General has been pleased to appoint you to the office of clerk of the peace of the county of Wentworth, in the room of Peter B. Spohn, Esq., deceased. Your commission is transmitted herewith. I have to refer you to the hon. Minister of Finance for instructions as to the completion of any securities you may be called upon to furnish in your capacity as clerk of the peace. I have the honour to be, &c.—*A. A. Dorion*, secretary."

9th. On the 15th of August, 1862, the defendant wrote as follows: "To the Honourable the Minister of Finance,—Sir, I have the honour of intimating to you that I have been appointed to the office of clerk of the peace for the county of Wentworth, and that the Honourable the Provincial Secretary refers me to you for the completion of any securities I may be called upon to furnish '*as clerk of the peace.*' I am prepared to furnish any such securities, but so far as I am aware the clerk of the peace is not required *as such officer* to furnish any securities. I presume that under the 9th sec. of ch. 17, of Con. Stats. U. C., p. 117, and sec. 7 of ch. 105, Con. Stats. U. C., p. 948, my appointment carries with it the obligation of discharging the duties pertaining to the office of county crown attorney. By sec. 2 of ch. 20, Consol. Stats. U. C., p. 180, that officer is required to give security for the due performance of his office. You will please advise me whether I will be required to perform such duties, and the nature of the security required."

10. On the 23rd of August, 1862, the following reply was sent to the defendant, signed by the Deputy Inspector General:—"Sir, in reply to your letter of the 15th instant, enquiring if your recent appointment as clerk of the peace for the county of Wentworth was intended to embrace also the office of county Crown attorney, I have the honour to refer you to the 9th section of the 7th chapter of the Consol. Statutes of Upper Canada, by which, according to the view of the Honourable Attorney-General for Upper Canada, you, as clerk of the peace, are also county attorney by the operation of the statute. I beg, therefore, to enclose herewith, a printed form of bond, which you are required to fill up with the penal sum of ten thousand dollars for yourself, and five thousand dollars for each of your two sureties, and to return same when completed to this department." Which bond, after being duly executed by the defendant and two sureties, was sent as above directed, and was accepted, and is retained by the Government as security according to law for the due performance of the duties of the office of county Crown attorney for the county of Wentworth aforesaid, by the defendant.

11th. Afterwards, and before the defendant commenced to perform the duties of the last mentioned office, he took the oath prescribed by law in reference thereto.

12th. On the 18th of September, 1862, the Honourable the Minister of Finance, at the request of the defendant as county Crown attorney, furnished the defendant with printed instructions for his guidance as county Crown attorney, and blank forms for the returns of moneys received and paid out in connexion with the division, county, and surrogate courts, and the salaries of county judges and recorders.

13th. The defendant, claiming under the above mentioned authority and instructions given to him to be and to act as county Crown attorney for the said county, from the time of taking said oath, has acted as such; and he admits, for the purpose of the question now submitted, that he he has received the sum of one dollar for fees for services rendered by him for business pertaining to the said office.

14th. The plaintiff has received no intimation of any kind from the Governor-General, other than aforesaid, informing him that he has been relieved from office; and notwithstanding the appointment of defendant to the office of clerk of the peace for the county of Wentworth, and the other matters above alleged, he contends that he is still county attorney for said county.

The questions for the opinion of the court are, whether the plaintiff is still the county attorney for the county of Wentworth and whether he is entitled to the fees payable for the duties of said office performed by the defendant.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for one dollar.

If the court shall be of opinion in the negative, then judgment shall be entered up for the defendant.

Robert A. Harrison, for the plaintiff, cited *Smith* v. *Latham*, 9 Bing. 692; *Commonwealth of Pennsylvania ex rel., Bowman* v. *Slifer*, 25 Pennsylvania Reports, 23; *Shoubridge* v. *Clark*, 12 C. B. 335; *Hall* v. *The Mayor &c. of Swansea*, 5 Q. B. 526; Com. Dig. "Officer" E. *a*.

The defendant, in person, contra.

The statutes cited are referred to in the judgments.

McLEAN, C. J.—On the 10th of June, 1857, the legislature passed "An act for the appointment of county attorneys, and for other purposes in relation to the local administration of justice in Upper Canada," (20 Vic., ch. 59, Consol. Stat. U. C., ch. 17.) The third section of the act as passed, ch. 59, provides that "it shall be lawful for the Governor to appoint a county attorney for

each and every county in Upper Canada, who shall hold office *during pleasure*, and upon the death, resignation or removal of any county attorney to supply the vacancy.

The second section provides, that "no person shall be appointed as a county attorney, or shall act in that capacity, who shall not be a barrister-at-law of not less than three years' standing at the Upper Canada bar, and resident in the county for which he shall be appointed; provided that any person now" (that is on the 10th of June, 1857) "holding the office of clerk of the peace, who is a barrister-at-law, may be appointed to the office of county attorney for the county of which he shall be clerk of the peace."

There were at that time, and there are yet, clerks of the peace who are not barristers, and there may be some who were barristers who are of less than three years' standing at the bar, and the second clause provided that any of the latter might be appointed to the office of county attorney within the county for which he was clerk of the peace. It was not made incumbent on the Governor to appoint such persons to be county attorneys of their several counties, but they were eligible for appointment.

At the time of the passing of the act a Mr. Spohn, a barrister, held the office of clerk of the peace, and he continued to hold the office up to the time of his death, on the 28th day of May, 1862. The vacancy was filled up by the appointment of the defendant on the 22nd of July, 1862, as clerk of the peace, up to which time the plaintiff continued to act as county attorney, having been duly appointed to that office by commision bearing date the 6th day of April, 1858. The plaintiff was not removed from office except by the appointment of the defendant as clerk of the peace, and under the 9th section of 20 Vic., ch. 59, claims to be *ex-officio* county attorney for the county of Wentworth, of which he is clerk of the peace. That section provides that "from and after the passing of this act no person shall be appointed as clerk of the peace for any county in Upper Canada, who is not a barrister-at-law of not less than three years' standing at the Upper Canada bar; and such clerk of the peace shall be *ex-officio county attorney* for the county of which he is clerk of the peace."

By the appointment of defendant as clerk of the peace he became—not by virtue of any commission appointing him to the office, *but by operation of law*, having all the qualifications required —*ex-officio* county attorney of the county of Wentworth; and the government could not, contrary to the express provision of the statute, have continued the plaintiff in that office by any other means except by revoking or rescinding the commission given to defendant as clerk of the peace.

But by the special case submitted, it appears that the Governor gave the appointment as clerk of the peace to defendant, fully intending that such appointment should bring with it the office of *ex-officio* county attorney, and he has been called upon to furnish the security required by law from the person holding the latter office, but not required for the performance of duties of the clerk of the peace. The office held by the plaintiff was *during pleasure*. The government might at any time have removed him by any act showing that it was the pleasure of the Governor-General that he should not longer continue to fill the office. The defendant was in fact a tenant-at-will, and no act could more clearly shew the determination of that will than the appointment of defendant as clerk of the peace, and as such *ex-officio* county attorney.

In my opinion the defendant is entitled to judgment in this case.

Hagarty, J.—(After referring to 20 Vic., ch. 59, secs. 2, 3, and 9, already cited by the learned Chief Justice.)—In the Consol. Stats. U. C., ch. 17, sec. 9, the ninth clause of 20 Vic. ch. 59, is somewhat varied in expression, "No person shall after this act takes effect be appointed a clerk of the peace for any county who is not a barrister-at-law of not less than three years' standing at the Upper Canada bar, *and every clerk of the peace so appointed shall be ex-officio county attorney for the county of which he is clerk of the peace.*

When the office of county attorney was first established, Mr. Spohn filled the office of clerk of the peace for Wentworth. The government did not avail itself of the right of appointing that gentleman to the new office, even if he were legally qualified within the clause already cited, but appointed the plaintiff, Mr. Robertson. Mr. Spohn held the clerkship of the peace till his death, in May, 1862.

It was then necessary to appoint a successor, and accordingly the present defendant was appointed clerk of the peace, being legally qualified within the words of the statute.

He was, therefore, appointed after the act above cited, and I do not see how the inevitable consequence must not be, that "*so appointed, he shall be ex-officio county attorney for the county of which he is clerk of the peace.*"

The legislature has thought proper, in the event of every appointment to be made after the passing of the act to annex this office of county attorney to that of clerk of the peace.

Mr. Harrison, for the plaintiff, argues strongly that Mr. Robertson must continue to hold office as county attorney under his commision till legally dismissed, or removed by writ of discharge. But the paramount authority of the legislature seems to me to remove the case beyond all question by the clear language used. When they declare that whenever a man be thereafter appointed clerk of the peace, he shall *ex-officio* be county attorney, it seems to me to do away with all necessity for any thing else, and gives the new clerk of the peace a parliamentary title to be county attorney. His appointment must, I consider, be held to revoke any existing commission to any other person. He requires no commission or appointment as county attorney. He enters upon that office not by any commission or appointment, but solely by virtue of his appointment to the former office.

Parliament has placed in the hands of the executive the power to remove or dismiss any county attorney, and that power, I presume, may be exercised at any time, at pleasure. Judging from the language used in the several acts, I assume that the general intention was that the same person should fill both offices; that when this act was passed, certain persons may have held the clerkship of the peace who had not the legal standing deemed proper for future occupants of that office; that such persons need not necessarily be disturbed in their offices, and that county clerks could, in such cases, be appointed without reference to the other office, but that for the future a certain fixed legal standing should be required in all clerks of the peace, and that every one properly qualified, and duly appointed to the latter office, should *as such* at once become county attorney. This would, in my opinion, at once revoke or annul, by the express words of the enactment, any previous or existing appointment as county attorney.

The case cited of *Smyth* v. *Latham* (9 Bing. 710) shews that the subsequent appointment of a new officer, in the place and stead of one holding an office during pleasure, "bears so close an analogy to the case of a tenancy-at-will, where a demise to a new tenant would be a determination of the will as to the former tenant, as to make it difficult to maintain that the new appointment is not a virtual revocation of the former." Again, it is said there, "As the office is an office during pleasure only, the will of the commissioners to determine the former appointment has been sufficiently declared by the appointment of a successor."

I think we must give effect to the clear words of the statute, and hold the defendant to be the county attorney, and therefore that the postea should be to defendant.

Connor, J., concurred.

Judgment for defendant.

COMMON PLEAS.

(*Reported by* E. C. Jones, Esq., *Barrister-at-Law, Reporter to the Court.*)

Cook et al v. Christie.

Ejectment—Deeds—Thirty years old—Custody of.

In an action of ejectment, the plaintiffs claimed title through two deeds, over thirty years old, in proof of which they shewed one to have come from the custody of the former owner's agent, and the other to have been produced under a written order from the agent. On motion against the verdict on the ground that they were not proved to have come from the proper custody, *held*, that the evidence was sufficient, without calling the agent who had had charge of them. (M. T., 26 Vic. 1862.)

Ejectment for the west half of lot No. 8, 3rd concession, Williamsburgh. Writ tested 4th September 1861. Defence for the whole. The claiments set up title, under a deed from Charles Jacob, heir-at-law of John Jacob, Martha Lockhead, Richard Denning, and Lucy his wife, Elizabeth Jacob, and Mary Russell; the said Martha

Lockhart, Lucy Denning, Elizabeth Jacob, and Mary Russell, being co-heiresses of William Jacob, and John Jacob, and William Jacob, deriving title, by deed from Richard Wharffe, who derived title, by deed, from Philip Meyers, the grantee of the Crown. The defendants set up no other title but by possession.

The case was tried at Cornwall, in October last, before Hagarty, J. The whole dispute at the trial (renewed in term) was on the sufficiency of the evidence as to two deeds, one dated the 7th February, 1803, purporting to be from Philip Meyers (to whom it was proved the Crown, by patent, dated the 16th July, 1797, had granted the whole lot named in the writ) to Richard Wharffe, for the whole lot; the other dated the 31st May, 1808, purporting to be a conveyance from Richard Wharffe to John Jacob, and William Jacob, of London, merchants. The question was, whether the deeds came out of the proper custody. A witness swore that he obtained the first deed from the Hon. G. S. Boulton, of Cobourg who was said to be, and who acted as agent for the Jacob family as to these lands. The second deed he received from the plaintiff's counsel, by the written authority of Mr. Boulton. It was admitted that the plaintiffs' counsel had charge of the papers of the late George Macdonell, Esquire, and had this deed among such papers, and that George Macdonell had, during his life, written to Mr. Boulton for information, and that, in reply, he had sent him the deed. Both these deeds on the face of them, being more than thirty years old, were shown to have come out of Mr. Boulton's hands. Wharffe, it was admitted, at one time resided in Cornwall. It was objected that the evidence did not shew that these deeds came out of the proper custody; that Mr. Boulton should have been called, and that there was not sufficient evidence of the identity of the parties. Leave was reserved to move for a nonsuit on these points, and the plaintiff had a verdict.

In Michaelmas term, *McLennan* obtained a *rule nisi* to enter a nonsuit, on the leave reserved, because the deed to Wharffe, and the deed from him to John and William Jacob, were improperly received in evidence.

Richards, Q. C., shewed cause. He cited *Rees* v. *Walters*, 3 M. & W., 527; Doe *Doe Jocob* v. *Phillips*, 8 Q. B. 158; *Doe* v. *Keeling* 11, Q. B., 884.

McLennan supported the rule.

DRAPER, C. J.—I am of opinion this rule should be discharged. The deeds in question were produced on behalf of the plaintiff, who claimed the estate, and who was, therefore the proper person to have the custody of them; and they came from the hands of a person with regard to whom there was some evidence that he was agent for the former owners of the property, and parted with the deeds in affirmance of the title of the purchasers from them.

In *Jacob* v. *Phillips*, Coleridge, J. observed "Evidence of the custody from which a deed thirty years old comes is given, not as a ground for reading the instrument for or against a party, but only to afford the judge reasonable assurance of its authencity," and in *Rees* v. *Walters*, Baron Parke said he rather thought it was for the judge to say whether a deed was produced from the proper custody or not, and that the court could not interfere, unless they though him wrong. Under the circumstances proved, which I think are as strong as in *Doe Earl of Shewsbury* v. *Kneeling*, we could not properly grant a nonsuit, and I see no sufficient reason to grant a new trial, in order that Mr. Boulton might be called to establish facts of which there is some evidence, and the existence of which the defendant has not ventured to deny.

Per cur.—Rule discharged.

CHANCERY.

(*Reported by* THOMAS HODGINS, Esq., M.A., *Barrister-at-Law.*)

STEVENSON v. BROWN.

Partners—Assignment for benefit of creditors—Power.

One partner of a mercantile firm has no power, either during the existence or after the dissolution of a partnership, to make an assignment of the property and effects of the firm, to a trustee for the benefit of creditors.

The bill in this case was filed by William Stevenson against James A. Brown, Hiram Capron, and Matthew Crooks Cameron, setting forth that the plaintiff and the defendant Brown were partners in the firm of J. A. Brown & Co.; that difficulties had occurred between them; that the defendant Brown had thereupon, and in consequence of the alleged inability of said firm to pay its debts, made an assignment of all the partnership stock and effects to the other defendants as trustees for the benefit of creditors; that plaintiff had protested against such assignment, but that, nevertheless, the said defendant had let said trustees into possession and had ousted the plaintiff. The bill prayed that the assignment might be declared void and the defendants restrained from acting under it, and that the partnership might be wound up and a Receiver appointed.

Hodgins, for the plaintiff, cited the cases referred to in the judgment of the Vice-Chancellor.

McMichael & Fitzgerald, for the defendants, relied upon *Fox* v. *Rose*, 10 U. C. Q. B., 16, and *Burchart* v. *Draper*, 10 Ha. 453.

SPRAGGE, V.C.—The question is, whether one of two co-partners in business can make an assignment of the whole effects of the partnership to trustees for the benefit of creditors.

No English authority has gone this length, and the existence of such a power in one partner is not, it appears to me, in accordance with the principles upon which one partner is held to have authority to bind his co-partner as well as himself. Such authority is, as was said by Lord Wensleydale in *Ernest* v. *Nichols*, 6 H. of L. C. 417, a branch of the law of agency, and it was concisely stated by him, (*Hawker* v. *Bourne*, 8 M. & W., 710,) "One partner by virtue of that relation is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him, by virtue of that relation, all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged."

In the case of *Fraser* v *McLeod*, 8 Gr. 275, I referred to several cases where the dealings of one partner are held to be beyond his authority and his co-partner not affected thereby. The English authorities go this length, that one partner may sell partnership goods, or transfer them in payment of a debt, and in one case, *Fox* v. *Hanbury* (2 Cox, p. 445) the whole of the goods of a partnership were so transferred, and upon trover brought against the purchaser the judgment was for the defendant. The judgment was given by Lord Mansfield, who said, "Each (partner) has a power singly to dispose of the whole of the partnership effects." This case was decided chiefly upon the frame of the action.

In the American Courts, however, there has been a conflict of decision upon the point. The reasons of Chancellor Walworth against such a power residing in one partner are forcible and, I think, conclusive. After enumerating instances of what a partner may do he proceeds, *Haven* v. *Hussey* 5, Paige, 30, "All these instances of authority, as well as that to make negotiable paper, flow from the principle that each is the agent for the whole. But for what is he such agent? For the purposes of carrying on the business of the firm, and because the authority to do the act is implied from the nature of the business. Now a transfer of all the effects of the firm for payment of its debts is a virtual dissolution of the partnership. It supersedes all the business of the firm as such. It takes from the control of each all the property with which such business is conducted. The purposes of the business then clearly do not require that such a power should be implied. What other reason is there for holding that by the contract of partnership it should be inferred. I do not think that the principle insisted upon is a true one, namely, that such a transfer is only invalid when it operates as a fraud upon the other partner, when, for example, it is made against his wishes, and to give preferences which he is unwilling to give. It strikes me that the principle upon which the invalidity of the principle is established lies deeper. I consider that neither during the existence nor after the dissolution of a partnership can such a transfer be made, because of want of power in any one partner to make it. A direct payment of money, or a transfer of property to an acknowledged creditor is an admitted and a necessary power during the existence of the partnership. We probably are compelled by authorities to go so far as to say that it is a necessary surviving power after a dissolution in whatever way that is effected. All that is requisite to test the transfer is the amount of debt and the extent of the fund assigned. But upon the assignment of the property of a firm to a trustee a complication of duties and res-

ponsibilities is involved. An agent is appointed to control and dispose of the whole. The capacity, integrity, and industry of another are brought to the management and the fitness of the party selected is judged of solely by one member of the firm."

It is thus well put, that granting the authority of a partner to sell the whole of the partnership effects, an authority which seems to have been upheld in the Court of Queen's Bench in this Province, in *Fox* v. *Rose*, 10 U. C. Q. B. 16, still it is going much further to say that he can assign to a trustee, *Butchart* v. *Draper*, 10 Ha. 458, before Sir Page Wood, and in appeal (4 D. M. & G.) before the Lords' Justices, is certainly no authority for this position. The point decided was only this, that after a dissolution of partnership one partner has authority to do what is necessary to carry out a contract made during the partnership—that contract being within the scope of the partnership business. This case is stronger than those cited, in this, that the plaintiff in express terms dissented from the proposed assignment. I think that the defendant has exceeded his authority, and that the plaintiff is entitled to the relief prayed by his bill.

COMMON LAW CHAMBERS.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

Ex parte Glass, in re McDonald, one, &c.

Bill of costs—Conveyancing charges—Con. Stat. U. C. cap. 35—Third party's clauses.

A bill exclusively for conveyancing charges cannot be referred to taxation in Upper Canada. (In re Lemon & Peterson, 8 U. C. L. J., 185, upheld.)

If the bill contain any one taxable item, the whole bill is liable to taxation.

Where two bills were delivered at the same time, the one being for the costs of an action of ejectment, and the other for expenses attending a sale of mortgaged property, pursuant to a power of sale contained in the mortgage, both bills being referable to a written statement containing an item "Solicitor's costs, $143." *Held*, as the ejectment bill was taxable, it drew with it the remaining bill (or conveyancing charges).

A mortgagor has a right to have a taxation of the mortgagees solicitor's bill, because he is liable to pay it; but the act in no way alters the relation between the solicitor and his client.

(Chambers, February 28, 1863.)

The applicant, Glass, mortgaged his property to the Trust and Loan Company, with power of sale.

Default was made, and mortgagees, by Mr. Macdonald, their attorney, brought ejectment and then sold the land under the power, and paid the surplus purchase money to Glass, deducting their attorney's costs of this ejectment and the sale.

Mr. McDonald sent mortgagor a statement of principal and interest due on mortgage, and an item for solicitor's costs $143.

Applicant requested an account in detail of this item, and received two bills, one for £10 14s. 7d., costs in the ejectment, the other £20 12s. 3d., costs of exercising power of sale.

These bills he received in March last.

In November following, he obtained a summons to have the bill taxed. After several enlargements the summons came on before Hagarty, J., for argument.

W. H. Burns for the summons.

S. J. Vankoughnet contra.

The following cases were cited during the argument: *Re Phillpotts*, 18 Beav., 84; *Re Fyson*, 9 Beav., 117; *Re Dawson & Bryan*, 28 Beav., 605; *Re Loughborough*, 28 Beav., 489; *Re Abbott*, 4 L.T. N. S., 576; *Re Begnald*, 9 Beav., 269; *Re Lemon & Peterson*, 8 U. C. L. J., 185.

Hagarty, J.—Before the passing of our attorney's act, 16 Vic., cap. 175, now Consol. Stat. U. C., cap. 35, the applicant would have had no such remedy as asked, because no sufficient privity existed between him and the mortgagee's solicitor, and his only course would have been to file a bill for an account.

But sec. 38 of Consol. Stat. U. C., cap 35, (taken from Imperial Act 6 & 7 Vic., cap. 78,) declares that any person not being chargeable as the principal party, who is liable to pay or has paid any bill to the attorney, or to the principal party entitled thereto, the party so paying may make the like application for a reference thereof to taxation, and in like manner as the party chargeable therewith might himself have made, and the same proceedings shall be had thereupon as if such application had been made by the party so chargeable. Section 39 of the same act allows the court or a judge to consider any additional special circumstances applicable to the persons making the applications, although they be not applicable to the party chargeable with the bill. Section 40 empowers an order to be made on the attorney to deliver to the applicant a copy of the bill, on paying costs of copy.

These provisions, under the name of "third party clauses," have made an important change in the law.

I consider the present applicant comes clearly within their reach, if there be no difficulty as to the right to refer this peculiar kind of charges.

I agree with the judgment of my late lamented brother, Judge Burns, in *Re Lemon & Peterson*, 8 U. C. L. J., 185, that a bill exclusively for conveyancing charges cannot be referred to taxation in Upper Canada.

The Imperial Act, already cited at section 37, gives express power to the Lord Chancellor and Master of the Rolls to order a taxation of a bill "in case no part of such business shall have been transacted in any court of law or equity." Our statute has no analagus provision, and merely refers to business done by any attorney or solicitor "as such." In England it is common to find a petition to the Chancellor or Master of Rolls (when no cause in court) to refer in a case exactly like the present.—(In *re Abbott*, 4 L. T., N. S., 576). It has, I think, always been our practice to see if the bill contained any one taxable item, and if so, then to hold, as in the language of Park, J., in *Smith* v. *Taylor*, 7 Bing., 263, "one taxable item draws into its vortex all others in the same bill."

I have had some doubts as to my poweer to refr the bill for the costs of exercising the power of sale, as it is made out separately, but I think a liberal construction of the rule and practice warrants my considering, that although on separate sheets of paper, and headed separately, the two documents, viz.: the ejectment costs and the power of sale costs are referable to the item in the statement rendered to the mortgagor, "solicitor's costs $143, and so I may consider them as the particulars of this item, and that as the ejectment costs are clearly taxable, they must draw the other charges after them.

It must be understood, that in the taxation, the principle on which the bill is taxed is not as between the third person (viz.: the applicant) and the solicitor, but as between such solicitor and his own client. (See 1 Smith, Ch'y Prac., 134.)

It is also to be noted as laid down in the same work, "that if the mortgagee thinks fit to pay his own solicitor's bill, then, although the right of the mortgagee to charge the full amount against the mortgagor is left open, the mortgagor cannot, as of course, open that settlement as between mortgagee and his solicitor." The mortgagor would not, in such a case, be without a remedy, for, in the settlement between him and the mortgagee, every improper payment made by the mortgagee to his solicitor would be disallowed as between mortgagee and mortgagor.

This language is taken almost *verbatim* from that of the Master of the Rolls in *Exp. Bignold*, 9 Beav. 271. The Master of the Rolls further says: "a mortgagor has a right to have a taxation of the mortgagee's solicitor's bill, because he is liable to pay it; and I have often had occasion to say, that this act in no way alters the relation between a solicitor and his client; * * the mortgagor cannot, as of course, open that settlement (viz.: between mortgagee and his solicitor) and say, "the matter is still open, for the bill has never been settled as between me and the mortgagee's solicitor." The solicitor has a right to say, "I never acted as your solicitor; I have fairly settled all matters with my own client, and am not liable to account again to you." I also refer to *Exp. Fyson*, 9 Beav., 118; *Exp. Gaitskill*, 1 Phill., 581; *Exp. Dickson*, 28 L. T. 153; Marshall on Costs, 217; 218.

I therefore direct a reference of these bills to be taxed by the Master of the Court of Common Pleas, in which court the ejectment suit was brought.

When the true amount properly taxable to the mortgagees, as between them as clients and Mr. Macdonald as their solicitor, is ascertained, the applicant can be readily advised as to his remedy for any amount which he can prove has been unwarrantably retained by the mortgagee.

Order accordingly.

MONTHLY REPERTORY.

COMMON LAW.

EX. EDWARDS AND ANOTHER v. SOUTHGATE.

Contract—Lien—Shipping agent—Bill of lading—Liability in Trover.

A shipping agent having a lien on the bill of lading of goods he has shipped, may, if the lien is not satisfied before they have reached their destination, have the goods brought home in order to retain his lien upon them, and is not liable to any action for so doing.

EX. C. BEGGE ET AL v. PARKINSON.

Contract—Implied and express agreement.

Where A., a provision merchant, agreed with B., a ship owner, to supply him with provisions for the use of passengers on board his ship, with knowledge on A.'s part of the purpose for which the goods were destined, and it was specifically and expressly agreed that such goods were guaranteed by the seller A. to pass the survey of the officers appointed by the East India Company.

Held, in error on bill of exceptions that the express guarantee that the goods should pass such survey did not exclude the implied contract on the part of A. that the provisions so furnished should be fit for the intended voyage.

EX. HOLMES v. CLARK AND ANOTHER.

Practice—New Trial—Surprise.

A party to a cause, who has not been called as a witness, cannot have a new trial on the ground of surprise, in regard to the effect of any conversation with himself, at all events, if he admits some conversation to have occurred, and the effect of it is not necessarily decisive of the case.

EX. WILSON v. CHARTIER.

Practice—Ejectment—Execution—Habere facias possessioner—Retaking possession by the defendant.

Although when an execution is in progress the court will enforce obedience and punish resistance to its process, by attachment, for contempt, and when possession is forcibly retaken before the writ is returned, will allow a fresh writ to be issued; yet when possession is retaken after the writ is returned, it will not interfere summarily by rule or order to enforce re-delivery of possession.

CHANCERY.

V. C. S. MCCULLOCH v. MCCULLOCH.

Will—Construction—Legacy to a single woman with gift on her marriage.

A. (*inter alia*), bequeathed to B. (a single woman), the sum of £3000 sterling, "the interest thereof to be for her sole and separate use during her lifetime, and while she continues unmarried; thereafter, should she marry, the principal and interest to go over to the residuary legatee."

Held, that there was a gift of principal and interest to B., subject to be divested on her marriage.

V. C. S. LOFTUS v. MAW.

Specific performance—Services in consideration of promise to bequeath—Codicil—Revocation.

A. rendered domestic services on the faith of a promise by B. that he would compensate her, and of a codicil by which, in pursuance of such promise, he bequeathed to her a life interest in certain houses. B. revoked that codicil by another which was duly proved.

Held, that it appearing that A. had been induced to render valuable services to B., on the faith that by so doing she would become entitled to the benefit of the trusts created in her favour by the former codicil, the testator had no right to revoke the same, and that such trusts must be performed.

M. R. PARSONS v. HAYWARD.

Partnership—Articles—Term of years—Continuation of business after expiration of term—Account of profits—Notice of dissolution.

A and B were partners under articles of partnership, which provided that the term of the partnership should be seven years, that the business should be carried on in the name of B, who should reside on the business premises and act as managing partner, and that at the expiration of the partnership the assets should be realised, sold and divided. After the seven years had expired the same business was still carried on in the same place and under the same style, but no notice was given by either partner to the other that the former arrangement was to be considered at an end. The capital of A still remained in the business. In consequence of the claim made by A to the whole profits of the business since the expiration of the term, A filed his bill for a dissolution of the partnership and the usual accounts upon the footing of the partnership deed.

Held, that as the articles required that the partnership assets should be realised and divided at the expiration of the partnership, B ought to have adopted that course if he wished to deprive A of a right to participate in the future profits of the business, and not having done so, but having allowed the business to go on in the same way as during the term, the profits up to the time of the sale and realisation of the business must follow the same rules as those provided in the articles, and that the accounts ought to be taken upon that footing.

Where a partnership business for a term is carried on after the expiration of the term, although either party may then put an end to the arrangement by notice, yet, until he does so put an end to it, the business will be presumed to have been carried on upon the previous footing.

BOOK REVIEWS.

Several periodicals are before us for notice. We shall endeavour to review them in our next number.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

DONALD GUTHRIE of Guelph, Gentleman, to be a Notary Public in Upper Canada. (Gazetted February 28, 1863.)

CHARLES BERTRAM ORDE of Lindsay, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Feb. 28, 1863.)

WILLIAM HENRY WALKER of Ottawa, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Feb. 28, 1863.)

JOHN DOWNEY of Toronto, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Feb. 28, 1863.)

THOMAS JAMES FITZSIMMONS of Brockville, Esq., to be a Notary Public in Upper Canada. (Gazetted Feb. 28, 1863.)

D. MITCHELL McDONALD of Toronto, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 7, 1863.)

WILLIAM DAVID HAMMOND of Wardsville, Esq., to be a Notary Public in Upper Canada. (Gazetted March 7. 1863.)

JOHN McGILL CHAMBERS of Smith's Falls, Esq., to be a Notary Public in Upper Canada. (Gazetted March 7, 1863.)

PHILIP McKENZIE of London, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 7, 1863.)

CORONERS.

JOHN BIGHAM, Esq., M.D., Associate Coroner for the United Counties of Huron and Bruce. (Gazetted March 7, 1863.

TO CORRESPONDENTS.

T. S.—A CLERK CO. W.—M.—M.P. (London).—Under "Division Courts."

A. M.—Your communication must be addressed to the Editors of the *Law Journal*, and so published by us. In its present shape we can make no use of it.

IGNIS FATUUS.—Too late for this number. Will receive attention in our next.

EVINS.—Received, but too late for present issue.

DIARY FOR MAY.

1. Friday ..... Last day for notice to Co. of appor. of Grammar School monies
2. Saturday ..... Articles, &c., to be left with Secretary of Law Society.
3. SUNDAY..... *4th Sunday after Easter.*
5. Tuesday ..... Chancery Sittings Belleville. Last day notice for Brockville.
9. Saturday..... Chancery Hearing Term ends.
10. SUNDAY..... *Rogation.*
12. Tuesday ..... Chancery Sittings Kingston. Last day notice for Ottawa.
13. Wednesday .. Last day for service for County Court.
17. SUNDAY ..... *1st Sunday after Ascension.*
18. Monday ..... Easter Term begins.
19. Tuesday ..... Chancery Sittings Brockville. Last day notice for Cornwall.
22. Friday..... Paper Day, Q.B.
23. Saturday..... Paper Day, C.P. Declare for County Court.
24. SUNDAY ..... *Whit Sunday.* Queen's Birthday.
25. Monday..... Paper Day, Q.B.
26. Tuesday ..... Paper Day, C.P. Chancery Sittings Ottawa.
27. Wednesday .. Paper Day, Q.B.
28. Thursday .... Paper Day, C.P. [Assess. Roll, and for Co. Ct. to rev. Tp. roll.
30. Saturday..... Easter Term ends. Last day for Court of Revis. finally to rev.
31. SUNDAY ..... *Trinity Sunday.*

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

MAY, 1863.

QUEEN'S COUNSEL.

In every profession there are rewards of merit more or less substantial. These, spur men to action; and so long as the rewards are honestly distributed, the effect upon the whole profession is good.

By nature men are different; some have greater mental activity than others; some have more judgment than others; some have a keener sense of honor than others; some have a greater ability to please than others; some are better speakers than others—in a word, some by nature are gifted, while others are neglected.

In no profession can a dullard attain real success; and yet some men, though not bright, may, in certain professions, attain marked distinction, who, in other professions, would live and die in obscurity.

Some men are adapted for divinity—others for medicine—others for law—others for no learned profession whatever. The choice of profession, therefore, is one of serious moment. A wrong step taken at the start often proves such a mistake that a whole lifetime is not long enough to rectify it.

In no profession is true merit better appreciated by the public than that of the law. A deserving man, in spite of adverse circumstances, by dint of energy may raise himself as high as he pleases. If he has the true ring he is sure to be appreciated. The converse is also true. A man unfit for the profession of the law can not, in general, be forced into greatness; or if so forced, soon falls to the level which nature designed for him; all the titles in the world will not make him a great lawyer, if nature has set upon him the stamp of mediocrity.

The profession of the law may be divided into two branches—the attorney or solicitor, and the barrister or advocate. In this paper we are more particularly concerned with the latter.

The qualifications of a successful barrister are many. He must be quick—courageous—decided—intelligent—well-informed. He must have good common-sense, versatility and ability to please. He must be able to express his ideas with clearness and appropriateness. He must be ready for any and every emergency—equal to any and every occasion.

Many enter the profession thinking themselves fitted for the bar, but soon learn either that they have overrated themselves, or underrated what is required of them. Many are called, but few chosen for real success. Examine those who have succeeded, compare them with those who have failed, and the "reasons why" will be made apparent to the humblest capacity.

Connection in England is something: in Canada it is nothing. A man with us must succeed upon his own merits, and not on those of his friends or relatives. He must either sink or swim. If, buoyed up with the aid of sanguine and powerful friends, he venture into deep water, so long as sustained by them he will appear to do as well as others who swim without such aids, but the moment the aids are withdrawn he sinks to swim no more.

In England there are many prizes for able advocates. In Canada the prizes, though not so many, are not to be despised. The learned professions in this colony represent the aristocracy of intellect. Lawyers are to be found year by year conspicuous in parliament, either as leaders of the government or of the opposition. In all secular assemblies of a deliberative character lawyers are preeminent. Their ability to express their ideas in a manner to be understood by their fellow-men is the great secret of their success.

The substantial prizes in this colony are—judgeships of the superior and inferior courts—crown prosecutorships—crown attorneyships. These are the gift of the government for the time being. The insubstantial prize is that of a Queen's counselship. This is also in the gift of the government for the time being. The real prize—more substantial than all others—is that of public confidence and public support.

Experience has proved that government appointments are rarely for merit. Sometimes by accident rather than design government may appoint the right man to the right place; but the reverse of this is too often the case. Political subserviency is too often the qualification for place and power. The leprosy of politics appears to insinuate itself into every branch of the human economy, where appointments are vested in what are called free governments.

So far as legal appointments in Upper Canada are concerned, great responsibility is thrown upon the attorney-general for the time being. Upon his advice such appointments are made. In his hands is the power of elevating or depressing the standard of his profession. He is, in a measure, its guardian. If the power vested in him be used with a single eye to the public good, he will receive the approbation of all well-meaning men, no matter what their political creed or political affinities. But if used to reward political partisans, or to honor private friends—other things not being equal—the disapprobation, if not the execration, of all thinking men will be the consequence. Fortunately for Upper Canada our attorneys-general hitherto, though in some things blameable, have not been recreants to their trust. The present attorney-general also has, so far as we can judge, to the best of his ability discharged his responsible trust, but has, we fear, in some things yielded too much to the claims of party and other outside pressure.

On this occasion we shall make no reference to his judicial appointments. We are not prepared at present either to sanction or to condemn them. We have too much respect for the Bench in all its gradations to speak lightly of those who hold judicial appointments. We prefer rather, hoping for the best, to give a fair trial to every man who receives such an appointment.

But with another class of appointments we hesitate less to deal. The appointment of Queen's Counsel, though of no real value, has hitherto been looked upon as something worthy of acceptance. So long as conferred upon worthy men, and worthy men only, it has been esteemed an honorable appointment. Of late years, however, even its fictitious value has fallen. With multiplication comes deterioration. The appointments have been too freely bestowed, and the result has been that the standard of value is much lowered.

A Queen's Counsel *ought* to mean an advocate who, by real ability, has attained such a position in the foremost ranks of his profession as to entitle him to special distinction. No lawyer springs to a fame in a day, so that some standing at the bar is usually the incident of a foremost advocate, but not his qualification for the appointment. There should be no confusion between the incident and the actual qualification. To make a man a Queen's Counsel merely because of old standing at the bar if otherwise unfit would be absurd. So, respectability is an incident. No man should be appointed a Queen's Counsel unless a man of honor and of respectability. But it does not follow that every man of honor and respectability should receive the appointment. Respectability is only one of the incidents, and not any more than age *the* qualification. The sole qualification should be merit. This and this alone should be the motive for the appointment.

In England the appointments are usually conferred upon the leaders of the bar in the different courts, and on the different circuits. In fact long before the executive makes the appointment the profession know that it will be made. The consequence is that the appointment, when made, takes no one by surprise. All are prepared for it; and, when made, all endorse it. But when appointments are made which take the profession wholly by surprise, there is something wrong.

Recently no less than ten gentlemen were appointed Queen's Counsel in Upper Canada. Rumor had it that the appointmenss were on the *tapis* some time before they were made; and rumor foretold correctly the appointment of one or two, but was sadly at fault as to the remainder. All the men appointed are respectable men—some of them are old men; but all are *not* qualified. The Attorney-General has evidently yielded too much to pressure. The consequence has been in the appointment of some men, whose appointment has been a surprise to every body, if not to themselves.

It is not for us to particularize. It would be invidious for us to do so. No good would come of it. The appointments are made and the mischief is done. Judging from what the Attorney-General has done, the only thing at which we wonder is, that while he was about it, he did not appoint every man at the bar—whether he ever held a brief or not—a Queen's Counsel, and so practically destroy the title which, we are sorry to say, he has, unwittingly no doubt, done so much to degrade. The standard before he took office was too low. He has made it still lower; and a few steps farther in a downward direction, and the title, instead of being a mark of ability, will be that of mediocrity, if not of nothingness.

In matters where a fair exercise of judgment is required there should be no bias. We venture to assert that if the Attorney-General had exercised his judgment in the contemplated appointments, free from the influence of political support, private friendship, and other such considerations, the result would have been very different. We cannot say that he has been controlled solely by political influence, for he has appointed men of all politics. We cannot say that he has been controlled solely by private friendships,

for he has appointed men of whom he knew little except by reputation. We cannot say that he has been controlled solely by a respect for old age, for he has appointed young as well as old men. But we do say that these bastard elements more or less enter into the list of his appointments, and that some men appointed have no claim to the appointment, beyond one or other of these bastard titles.

We know how difficult it is under our present form of government for men in power to be governed solely by a sense of right and merit. Expediency too often usurps the place of right. Both in England and in Canada expediency is doing much to lower the standard of the bar, if not of the bench. The fault is, perhaps, not so much that of the Chancellor, in England, or Attorney-General, in Canada, for the time being, as of the system of government which renders it necessary for these officers to make sacrifices. The result, however, is none the less pernicious—none the less deplorable—none the less to be deplored.

THE LATE MR. JUSTICE CONNER.

The *Canada Gazette*, under date 31st January last, announced that His Excellency the Governor-General had been pleased to appoint Skeffington Connor, LL.D., to be a Puisne Judge of Her Majesty's Court of Queen's Bench for Upper Canada, in the room and stead of the Hon. Robert Easton Burns, then lately deceased.

The announcement was well received by the many well-wishers of the learned gentleman who had thus been honored. Bright hopes were entertained for his future.

He took his seat on the bench during Hilary Term last. He presided at the assizes for the County of the City of Toronto, which opened on the 16th March last. He then opened the assizes for the United Counties of York and Peel, on the 13th April last; and on the 29th April last, during the sitting of the assizes, after a few days' indisposition, breathed his last.

Those who were intimately acquainted with him were aware that ever since his elevation to the bench, his health was precarious; but none suspected that the day of his death was so near at hand. Owing to his recent elevation to the bench, he did not appear to advantage as a Judge. It requires time to make a Judge of a barrister, however able; and Dr. Connor, ere he had made himself at home in his new position, was hurried off to eternity—a warning to all of the uncertainty of life, and of the folly of setting hopes or affections on things terrestrial.

He was not an old man at the time of his death. He was born in Dublin, in 1810; entered Trinity College in 1824, and graduated at the same institution in 1830. In 1830, he married Eliza Hume, the sister of Mrs. Chancellor Blake, and in 1832 came to Canada. For two years he lived in Orillia. Tired of country life, he returned to Ireland, resided a short time on the continent, and in 1838 was called to the Irish bar. In 1842, having returned to Canada, he was called to the Upper Canadian bar, and entered into partnership, in the practice of the law, with his brother-in-law, Mr. Blake, and the present Mr. Justice Morrison. In 1849, he revisited Ireland, and had conferred upon him by his alma mater the degree of LL.D. In 1850, upon his return to Canada, he was elected a bencher of the Law Society, and was appointed a Queen's Counsel. In 1856, he was elected a representative in the Legislative Assembly for South Oxford, and thenceforward devoted so much of his time to politics, that he to a great extent lost his practice. In 1858, he was appointed Solicitor-General for Upper Canada, which office he held only for a few days, owing to the defeat of the government of which he was a member.

Dr. Conner in manner was courteous, though at times bitter. He was an able advocate, and, had he attended to his profession, to the exclusion of politics, might in the course of time have earned for himself a comfortable competence. Of late years his temper was not improved, owing to the progress of disease of some kind, to which he ultimately succumbed.

We feel a delicacy in pronouncing an opinion upon his career as a judge, owing to the fact that it was so short, and owing to the fact that he is no longer living; but if the truth must be told, we have no hesitation in saying his friends were disappointed. Had it pleased Providence longer to spare his life, he would probably have improved, and become an able Judge.

In private life he was much esteemed. He was generous to a fault, and hospitable to all with whom he was acquainted. His death, so soon after his elevation to the bench, has cast a gloom over a large circle of friends, whose fond hopes have thus been destroyed.

MR. HALLOWELL'S DIGEST OF ACTS.

We published in the last number of the *Law Journal* a Digest of acts passed during the years 1860, 1861, and 1862, which repeal, amend, vary or affect the Consolidated Statutes of *Upper Canada*. We publish in this number a continuation of the Digest, which embraces acts passed during the same years affecting the Consolidated Statutes of *Canada*. The compiler is Mr. J. S. Hallowell, student-at-law, who has already made himself favourably known to our readers through the columns of the *Law Journal*. So far as we have been able to judge, we can say the compilation is an accurate one, and all must admit it is a useful one. It is difficult to keep up with the work of legislation in Canada. The amending, altering, repealing,

re-enacting, and chopping of every kind is well calculated, in the absence of some such aid as that of Mr. Hallowell's compilation, to confuse if not to mislead. Few men in practice have either the time or the inclination year by year to note the effect of each session's legislation. To all such, Mr. Hallowell's Digest will be of much value. And we are glad to learn that he has been induced to have it published in pamphlet form. It is for sale by Messrs. W. C. Chewett & Co., and other law booksellers in Toronto. Price 25 cents.

DIVISION COURTS.

A bill is now before Parliament to enable judgment creditors in Division Courts, to attach debts due their judgment debtors, provided the amount of such debts be within the jurisdiction of such Division Courts. It is introduced by Mr. Hooper, and is as follows:

BILL.

An Act respecting the Attachment of Debts in Division Courts:

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. Any party who has had an execution in any Division Court returned *nulla bona*, either as to the whole amount or as to part, may obtain from the Clerk an order that all debts owing by or accruing from any person or persons to the judgment debtor, of amounts within the jurisdiction of a Division Court shall be attached to answer the judgment.

II. In case the Judge be satisfied upon application on oath made to him by the party in whose favor a judgment has been given, or be satisfied by other testimony that such party will be in danger of losing the amount of the judgment if compelled to wait until the return of the execution before such order is obtained, he may direct the order to issue at such time as he thinks fit.

PROCEEDINGS AGAINST GARNISHEES.

III. The person to or from whom such debts are owing or accruing is hereinafter called the garnishee, and service on him of the order or notice thereof to him in such manner as the Judge directs, shall bind such debts in his hands.

IV. The order shall be for the garnishee to appear before the Clerk of the Division Court, within whose division the garnishee resides, at his office, on some day to be appointed in the said order; and the said order shall be served on such garnishee, and if the garnishee do not forthwith pay the amount due by him, or an amount equal to the judgment debt, and do not dispute the debt due or claimed to be due from him to the judgment debtor, or if he do not appear before the Division Court Clerk named in the order at his office, on the day appointed, then such Clerk, on proof of the service of the order having been made four days previous, may issue execution out of the Division Court of the division in which such garnishee resides, to levy the amount due from such garnishee, and the bailiff to whom such writ or execution is directed shall be thereby authorized to levy, and shall levy the amount mentioned in the said execution towards satisfaction of the judgment debt, together with the costs of the proceeding to be taxed, and his own lawful fees; but if the garnishee disputes his liability, the judgment creditor shall be at liberty to proceed against the garnishee, according to the practice of the said Division Courts, for the alleged debt or for the amount due to the judgment debtor, if less than the judgment debt, and for costs of suit.

V. Payment made by, or execution levied upon the garnishee under any such proceeding as aforesaid, shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although the proceeding should be afterwards set aside or the judgment reversed.

VI. There shall be kept at the several offices of the Clerks of the Division Courts a Debt Attachment Book, and in such book, entries shall be made of the attachment and proceedings thereon, with names, dates and statements of the amount recovered and otherwise; and the mode of keeping such books shall be the same in all the offices, and the copies of any entries made therein may be taken by any person upon application to the proper officer.

VII. The costs of any application for an attachment of debt under this Act, and of any proceedings arising from, or incidental to such application, shall be, in the discretion of the Judge, subject to any general rules that may be made in reference thereto.

VIII. This Act shall be read as if it formed part of the Division Courts Act.

DIGEST OF ACTS PASSED DURING SESSIONS OF 1860-1-2.

WHICH REPEAL, AMEND, VARY OR AFFECT, CONSOLIDATED STATUTES, FOR CANADA.

(*By* J. S. Hallowell, *Student-at-Law.*)

Imperial Act 3 & 4 Vic. c. 35, p. xix, Re-Union of Upper Canada and Lower Canada, vide 23 Vic. c. 21.

Con. Stat. C.

c. 1, s. 20, p. 4, acceptance by a member of Legislative Council of office of Speaker not to vacate his seat, repealed by 23 Vic. c. 3, s. 1.

c. 1, s. 24, p. 5, Governor to appoint Speaker, repealed by 23 Vic. c. 3, s. 1, s. 2 in lieu thereof.

c. 1, sch. A, p. 9, Electoral Division of Trent, vide 23 Vic. c. 39, s. 5.

c. 1, sch. A, p. 9, Electoral Division of Cataraqui, vide 23 Vic. c. 39, s. 5.

c. 2, s. 3, p. 12, Electoral Division City of Quebec, amended by 23 Vic. c. 1, s. 1, and vide s. 4, 7.

c. 2, s. 4, p. 13, Electoral Division City of Montreal, amended by 23 Vic. c. 1, s. 2, and vide s. 4.

c. 2, s. 8, sub-s. 13, p. 16, North Riding of Waterloo, amended by 23 Vic. c. 40, s. 1.

c. 2, s. 9, sub-s. 3, p. 17, Electoral Division City of Toronto, amended by 23 Vic. c. 1, s. 3, and vide s. 4, 5.

c. 3, s. 4, sub-s. 4, p. 20, acceptance by a member of Legislative Council of office of Speaker not to vacate his seat, repealed by 23 Vic. c. 3, s. 1.

c. 3, s. 9, p. 21, so much of this section as relates to such office repealed by 23 Vic. c. 3, s. 1.

c. 3, s. 17, p. 23, so much of this section as relates to such office repealed by 23 Vic. c. 3, s. 1; vide 23 Vic. c. 3, s. 2, 3, 4, 5.

c. 3, s. 19, p. 24, deductions for non-attendance of member, amended by 23 Vic. c. 16, s. 1, sch. A, p. 25, amended by 23 Vic. c. 16, s. 4.

The Imperial Act 3 & 4 Vic. c. 35, s. 9, p. xxii, so much as relates to office of Speaker, repealed by 23 Vic. c. 3, s. 1.

Less than 31 days' attendance not to entitle member to sessional allowance, but to $6 00 a day, 23 Vic. c. 16, s. 2.

Case of a member attending only for part of the session, 23 Vic. c. 16, s. 3.

c. 6, p. 34, election of members of Legislature, vide 23 Vic. c. 1, s. 4, as to Quebec, Montreal and Toronto.

c. 6, s. 11, p. 41, voters' list L. C. as to Quebec, amended by 23 Vic. c. 1, s. 8.

c. 6, s. 14, p. 44, appeal from Revising Board to the Superior or Circuit Court, 24 Vic. c. 25, added.

Con. Stat. C.

c. 6, s. 21, p. 48, Returning Officers in L. C., vide 23 Vic. c. 1, s. 6, as to Electoral Division of Cities of Quebec and Montreal.

c. 6, s. 22, p. 49, Returning Officers in U. C., vide 23 Vic. c. 1, s. 6, as to Electoral Division of City of Toronto.

c. 6, s. 25, p. 50, qualification of Returning Officer, vide 23 Vic. c. 1, s. 6, sub-s. 2.

c. 6, s. 40, p. 59, as to polling places in Wards of Quebec and Montreal, vide 23 Vic. c. 6, s. 5.

c. 6, s. 82, 83, p. 76, provisions against bribery and corruption, and penalty, &c., repealed by 23 Vic. c. 17, s. 1, sub-s. 2, 3, 4, 5, 6, substituted therefor.

c. 9, s. 3, p. 159, spirituous liquors not to be furnished to Indians in U. C., rep. 23 Vic. c. 33, s. 1, s. 2 in lieu thereof.

c. 14, s. 6, p. 187, certain provisions as to sinking fund, rep. 23 Vic. c. 4, s. 1.

c. 17, p. 211, Customs Act, 23 Vic. c. 18 and c. 19, 24 Vic. c. 2, 3, and 25 Vic. c. 4, construed as one act, vide 23 Vic. c. 18, s. 1, 23 Vic. c. 19, s. 2, and 24 Vic. c. 2, s. 3, 24 Vic. c. 3, 25 Vic. c. 4, s. 7.

c. 17, sch. A, p. 255, Periodicals and pamphlets, &c., paying 10 per cent. duty, repealed by 23 Vic. c. 18, s. 1.

c. 17, sch. A, p. 255, goods paying 10 per cent., kerosene and coal oil, &c., added by 25 Vic. c. 4, s. 4.

c. 17, sch. A, p. 256, table of free goods, vide 23 Vic. c. 18, s. 2.

c. 17, sch. A, p. 256, coffee, green, additional duty of 3 cents per lb. imposed by 25 Vic. c. 4, s. 1.

c. 17, sch. A, p. 253, brandy, by 23 Vic. c. 19, s. 1, Governor may reduce duty to 30 per cent.

c. 17, sch. A, p. 254, wines, dried fruits, currants, figs almonds, walnuts and filberts, by 23 Vic. c. 19, s. 1, Governor may reduce duty to 20 per cent.

c. 17, sch. A, p. 254, coffee, ground or roasted, additional duty of 3 cents. per lb. imposed by 25 Vic. c. 4, s. 1.

c. 17, sch. A, p. 259, packages exempt from duty, repealed by 24 Vic. c. 2, s. 1, vide s. 2.

c. 17, sch. A, p. 254, molasses, additional duty of 5 cents. per wine gallon, imposed by 25 Vic. c. 4, s. 1.

c. 17, sch. A, p. 254, sugar, raw, additional duty of 2 cents. per lb. imposed by 25 Vic. c. 4, s. 1.

c. 17, sch. A, p. 254, sugar, refined, additional duty of 3 cents. per lb. imposed by 25 Vic. c. 4, s. 1.

c. 17, sch. A, p. 256, goods paying specific duty, confectionery, 3 cents. per lb. added by 25 Vic. c. 4.

c. 17, sch. A, p. 256, tea, new duty imposed by 25 Vic. c. 4, s. 2.

c. 17, sch. A, p. 256, whiskey, new duty imposed by 25 Vic. c. 4, s. 3.

c. 17, sch. A, p. 256, free goods, scrap brass, &c., added by 25 Vic. c. 4, s. 5.

c. 17, sch. A, p. 261, all importations for the use of H. M. army and navy serving in Canada, or for the public uses of the province, free in certain cases, vide 25 Vic. c. 4, s. 6.

c. 19, p. 267, Duties of Excise Act and 25 Vic. c. 5, to be construed as one act, 25 Vic. c. 5, s. 18.

c. 19, s. 2, sub-s. 2, p. 268, what constitutes a distillery, amended 25 Vic. c. 5, s. 2.

c. 19, s. 4, sub-s. 2, p. 268, duty for a distiller's license, rep. 25 Vic. c. 5, s. 3, sub-s. 2, which is substituted for the repealed section.

c. 19, s. 4, sub-s. 3, p. 269, duty for a brewer's license, rep. 25 Vic. c. 5, s. 3, sub-s. 3, which is substituted for the repealed section.

c. 19, s. 8, p. 270, duty per gallon on all spirits made in this province, amended 25 Vic. c. 5, s. 5, 6.

c. 19, s. 9, p. 270, duty of one cent. per gallon on malt liquor, &c., altered to 3 cents. per gallon, 25 Vic. c. 5, s. 7.

c. 19, s. 17, p. 273, Revenue Inspectors to be called Collectors of Inland Revenue, 25 Vic. c. 5, s. 1.

Con. Stat. C.

c. 19, s. 18, p. 273, powers of Inspectors as to premises, books and accounts of distillers, vide 25 Vic. c. 5, s. 17, 25 Vic. c. 5, s. 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, new.

c. 20, p. 277, provincial duty on tavern licenses, vide 23 Vic. c. 6, s. 4, and 25 Vic. c. 6, s. 1.

c. 22, p. 281, Public Lands Act, rep. 23 Vic. c. 2, and vide c. 151, as to Indian Lands.

c. 24, p. 292, Ordnance and Admiralty Lands, vide 25 Vic. c. 2, as to telegraphs connected with military defences.

c. 24, 2nd sch. p. 297, as to land located by enrolled pensioner in Penetanguishene, rep. 23 Vic. c. 22, s. 1.

c. 28, s. 41, p. 314, official arbitraters of public works, vide 24 Vic. c. 4, s. 1.

c. 28, s. 42, p. 314, their oath, 24 Vic. c. 4, s. 5, repeals s. 42 and substitutes new form of oath.

c. 28, sch. A, p. 333, Port Burwell Harbour and Inner Basin, rep. 23 Vic. c. 103.

c. 28, s. 46, sub-s. 2, p. 316, claimants to give security for costs of arbitration, &c., rep. 24 Vic. c. 4, s. 2, and s. 3 substituted for repealed section.

c. 28, s. 59, p. 319, costs of arbitration, &c., rep. 24 Vic. c. 4, s. 2, and s. 4 substituted for repealed section.

c. 32, p. 379, Bureau of Agriculture, &c., amended 25 Vic. c. 7.

c. 32, s. 21, p. 383, corporate powers of Boards of Arts and Manufactures, by 23 Vic. c. 33, may borrow money.

c. 33, p. 406, Board of Registration and Statistics, vide 24 Vic. c. 21, as to trade marks, &c.

c. 34, p. 419, Patents for Inventions. Vide 24 Vic. c. 139, as to exception in favor of John Ericsson, not a British subject.

c. 35, p. 433, Militia Act and 25 Vic. c. 1, construed as one Act, 25 Vic. c. 1, sec. 12.

c. 35, sec. 20, p. 437, rolls of companies to be made annually, amended 25 Vic. c. 1, s. 1.

c. 35, s. 22, p. 438, volunteer companies, of what to consist, rep. 25 Vic. c. 1, sec. 2, which is substituted for repealed section.

c. 35, s. 31, p. 440, Volunteers' uniform, additional section added by 25 Vic. c. 1, s. 3.

c. 35, s. 32, p. 440, volunteer's arms, rep. 25 Vic. c. 1, s. 4, which is substituted for repealed section.

c. 35, s. 40, p. 442, payment of active militia, rep. 25 Vic. c. 1, s. 6, which is substituted for repealed section.

c. 35, s. 48, p. 444, payment of officers, &c., rep. 25 Vic. c. 1, s. 7, which is substituted for repealed section.

Appointment of brigade majors, &c., 25 Vic. c. 1, s. 5.

On proof of performance of drill, active militia to be paid, 25 Vic. c. 1, s. 8.

Pay of militia called out for active service, 25 Vic. c. 1, s. 9.

Raising regiments in time of war, 25 Vic. c. 1, s. 10.

Drill Association, 25 Vic. c. 1, s. 11.

The five last mentioned sections are new enactments.

c. 40, s. 20, sub-s. 1, p. 527, unlicensed persons not to act as runners for steamboats, &c., rep. 25 Vic. c. 8, which is substituted for repealed section.

c. 45, s. 3, p. 558, Board of Steamboat Inspectors, to make certain regulations, &c., amended 23 Vic. c. 28, s. 1.

c. 45, s. 33, liability for damages sustained by the non-observance of this act, p. 566, vide 23 Vic. c. 28, s. 2.

c. 45, s. 34, penalty for contravention, p. 566, vide 23 Vic. c. 28, s. 2.

c. 45, s. 35, recovery and application of penalties, p. 566, vide 23 Vic. c. 28, s. 2.

c. 47, s. 10, p. 590, Inspectors of flour and meat at Quebec and Montreal to have assistants, amended 23 Vic. c. 26, s. 1.

c. 47, s. 17, p. 594, branding qualities of flour, rep. 23 Vic. c. 26, s. 2, and see grades there substituted.

c. 47, s. 18, p. 595, renewing samples, amended 23 Vic. c. 26, s. 3.

23 Vic. c. 26, s. 4, interpretation clause.

c. 51, s. 2, p. 630, appointment of inspectors of sole leather, rep. 24 Vic. c. 22, which is substituted for repealed section.

Con. Stat. C.

c. 54, s. 4, 5, 6, 7, 8, 9, 10, 12, 13, p. 644-5-6; 24 Vic. c. 23, s. 3, enacts that these sections have applied and shall apply to all Banks chartered before, during or after the sessions of 1859.

c. 54, s. 8, p. 645, Banks may take by indorsement bills of lading, &c., as collateral security for bills, &c., discounted by them, amended 24 Vic. c. 23, s. 1.

c. 54, s. 11, p. 646, Act to apply to Banks chartered in 1859, repealed by 24 Vic. c. 23, s. 3.

Advances on bills of lading to give a first lien on goods, by 24 Vic. c. 23, s. 2.

c. 56, s. 70, p. 679; so much of this section as limits the duration of 4 & 5 Vic. c. 32, rep. 24 Vic. c. 6, s. 5, which continues 4 & 5 Vic. c. 32, as regards Savings Banks, for five years from 18th May, 1861, and from thence until the end of the next ensuing session of the Provincial Parliament.

c. 58, p. 682, Insurance Companies, by 23 Vic. c. 34, may take 8 per cent.

c. 63, s. 1, p. 719, formation of Joint Stock Companies, amended 23 Vic. c. 30, s. 1, and 24 Vic. c. 19, s. 1, vide 23 Vic. c. 31, and 24 Vic. c. 20.

c. 63, s. 2, p. 720, how statement to be acknowledged, amended 24 Vic. c. 19, s. 2.

c. 63, p. 730, new section added by 23 Vic. c. 30, s. 2, and vide 23 Vic. c. 31, and 24 Vic. c. 20.

c. 64, p. 730, Mining Companies, vide 23 Vic. c. 31, and 24 Vic. c. 20.

c. 65, p. 732, Joint Stock Companies, Gas and Water; 23 Vic. 32, extends c. 65 to parish and township municipalities, vide 23 Vic. c. 31, and 24 Vic. c. 20.

c. 66, p. 748, Railway Act amended 23 Vic. c. 29, vide 23 Vic. c. 31, and 24 Vic. c. 17, 20.

c. 66, s. 11, sub-s. 1, p. 756, explained by 24 Vic. c. 17, s. 1, 2.

c. 66, s. 131, p. 784, one railway company may agree with another respecting traffic, amended 24 Vic. c. 17, s. 4.

When County Court judge interested in lands required for railroad, 23 Vic. c. 29, s. 10, 24 Vic. c. 17, s. 3.

Penalty on railway employees refusing to forward traffic, 24 Vic. c. 17, s. 5.

Interpretation of certain words, 24 Vic. c. 17, s. 6.

24 Vic. c. 17, to form part of Railroad Act, 24 Vic. c. 17, s. 7.

Interest of purchase money to be deemed part of railroad's working expenses, 24 Vic. c. 17, s. 8.

c. 67, p. 797, Electric Telegraph Companies, vide 23 Vic. c. 31, and 24 Vic. c. 20.

c. 68, p. 801, Joint Stock Companies, to facilitate the transmission of timber down rivers and streams, vide 23 Vic. c. 31, 24 Vic. c. 20.

c. 76, p. 860, practice of physic and surgery, and the study of anatomy, vide 24 Vic. c. 24, as to vaccination.

c. 77, s. 91, p. 882, plans of towns, &c., to be registered. vide 24 Vic. c. 49.

c. 80, p. 892, foreign judgments and decrees, vide 23 Vic. c.24,

c. 88, p. 940, fire inquests, by 23 Vic. c. 35, extended to country parts, and by 24 Vic. c. 33, amended as to Upper Canada.

c. 89, s. 1, 2, 3, p. 944-5, procedure in extradition matters, rep. 24 Vic. c. 6, s. 1.

c. 89, s. 1, p. 944, 24 Vic. c. 6, s. 2, substituted therefor.

c. 89, s. 2, p. 945, 24 Vic. c. 6, s. 3, substituted therefor.

c. 89, s. 3, p. 945, 24 Vic. c. 6, s. 4, substituted therefor.

c. 91, p. 952, offences against the person, vide 24 Vic. c. 8.

c. 91, s. 5, p. 953, poisoning with intent to murder, amended 24 Vic. c. 7.

c. 91, s. 13, p. 955, feloniously administering drugs, vide 24 Vic. c. 7.

c. 92, p. 961, offences against the person and property, vide 24 Vic. c. 8.

c. 92, s. 36, 37, p. 969-70, destroying trees, &c., vide 23 Vic. c. 37.

c. 93, s. 24, 25, p. 985, destroying trees, &c., vide 23 Vic. c.37.

c. 93, s. 28, p. 986, vide 25 Vic. c. 22, s. 2.

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c. 95, p. 993, lotteries, by 23 Vic. c. 36, c. 95, not to apply to bazaars for charitable purposes.

c. 99, s. 39, p. 1016, perjury, indictments in cases of, amended 24 Vic. c. 10.

c. 99, s. 40, p. 1016, subornation of perjury, indictments in cases of, amended 24 Vic. c. 10.

c. 99, s 60, p. 1022, obtaining money, &c., under false pretences, vide 24 Vic. c. 10.

c. 99, s. 91, 92, p. 1029, recording sentence of death, effect of, rep. 24 Vic. c. 9.

As to indictments for the following offences—conspiracy, keeping a gambling house, keeping a disorderly house, and any indecent assault—vide 24 Vic. c. 10.

c. 102, s. 54, p. 1055, in U.C. County Court Judge may order person committed for trial to be bailed, rep. 24 Vic. c. 15, s. 1, s. 2 substituted for s. 54.

c. 103, p. 1083, Justices of the Peace out of Sessions in re summary convictions, vide 23 Vic. c. 14, s. 3.

c. 107, p. 1155, prisons for young offenders, vide 23 Vic. c. 22, s. 2, as to Penetanguishene.

c. 108, s. 6, p. 1159, provision as to Criminal Lunatic Asylums, rep. 24 Vic. c. 13, s. 1, and vide s. 3 substituted for s. 6.

c. 109, p. 1159, confinement of dangerous Lunatics, vide 24 Vic. c. 13, s. 2.

c. 110, s. 4, p. 1164, absence of Chairman of Jail and Prison Board, &c., rep. 24 Vic. c. 11, s. 1, s. 2 substituted for s. 4.

c. 110, s. 11, sub-s. 1, p. 1167, Inspectors to visit prison at least four times a year, rep. 24 Vic. c. 11, s. 1, s. 3 substituted for s. 11, sub-s. 1.

c. 110, s. 11, sub-s. 3, p. 1168, to keep minutes of their visits, rep. 24 Vic. c. 11, s. 1, s. 4 substituted for s. 11, sub-s. 3.

c. 110, s. 11, sub-s. 10, p. 1169, Inspectors to report annually, amended 24 Vic. c. 11, s. 6.

c. 110, s. 25, p. 1175, Inspectors to keep a record of proceedings and transmit to the Governor, rep. 24 Vic. c. 11, s. 1, s. 5 substituted for s. 25.

c. 110, s. 32, p. 1176, Inspectors to report annually, amended 24 Vic. c. 11, s. 6.

Words "Board" "Inspectors" to mean a quorum of the same, 24 Vic. c. 11, s. 7.

c. 111, s. 46, sub-s. 1, p. 1191, salaries of Inspectors, rep. 24 Vic. c. 12.

c. 111, s. 73, p. 1199, treatment of military convicts, rep. 24 Vic. c. 12.

c. 111, s. 74, p. 1199, treatment of insane convicts, rep. 24 Vic. c. 12.

7 Vic. c. 10, 9 Vic. c. 30, 12 Vic. c. 18, 13 & 14 Vic. c. 20, continued by 25 Vic. c. 9, to 1st January, 1863, and thence until the end of the then next ensuing session of the Provincial Parliament, vide 23 Vic. c. 14, s. 2, 24 Vic. c. 5, s. 2, vide s. 3, saving clause.

Defects in the registration of titles in the county of Hastings, continued by 25 Vic. c. 9, s. 4, to 1st January, 1863, and thence until the end of the then next ensuing session of the Provincial Parliament, vide 23 Vic. c. 14, s. 5, 24 Vic. c. 9, s. 4, vide s. 3, saving clause.

SELECTIONS.

CRIME AND CRIMINALS.

BY ALEXANDER PULLING, ESQUIRE, OF THE INNER TEMPLE, BARRISTER-AT-LAW.

The daring atrocities recently perpetrated in the open streets of London, have had the effect of forcing on public attention the very serious social question of the best mode of dealing with our criminals. Able writers in the public journals, experienced officials, and intelligent reformers, have given us their various views on the subject of transportation, penal servitude, prison discipline, and tickets-of-leave. And we have

had described to us, in startling colours, the 'Guilt Gardens' where crime is suffered to grow, in spite of the weeding of the police, and the missionaries of religion and humanity.

There appears to be an almost unanimous feeling that our present provisions for checking the growth of crime, for dealing out justice to malefactors, and protecting the community from their outrages, are defective; we see crime systematically carried on, and the gardens of guilt flourish under the immediate surveillance of the police, and hardened offenders let loose on society, through defective provisions for keeping them under restraint. The Government, moved by the pressure from without, has instituted a formal enquiry, but in spite of all that has been said or written, we have as yet no practical suggestions for legislative interference.

Our known criminal population at this day living in unconstrained liberty, constitutes a large and formidable body, amounting, according to the last police return, to upwards of 123,000 individuals,* having for their known haunts upwards of 24,000 houses, dens of infamy where crime is systematically encouraged, and the criminal sheltered and protected. The known criminals suffered to be at large out-number twelve times the convicts in actual custody, and six times the whole constabulary force of the kingdom. They swarm in our principal towns, with varying force in proportion to the ordinary population; and, as might be expected, are in the greatest numbers in London, where the criminals at large are upwards of 21,000 strong, living in or frequenting (as we are told) 2,755 houses of evil fame, disreputable beer and spirit shops, coffee-houses, brothels, tramps' lodging-houses, and other places of a similar character.

The 'Thieves' Quarter' is in most places a distinct district. It often includes whole streets, occupied by criminals, or these who are in league with them, or directly derive their support from them; and the rents and profits of these sinks of iniquity, where do they go to? The depredations on the public have been variously estimated at from £700,000 to a million sterling per annum. We may conjecture how much of this goes to the receiver of stolen goods; and, looking at the high rents which are always charged for the abodes of infamy, how much finds its way in the shape of rent to the lodging-house keeper, and to his immediate landlord, and to the actual owners of property so polluted? Those who have made the haunts of vice their study, tell us that the actual perpetrator of crime is proverbially improvident. He squanders his ill-gotten spoil almost as soon as he acquires it. His existence is one of continual venture: riot and revelling to-day —sickness, want, and misery the next. The community of criminals, however, hold fast by one another. The thief, when business is slack, can obtain credit from those who thrive by his misdeeds. The trade of thieving, like other trades, to be successfully carried on, requires the aid of the CAPITALIST. Without the ready money, which the receiver of stolen goods instantly supplies, and those dens where the criminal is harboured, the felon's vocation would be impracticable. Is it not within our power to suppress both the one and the other? The principle is incontrovertible, that *whatever is gained by, or used for the purpose of, contravening the law, should by the law be forfeited.* Bring this home to the case of the receiver of stolen goods, and the owners of places used as the *cover* for criminals, and robbery as a trade would cease of itself.

It may be assumed that the certain prospect of a pecuniary loss—even of simply having to restore what has been dishonestly obtained—would be far more effectual to check the criminal than the risk of any superadded personal suffering. The imagination, indeed, soon accustoms itself to mere risks, however serious, if there is an adequate inducement to incur them. Few of us are deterred by the prospect of possible mischance, from pursuing our ordinary callings by sea or land, in peace or war; and the *inevitable risk* of instant death, or of personal injury, loses its terror when it has been often incurred. None but the insane, or the predetermined martyr, however, rush on *certain* injury or loss.

The criminal, whose whole life has been one of venture, is in like manner influenced little by the terror of possible punishment; but let the prospect of failing in his enterprise, or suffering from what he is about to do, be certain and immediate, and the mere brute instinct of self-preservation will restrain him. When we look back to the curious varieties of punishment which have from time to time been devised with the view of deterring from crime, and consider how ineffectual they all of them were, from the pecuniary mulct of our Saxon ancestors, to the remorseless sentence of death which our grandfathers indiscriminately adhered to, is it not beyond a doubt that crime cannot be suppressed by a mere revision of the law affecting personal punishments? We may go a step farther, and say that the felon's calling can only be put an end to by making each venture inevitably unprofitable and impracticable. The odious slave trade survived the penal laws which were designed to repress it, and only died away when, with the progress of civilisation, the property in slaves was abolished, and the hideous slave traffic became a profitless venture. The smuggler, too, in days gone by, was deterred by no mere penal laws; but when, by judicious legislation, the contraband trade is come to be, on the whole, an unprofitable one, the old class of smugglers, who dared every danger with the chance of gain, have abandoned their calling in despair. Is it impossible to beat the robber in like manner out of the field, by diminishing the temptation and increasing the difficulty of his calling, to obstruct and prevent the offender in the career of evil, and to destroy the market for his produce; to substitute greater certainty of punishment and loss, for the mere risk which is now incurred; to make the criminal's career, not only as distasteful as possible, but one of certain failure—leaving only for the perpetration of crime those marked with the brand of incorrigible felon, operating, like that of incurable lunatic, as a forfeiture of all the privileges of a rational being?

If we look to the existing state of the law with regard to confiscation as the result of crime, we are bound to see that the principle aimed at is most inadequately carried out;—that the bankruptcy laws and revenue laws are more severe and certain against defaulters and those who deal with them, than that part of our code which aims at the repression of felony. Felony, by the common law, operates *de facto* as a forfeiture of all the convict's rights and property; but as the legal operation of the forfeiture dates only from the conviction, and not from the time of the offence, the just consequences of the crime are almost always evaded. The habitual receiver of stolen goods, the man who has grown rich by crime, never omits on the very eve of an inevitable conviction to make an assignment of all his property, so as effectually to insure its full enjoyment on his own release from prison, or its continued employment in its wonted course—the trade of crime. The Court of Common Pleas, a few years ago, was forced to decide that such an assignment was valid, though made after the commencement of the assizes, and of the very date of the record of the conviction, but before the day on which sentence was passed. It is true, that if actual fraud in the making the assignment were proved, this would invalidate it; but the act of assigning in contemplation of a conviction is not deemed illegal, and such assignments are rarely, if ever, defeated. The bankruptcy messenger can seize all the bankrupt's estate and effects which he possessed when he made the first default; but the estate and effects of the felon escape the grasp of the law which he has outraged.

* Though the formal returns show in these figures an apparant decrease in the numbers, as compared with preceding years, this unfortunately is accounted for merely by an error in the returns—the larger number returned three years ago as known criminals, including all those who *had ever been convicted*, whether proved to be relapsing into crime or not; while the returns now made only include those known to be living by crime.

Can there be any doubt of the justice of a provision which should make a conviction for felony operate as an absolute confiscation of all the property belonging to, or in the order or disposition of, the felon at the time of his offence; except, of course, as against *bonâ fide* purchasers for value without notice? This would, no doubt, sometimes fall as an unexpected blow on innocent persons dependent upon the felon's support; but the same misfortune happens in unexpected bankruptcies; and the apprehension of forfeiture would operate very beneficially in deterring from crime or from having dealings with suspected criminals. Such a provision would certainly go farther to destroy the business of receivers of stolen goods, than any amount of personal punishment that might be devised.

Again, when a vessel has been found to be engaged in a smuggling adventure, our revenue laws absolutely confiscate both ship, cargo, and stores, though the owners may have been really innocent of the illegal use to which their property had been applied—but the property in the felon's den, with the insignia of crime all round, is protected by the law. Every person interested in such property may be fixed with a guilty knowledge of the nefarious purpose for which it is used—every shilling received in the shape of rent may carry with it proof of the polluted source from which it came, and yet the law allows the property to continue, and bids the nuisance go on and prosper. Would the doctrines of our Constitution, or the principles of right and wrong, be violated if such property were *de facto* confiscated; if all houses where crime was habitually carried on, and known criminals harboured, were by law to become forfeited to the State, subject only to the *bonâ fide* rights and interests of those who had no notice?

The receiving houses for known criminals, indeed all houses of ill repute, it is notorious, bring in the most rent, and the least amount of losses from bad debts, or expenses of repairs, &c. They are owned, for the most part, if not by actual criminals, at all events by those who, having full power to suppress the evil, gain a shameful profit by its continuance. In some cases, no doubt, there are to be found among the many who have freehold, leasehold, legal or equitable interests in such property, persons who though, in the present state of the law, hesitating to take the initiative in attempting to prevent their property being applied to such nefarious uses, would hail with satisfaction any legal provision which would necessitate their getting rid of their infamous tenants; but these innocent possessors of income derived from such polluted sources form the exception, which any contemplated change in the law could easily provide for.

The remedy which seems most reasonable for getting rid of such decided social nuisances as the dens of iniquity already referred to, is, that every place proved to be the resort of known criminals of any class, or where any unlawful vocation is carried on, should *de facto* be forfeited; the proceedings for enforcing such forfeiture to be taken by the person next entitled to enter as landlord, if not conniving at such illegal use of the property, and on his default, by the Attorney-General; but in the latter case, all persons having any leasehold or freehold interests in the ill-omened property, and not proved to have had notice of the purpose for which it was applied, should be entitled to have such property restored, according to their several interests therein, on paying the expenses of the proceedings which had been rendered necessary by the illegal use of the same. In any provisions for carrying these suggestions into effect, ample power should be conferred for compelling those immediately entitled to take advantage of the forfeiture, to do so at once; and in default of proceedings by the various mesne landlords, and the owner of the freehold, the forfeiture should *prima facie* be to the Crown; so that every person in succession having any interest in property so applied to illegal purposes might have the power and inducement, as well as the obligation, to suppress the nuisance. The robber's nest cannot be now made in the clefts of rocks or subterranean caverns. Destroy the Thieves' Quarter, and the known criminal would be deprived of what is really essential to the carrying on the trade of robbery.

It remains to say a few words on the subject of personal control over the known criminal, and of his arrest, conviction, and personal punishment. In the case of persons who have been once convicted of felony, it can hardly be held an infringement of our general principles affecting the liberty of the subject, if the law imposed on the discharged convict, some liability to guarantee society against his relapse into crime, as a necessary protection for the rest of the community.

If an irascible person threatens violence to his neighbour, the law requires him to find sureties to keep the peace towards all Her Majesty's subjects, and he is liable to be imprisoned if he cannot find security, or afterwards offend. The known associate of thieves, however; the offender who has been a dozen times convicted, and who disclaims all attempts to gain an honest livelihood; bent on corrupting all who join him, and ever on the look out for the opportunity to plunder and rob; is, according to our present system, never called on to find security for his good behaviour. The danger to society is surely greater from an incorrigible criminal than from a man actuated by momentary passion, or a convict so far reformed as to obtain a ticket of leave.

Now to afford greater protection to the community against the criminal at large, would it not be better to provide that every conviction for felony should *de facto* operate as a recognizance on the part of the convict to be of good behaviour for a time to be named in the sentence? the recognizance to be forfeited on proof, to the satisfaction of a police magistrate, either of the convict leading a dishonest life, or not honestly endeavouring to maintain himself. All defaulters in this respect to be remitted to prison, unless some responsible sureties be found for their good behaviour.

As a further protection from the atrocities we have recently heard so much of, would it not be as well to increase the power of the police against persons reasonably suspected of felonious intentions? The Act 13 & 14 Vict. c. 10, makes it an offence to *go by night time* armed with offensive weapons or instruments with intent to commit a burglary, or having possession of housebreaking implements in the night time without reasonable excuse.

Would it not be wise to carry out this principle, and make it an offence for any suspected criminal to be found *at any time* in possession of dangerous or offensive instruments without lawful excuse; the liability to be treated as a suspected person to attach to all persons who have ever been convicted of felony or are the known associates of criminals?

At the present time there is too often a failure of justice in adjudicating on the convict, in consequence of defects in the evidence of a previous conviction, or of deficient information as to the circumstances under which the conviction took place, or of the real character of the offender.

As a remedy for this, why should there not be a Register kept of all persons who have been previously convicted? In this Register might be entered the name, age, and description of the convict, his adopted *alias* or *soubriquet*, a note of his conduct while in custody, his previous character and education, trade or vocation, his ordinary places of abode or resort, and such other particulars as might be necessary to establish the identity of the convict, and guide the judge or magistrate in discharging his duty.

To facilitate the formation of such a Register, all necessary information, as far as it can be obtained, should, in the case of persons accused of felony, be duly noted by the police officer having charge of the case; and all particulars should be furnished to the judge or magistrate presiding at the trial; and on the trial for any offence committed after a previous conviction, a note of these particulars should be annexed to the record of such conviction.

With regard to the much vexed question of tickets-of-leave, it is hardly to be denied that the indulgence shown after a judicial sentence deliberately passed, is, to a certain extent, a cancellation of that sentence in a manner not adequately provided for by the law; the indulgence being given for good conduct whilst under restraint, and not always justified by the offender's conduct when at large. The gaol chaplain, or the *dilletante* felon-tamer, may be deceived. The lunatic under the immediate eye of his keeper may be harmless, but very unfit to be discharged from all restraint. The tigers that tamely let Van Amburgh play his experiments upon them, would be very awkward animals to meet at night on the high road. To encourage good conduct in the prisoner, without diminishing the efficacy of his sentence—to hold out to the convict an immediate inducement to reform, and at the same time to prevent errors or abuses in the system of interfering with the authority of our judges—would it not be well to provide, that no ticket-of-leave, except in the case of urgent necessity from illness, &c., be granted *without the express sanction of the judge or magistrate who passed the sentence*, or in case of his death, by some other judge? All persons released on tickets-of-leave to be required to present themselves at stated times before a police-magistrate and to have their ticket-of-leave indorsed, so as to show what their conduct has been since it was granted.

With such additional restrictions on the criminal pursuing his infamous career, we might give more positive aid to the reformed or penitent offender.

Could it not with advantage be provided, that a convict, whether on ticket-of-leave or discharge, striving to gain an honest livelihood, should have more effectual protection from the police against maltreatment from his former associates or others; and on giving proof to the satisfaction of a police-magistrate of one year's good character, be entitled to have a formal certificate thereof, and an entry of the fact made against his name, on the Register of Convicts?

If any regulations made to carry out these suggestions were followed by more judicious rules for the profitable employment of prisoners, and enabling them on their discharge to support themselves by honest labour, or to emigrate, and by more care on the part of our local authorities for the healthiness and comfort of the dwellings of the poor, our criminal population would be very materially diminished, and the amendment of the offender, instead of being a mere *make-believe* to delude the unwary, would be permanent and real; the growth of crime would be effectually checked, and the criminal offender more often converted into the useful citizen.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page 98.*)

UNIFORMITY OF PROCEDURE IN THE DIVISION COURTS.

We continue this subject from last number.

We believe that much misapprehension exists as to the true objects of the Judgment Summons Clauses; and yet they seem plain enough; and if the provision was rightly and discreetly administered, would not be faulted by the fair creditor or upright debtor.

The subject of the enactment was briefly, and, we think, well put some years ago by Judge Gowan, in a published address. The learned judge—after expressing an opinion that the (then) new provision would be a great blow to fraudulent practices by debtors, and, in some measure, check the disposition common with imprudent persons to incur debts recklessly, and without any reasonable prospect of being able to discharge them afterwards—goes on to say:—"The powers given are for the discovery of the property withheld or concealed, and for the enforcement of such satisfaction as the debtor may be able to give, and for the punishment of fraud. This last is by no means to be understood as imprisonment for the debt due. Under the statute a debtor cannot be imprisoned at the pleasure of the creditor merely, without public examination by the court, to ascertain if grounds for it exist in the deceitfulness, extravagance or fraud of a debtor. The man willing to give up his property to his creditors, ready to submit his affairs to inspection, and who has acted honestly in a transaction, although he may be unable to meet his engagements, has nothing to fear from the operation of the law. It is the party who has been guilty of fraud in contracting the debt, or by not afterwards applying the means in his power towards liquidating it, or in secreting or covering his effects from his creditors, upon whom the law looks as a criminal, and surrounds with danger."

Perhaps one of the most important powers is that which relates to the discovery of property withheld or concealed. The creditor's object is to get his money—to secure the fruit of his judgment; and the power is rarely brought into motion with a view of merely punishing a debtor. The examination of the debtor is sometimes the easiest, and it is often the only method by which a creditor can tear away the veil of fraud from dishonest contrivances to cover property; and any one at all acquainted with the business of the division courts will know that a man against whom executions upon executions have been returned "no goods" is often proved out of his own lips to have ample means, or to have property in the name of another person, or to have debts or promissory notes due to him amply sufficient to meet all his engagements; and many a time within the writer's own knowledge, have men paid claims, sometimes at the last moment, from a well-supplied purse, rather than submit to an examination. It is easy to understand that a dishonest person may be able to deal with his property so that a bailiff would have no alternative but to return "no goods" to an execution against him; and a man with $1,000 in good notes in his pocket may laugh at a *fi. fa.*; but put this man under examination, and the truth, or a portion of it, will come out, and payment, or punishment for refusing, will be the appropriate result. From these

considerations it is obvious that a dishonest man who has means, but no inclination to pay his debts, will most anxiously desire to escape an examination. And, therefore, the law properly provides that should he neglect or refuse to appear he is to be punished, not, strictly speaking, as for a contempt, but non-appearance goes to show the high probability that some fact exists the telling of which would speak against him or benefit his creditors. Section 165 provides clearly enough for the cases under which a judgment debtor after summons may be committed, and that under five distinct heads. The first three relate to the personal conduct of the debtor after summons served on him.

1. If the debtor does not attend the summons as required, or allege a sufficient reason for not attending.

2. If he refuses to be sworn, or to give a full statement of his transactions and affairs; or,

3. If he does not make answer to the same to the satisfaction of the judge.

The judge may order him to be committed.

The last two grounds are—

4. If it appear to the judge either by examination *of the party* or *by the evidence*,

(*a*) That the party obtained credit from the plaintiff, or incurred the debt or liability under false pretences; or,

(*b*) By means of fraud or breach of trust; or,

(*c*) That he wilfully contracted the debt or liability without having at the time a reasonable expectation of being able to pay or satisfy the same; or,

(*d*) Has made, or caused to be made, any gift, delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors, or any of them; or

5. If it appears to the satisfaction of the judge that the party had, when summoned, or, since the judgment was obtained against him, has had sufficient means and ability to pay the debt, &c., and refused to pay, &c.

Then, and in any such case, the judge may, if he thinks fit—*i. e.*, in the exercise of a sound discretion—under the circumstances make an order to commit the party to the common gaol for a period which must not exceed forty days; but by section 169 he may obtain his discharge at any time upon satisfying the demands against him.

Now it is quite impossible to do justice to the parties or to carry out the law without a special examination into each particular case, and the judge who, as our correspondent states, "summarily disposed of a great number of judgment summonses by one order applicable to the whole batch, without hearing one word of evidence," displayed great ignorance or gross indifference as to his duties.

Our correspondent remarks further that "the benefit of the judgment summons clauses are practically denied in another county, because the judge has ordered the clerks of all his courts not to issue judgment summonses, unless conduct money is deposited for the judgment debtor, the same as if he were a witness, a thing never thought of in the superior courts."

We do not think the judge was acting with authority in giving the order stated, but we are by no means prepared to say that he might not under certain circumstances decline to make an order to commit for default of appearance, unless it was shewn to him that an indigent debtor residing at a distance from a court was furnished with conduct money. Our correspondent is wrong in saying it is "a thing never thought of in the superior courts," for several of the judges will not grant an order to commit unless there is some proof that the defendant has had conduct money paid him.

We must reserve further comment on this subject till next number.

CORRESPONDENCE.

New Trial on Interpleader.

TO THE EDITOR OF THE LAW JOURNAL.

GENTLEMEN,—The Common Pleas have recently decided, in *Mulligan* v. *Cook et al*, that a new trial in interpleader matters cannot be granted in a Division Court. I have always been of opinion that such power did exist, under the 107th section of the Consolidated Division Courts Acts. A similar decision, in *Regina* v. *Doty*, took place before the passing of the Consolidated Act. The impression gains ground that the recent decision virtually says, No new trial can be granted in the Division Courts. No mention is made of new trials, except in 107th section. I have failed to discover that any distinction is there made. The words are general, and confined to no particular class of cases.

Yours, &c., R. WILLIAMS,
Div. No. 1, *Co. Perth.*

Stratford, April 7, 1863.

[We agree on all points with our correspondent. The right of new trial in interpleader matters is more important than in ordinary cases; but the decisions referred to seem to run the other way, and of course they must govern in the Division Court. Should Mr. M. C. Cameron's bill pass, the latter clauses of his bill will do much to prevent the evils that would arise from want of the new-trial power, and we hope these clauses may pass. The first clauses, as to altering Divisions, are most objectionable, and would be sure to produce constant changes in Divisions, and unseemly efforts to serve selfish ends. No arrangement would be stable with such a provision, —EDS. L. J.]

MALAHIDE, April 11, 1856.

By-law—School Rate—Preliminaries.

To the Editors of the Law Journal.

GENTLEMEN,—A question involving the right of the judge of a Division Court, in the face of a municipal by-law imposing a school section rate, to try the validity of the preliminary proceedings of the school trustees, upon which the by-law was founded, having occurred in this neighbourhood, and conflicting opinions by legal gentlemen having been given on the subject, I take the liberty of submitting the matter to you.

The trustees of a union school section made a written application, under their corporate seal, to the Municipal Council, to levy and collect on the rate-payers in that part of said section lying within said municipality a certain amount, to assist in defraying the necessary expenses of the school, under the 10th and 12th sub-sections of the 27th section of the Common School Act (Con. Stat. U. C., p. 734), but did not show the decision or proceedings of the school meeting, under the 4th sub-section of the 16th section of the Common School Act (Con. Stat. U. C., p. 730).

The Municipal Council, as required by the 34th section of the Common School Act (see Con. Stat. U. C., p. 738), impose the tax. One of the rate-payers is sued in the Division Court for the amount, who resists the tax and defends the suit, on the following grounds, viz.: that the trustees had no authority to impose the rate themselves, nor get the Council to do so for them, inasmuch as at the annual school meeting it was decided "that the school was to be maintained by rate bill on scholars," which, with the Government, municipal and other grants, would have been sufficient to have maintained the school without taxation.

But the school trustees give another version of this, and assert that the annual meeting was declared illegal by the local superintendent, and that at a subsequent meeting, called under his authority, the rate-payers decided to have a free school, and authorized trustees to levy the amount necessary to maintain said school on ratable property in the said section.

The collector's roll was produced to prove amount of tax, by-law to show that it was regularly imposed, and the written application of trustees, upon which they claim they were compelled to act.

It was contended that the court had no right to go behind these documents, and enquire into the action of the rate-payers at their school meetings, but, that the request of the trustees, the by-law, and collector's roll, are conclusive.

It was contended, on the other part, that the Municipal Corporation, before they passed their by-law, were bound to enquire into the action and decision of the school meeting. The case of *Haacke* v. *Marr*, 8 U. C. C. P., 441, is relied upon by both parties in support of their opinions.

Draper, C. J., says that "the condition precedent to the exercise of the power to pass a by-law to levy a rate for school purposes within the section, should have been set forth in *Haacke* v. *Marr*" (see p. 445); and on page 443 he says, "If that authority can only be exercised either upon request or with the concurrence or consent of other parties, then I apprehend that the party must show, not merely that the by-law was passed, but that it was passed upon such request, or with such concurrence or consent."

Now, the question in debate is: One party insists that the assent and proceedings of the school meeting, *besides the request of the trustees*, is necessary to be shown. The other party insist that the request of the trustees evidenced by their corporate seal was all that the Municipal Council required as the condition precedent to their passing the by-law, and levying the special school section rate.

Your views in your next publication on the subject, will oblige,

Yours truly,

A SUBSCRIBER.

[We insert the letter of our correspondent, but as the questions to which he adverts are now before a court of competent jurisdiction for ajudication, we must decline to interfere.]—EDS. L. J.

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* R. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

SAMUEL MCLENNAN QUI TAM. v. PETER B. BROWN.

Magistrate—Conviction by two—Return of—Immediate—Signatures.

In an action against a magistrate for neglecting to make an immediate return of a conviction had before him and another justice on the 25th of September, 1861, it was sworn that a return accompanied by the conviction itself was made by the witness for himself, and on behalf of the defendant on the 6th December, 1861, and signed in the defendant's name by the witness, as well as for himself, the defendant having authorised and requested him so to sign it. The judge at the trial left it to the jury as to whether the return was "immediate" as required by the statute, telling them that the word immediate should be construed to mean within a reasonable time. Upon a verdict for defendant, and a motion for new trial.

Held, that the fact was properly left to the jury to decide whether the return as made came within the definition of the word "immediate," and the decision of a jury upon a matter of fact in a penal action is final.

That although the statute requires the return to be made by the convicting justices under their hands, yet when one justice of two who convicted made the return, signing his own name and that of the other justice by his express authority, it was sufficient.

Quære, per *Draper*, C. J.—Whether the return in this case came within the term immediate under the statute.

Debt against defendant as a justice of the peace for not making an immediate return of a conviction of John McLennan, James Gilmour, Samuel McLennan, and Thomas Fallon, had before the defendant and Alexander McIntyre, Esq., two of the justices of the Peace for the United Counties of Huron and Bruce, on the 25th day of Sept, 1861. Plea, never indebted.

The case was tried in November, 1862, at Goderich, before the Chief Justice of Upper Canada.

The clerk of the peace proved he had no return of the conviction stated in the declaration such as the statute specifies, but he produced a conviction, corresponding with the declaration, which he received on the 6th December, 1861. He was applied to by the plaintiffs' attorney about the 9th of October, to search for this conviction. The quarter sessions next ensuing, the 25th September, 1861, began on Tuesday, the 10th of December, and a notice of appeal against the conviction was lodged on that day. When the appeal was called the clerk of the peace stated the conviction had not been returned. This mistake arose from the prosecutor's name not appearing on the paper returned. It was also proved that the complaint was made against the four parties named for stopping up a road in the 12th concession of Culross, which road was between two lots, one of which belonged to the father of the McLennans, and the other to one of the sons.

On the defence Alexander McIntyre was called. He was one of the convicting justices. He stated that he drew up in his own

handwriting a return of this conviction in the month of November. That this return together with the conviction that were mailed in one envelope about the middle of November, addressed to the clerk of the peace, and that he put the packet into the Teeswater post-office. The return was in compliance with the statute. It was not returned sooner in consequence of a notice served by the prosecutor, as follows:

"Culross, November 20, 1861.

"To John McLennan.—Take notice that I have abandoned and do hereby abandon the case instituted by me against you for stopping up the road allowance between lots Nos. 32 & 33, 12th concession, and for which you were convicted before Alexander McIntyre and P. B. Brown, Esquires, on the 25th September, 1861, and further take notice that I do not intend to prosecute said case or take any further action therein. Yours, &c.,

(Signed,) "RICHARD HALDENBY."

Mr. McIntyre further swore that no fine or costs were ever exacted from or paid by the parties convicted. That the return was made in his name and that of the defendant, who had authorised him to put his defendant's name to it, and to make the return. The signature to the notice was proved, and service of it on each of the parties was admitted.

The jury found for the defendant.

In Michaelmas Term Eccles Q. C., obtained a rule *nisi* to enter a verdict for the plaintiff pursuant to leave reserved, or for a new trial, the verdict being contrary to law and evidence and the charge of the learned judge, the evidence for the defence being insufficient to sustain the verdict, and for misdirection in not ruling as a matter of law that the return proved was not immediate.

C. Robinson shewed cause. No point was taken at the trial that the judge should not have left it to the jury to say whether the return was immediate. And in *qui tam.* actions the courts will not grant a new trial on a question like this, where the charge to the jury is not clearly against law. He referred to *Tenant* v. *Bell*, 9 Q. B. 684; Ball *qui tam.* Fraser, 18 U. C. Q. B. 100; *Hall* v. *Green*, 9 Exch. 247; *Gough* v. *Hardman*, 6 Jun. N. S. 402; *Murphy qui tam* v. *Harvey*, 9 U. C. C. P. 528; *Henderson* v. *Sherborne*, 2 M. & W. 236; *Rex* v. *Mackintosh*, 2 Old Series, 497.

Eccles, Q. C., supported the rule.

DRAPER, C. J.—I do not find that any leave was reserved to move to enter a verdict for the plaintiff. The rule appears to have inadvertently issued in that respect.

And the objection now urged as a misdirection, namely, that the learned Chief Justice left it to the jury to say whether the return was immediate, which word he told them meant, "within a reasonable period," instead of ruling it as a matter of law, was not taken at the trial, and we should not therefore permit it to be urged now. The case of *Tenant* v. *Bell*, 9 Q.B. 684, supports as far as it goes, the course adopted in leaving the question to the jury.

Then, upon the evidence, it was contended at the trial that the evidence by McIntyre did not prove a return made by this defendant as he had not signed it, and that objection is renewed now. The statute, though it requires that the return should be made by the convicting justices, does not in the enacting clause require it to be under their proper hands. The schedule of forms ends thus: "A. B. & C. D., convicting justices" (as the case may be). I am of opinion that so far as this objection extends, the evidence fully warrants the verdict. That if one justice of several who convict makes the return, and signs the name of the other convicting justices to it, by their direction or express authority, it is sufficient.

The last question is as to the finding that this return was "Immediate." I am not by any means prepared to say that the evidence proves an immediate return. To be safe from the penalty justices of the peace who join in a conviction should be far more prompt in sending the same, with a return as required, and in the form given by the schedule to the act. A reasonable time, a time to enable them to do it conveniently, and in proper order, they may safely take. They incur the risk of a jury finding against them if they take more. I concur in the manner in which this question was left, nor is it objected to for on this point the verdict is complained of as against the learned Chief Justice's charge. But the jury have found that the return was made, and that it was immediate. And in a penal action such as this is, their verdict on a question of fact properly left to them is final and conclusive if in favour of the defendant. The cases of *Hall* v. *Green* and *Gough* v. *Hardman*, cited by Mr. Robinson settle this point.

I think, therefore, this rule should be discharged.

Per cur.—Rule discharged.

SAMUEL MCLENNAN QUI TAM. v. ALEXANDER MC INTYRE.

Justice of the Peace—Conviction—Return—Penalty when more than two magistrates—Not joint—Evidence.

This action was similar to the preceding case by same plaintiff against the second of the two convicting magistrates who was the principal witness for the defence on the former trial. On the trial of this case the defendant offered to put in as evidence the record of the last action with the verdict endorsed thereon, the object of which appeared to be to shew the return of the conviction by himself, and so indirectly to make him a witness on his own behalf.

Held, that the penalty not being a joint one, as against the two magistrates, but several, each being individually liable for not making the proper return, the record and verdict in favour of defendant in the former case could not be evidence of a return made by the defendant in this case

Held, also that the transmission of the conviction itself is not sufficient without a return thereof by the convicting justice.

The pleadings in this case are the same as in *McLennan qui tam* v. *Brown*, and the issue was tried on the same day, and very shortly after the jury had rendered their verdict for the defendant in that case. The present defendant was the principal witness for the defence in the action against Brown, and with the exception of his testimony the facts proved in the two cases were precisely similar. The defendants counsel however offered to put in evidence the record in that case on which was endorsed the verdict rendered in favour of Brown. The learned Chief Justice refused to receive it. The defendants counsel objected to the charge, contending that the word "immediate" must be construed with reference to all the circumstances, and that if the return was made as soon as necessary, under the circumstances of the case, the jury should have been directed, that it was sufficient to satisfy the statute, and that the notice of appeal, and the notice of abandonment of the prosecution were circumstances to be considered, in determining whether the return was "immediate," and the return of the conviction itself, is a compliance with the statute.

The learned Chief justice was against the defendant on both points, stating as to the first, that, taking all the circumstances into account, he could not tell the jury that, in his opinion, the return was immediate, he left it to them on the evidence. They found for the plaintiff.

C. Robinson, in Michaelmas Term, obtained a *rule nisi* for a new trial, for the rejection of the evidence, of the record and endorsement of verdict thereon, and to stay proceedings on an affidavit which, however, only shewed the identity of the pleadings in the two actions, and that the jury had found in favour of the defendant.

Eccles, Q. C., shewed cause, contending that the whole object of the rule was to make the defendant a witness in his own case, which our statutes did not permit.

C. Robinson, in support of the rule, cited Taylor on Evidence, 1284-5, 1294 to 1299, and 1304 to 1308; *Pritchard* v. *Hitchcock*, 6 M. & Gr. 151.

DRAPER, C. J.—The right to use the verdict in the case against Brown was not rested on the ground that the plaintiff could only recover one penalty for the not returning the conviction in question, for it was not denied that the statute (Consol. Stat. U. C., ch. 124, sec. 2) subjects each justice of the peace, whose duty it is to make a return, to a penalty if he neglects so to do. Nor was it offered simply to prove that a trial had occurred before the court then sitting, in a *qui tam* action against Brown, or that a verdict had been rendered in his favor. If that had been all, I apprehend the record tendered would have been admissible. The object plainly was to offer it as some proof of a fact in dispute on the trial of this cause, namely, that this defendant had returned the conviction. But, in truth, it could not have been evidence of that fact, because it was wholly indifferent to Brown's liability or non-liability. If he (Brown) had made a return, he would not be liable, because the defendant had neglected, and *vice versa*. There was no question of joint liability for a joint omission. Each action was for a several liability for the individual neglect of each defendant.

I think, therefore, the learned Chief Justice rightly rejected it as affording no evidence, whatever, material to the issue which he was trying.

Then, as to the direction to the jury, I think that the question, whether the return was immediate, *i. e.*, within a reasonable time, cannot be effected by the notice of appeal, or subsequent notice of abandonment of the prosecution. The duty of the justice is wholly unconnected with such proceedings. If it were not, he might justify delay, on the ground that he was waiting to see if there would be an appeal, &c.

Lastly, I am unable to concur in the argument, that transmitting the conviction itself, is the same thing as making a return of it. First, the statute not only does not say so, but it says, to my apprehension, something different; and, second, the conviction will not convey any information as to the time when the penalty was paid, if paid, nor to whom it was paid over by the convicting justice or justices, nor if it had been paid, any explanation why. The preamble of the original act, if referred to affords reasons for holding the conviction, and the return of it, as separate instruments and for enforcing the information which the schedule, if properly drawn up, would give. I should be very glad if I could hold that this defendant had substantially complied with the statute, either in point of time, or by returning the conviction only; but I think the plain construction of the act is against him.

I think, therefore, the rule must be discharged.

Per cur.—Rule discharged.

ARMSTRONG v. BOWES ET AL.

Justice of the peace—Notice of action—Form of—attorney's place of abode—objection not taken at nisi prius cannot be moved upon in term—Judgment by default against one defendant—Nonsuit—Consol. Stat. U. C., ch. 126.

Held, that a notice of action given to a justice of the peace, under Consol Stat. U. C., ch. 126, in the following words: "To John G. Bowes, of the City of Toronto, Esquire.—I, Annie Armstrong, of the City of Toronto, in the Province of Canada, spinster, residing with my father, James Armstrong at No. 148 Duchess Street, in the said city of Toronto, &c." Signed by the plaintiff, and endorsed, C. P. Armstrong v. Bowes.—Notice of Annie Armstrong to John G. Bowes.—The within named Annie Armstrong resides at No. 148 Duchess Street, in the City of Toronto.—Cameron & McMichael, for plaintiff, did not conform to the provisions of the 10th section, not having the place of abode, or business of the attorney endorsed, nor the court in which the action was to be brought, stated. The objection that no notice of action was necessary, not having been taken at the trial, *held*, that it could not afterwards be raised in term.

Held, also, that judgment by default being signed against one defendant did not prevent a nonsuit being entered, on objections raised by another defendant.

(C. P., M. T., 26 Vic.)

Trespass, and false imprisonment. Plea, by statute, not guilty, referring in the margin to the Consolidated Statutes of Upper Canada, chapter 126, sections 1 to 20, Public Acts.

The trial took place at the fall assizes for York and Peel, before Morrison, J. A witness was called, who swore that, as one of the clerks of Messrs. Cameron & McMichael, he served a copy (or duplicate) of the notice of action, of which notice the original was put in. He also stated that he examined the copy served with the original, and also examined the endorsements and they were correct. He did this on behalf of the plaintiff's attorneys.

The notice commenced thus: "To John G. Bowes, of the City of Toronto, Esquire. I, Annie Armstrong, of the City of Toronto, of the Province of Canada, spinster, residing with my father, James Armstrong, at No. 148, Duchess Street, in the said City of Toronto, hereby," &c., and was signed by the plaintiff. It was thus endorsed: "C. P. Armstrong v. Bowes. Notice of Annie Armstrong to John G. Bowes. The within-named Annie Armstrong resides at No. 148, Duchess Street, in the City of Toronto. Cameron & McMichael for the plaintiff.

Evidence was given of the trespass, and at the close of the plaintiff's case, a nonsuit was moved for, on the ground that the notice of action was served by the attorney, and that the place of abode, &c., of the attorney was not endorsed. It was also noted, at the request of the defendant's counsel, that, according to the evidence, the plaintiff was only eighteen years' old. Leave was reserved to move for a nonsuit, on the objection to the notice, and the plaintiff had a verdict.

In Michaelmas Term, *J. H. Cameron, Q. C.*, obtained a *rule nisi* accordingly, on behalf of the defendant Bowes, or for a new trial, on the ground that the notice of action which was served on the defendant Bowes, by the attorney of the plaintiff, had not the name and place of abode of such attorney endorsed thereon before service thereof.

M. C. Cameron shewed cause, contending the notice was sufficient, but if not, the defendant, Bowes, was not, under the circumstances, entitled to a notice. He referred to *Morgan* v. *Leach*, 10 M. & W. 558; *DeGondouin* v. *Lewis*, 10 A. & E. 117; *James* v. *Saunders*, 10 Bing. 429; *Burns' Justice of the Peace*, title, Justices of the Peace; *Bross* v. *Huber* 15 U. C. Q. B. 625; *Holliwell* v. *Taylor*, 16 U. C. Q. B. 279.

J. H. Cameron, Q. C., in reply, urged that it was not disputed at the trial that the defendant, Bowes, was entitled to notice, and that it was clear the statute was not complied with. He cited *Roberts* v. *Williams*, 2 C. M. & R. 561, 5 Tyr. 583; and *Collins* v. *Hungerford*, 7 Irish C. L. N. S. 581.

DRAPER, C. J.—The 10th section of our statutes (ch. 126, Consol. Stat. U. C.) enacts that "no such action shall be commenced against any justice of the peace until one month, at least, after a notice, in writing, of the intended action has been delivered to him, or left for him at his usual place of abode, by the party intending to commence the action, or by his attorney or agent, in which notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and *upon the back thereof* shall be endorsed the name and place of abode of the party intending to sue, *and also*, the name and place of abode or of business of his attorney or agent, if the notice be served by such attorney or agent."

It appears to me impossible to hold that this notice complies with the statute, for though the name and place of abode of the plaintiff is endorsed, and also, the name of her attorneys, yet their place of abode or business is not endorsed, which is necessary, if their clerk, who proved the service, served it for them, and if he served it as an agent for the plaintiff, his name and place of abode or business should have been endorsed, but are not.

I agree that the objection, that the defendant was not entitled to notice, should have been raised at the trial, and not being taken there cannot be afterwards taken here. In *Bross* v. *Huber*, 15 U. C. Q. B 625, the learned Chief Justice expressed a similar opinion on this point. I should doubt, however, whether it could be properly held that a statement of the name and place of abode of the attorney, at the foot of the notice, and therefore, as I understand it, on the face of it, could be held a compliance with the act. It is true that in *Crooks* v. *Curry*, cited in 1 Tidd 28n., 8th edition, it is said to have been ruled to be sufficient; but in *Taylor* v. *Fenwick*, 3 B. & P. 553, note *a*, *Lord Mansfield* says, "in favour of Justices of the peace, the legislature has thought fit to prescribe a precise form; whether right or not it does not matter;" and in *Lovelace* v. *Curry*, 7 T. R. 685, Lawrence, *J.*, states, as the judgment of the court, in *Taylor* v. *Fenwick*, "The statute has prescribed a form which must be implicitly followed, and *it admits of no equivalent*. The statute was made to introduce a strictness of form in favour of Justices, and it must be observed literally."

Where one of two defendants allows judgment to go by default, as in this case, the plaintiff may be nonsuited. *Murphy* v. *Donlan*, 5 B. & C. 178; *Jones* v. *Gibson*, 5 B. & C. 768. In *Stuart* v. *Rogers*, 4 M. & W. 649, the court approved of *Murphy* v. *Donlan*, though Parke, B., appears to have thought that it might be different in an action of trespass. It would be better plaintiff should enter a *stet processus*, as was done in that case, or we may feel driven to grant a new trial.

Per cur.—Rule absolute.

CHANCERY.

(*Reported by* ALEXANDER GRANT, Esq., *Barrister-at-Law.*)

HODGINS v. MCNEIL.

Marriage with deceased wife's sister—Conflict of laws—Canon law.

Held, 1st. That the English Act 5 and 6 Wm IV., c. 54, declaring marriage with deceased wife's sister absolutely null and void, is not in force in Upper Canada, such marriages being governed by the law of England as introduced by the Upper Canada Constitutional Act, 31 Geo. III. c. 1.

2. That the words "canonical disqualification," used in several marriage acts of this Province, do not introduce the canon law to a greater extent than it had been previously introduced as part of the law of England.

3. That the law as laid down in *Brook* v. *Brook*, H. of Lds. 1, and *Fenton* v. *Livingstone*, 3 Macq. H. of Lds. 62, does not apply to Upper Canada.

This was an administration suit, in which the question of the right of the widow of the intestate to dower was contested, on the ground that her marriage with the intestate was void—she being his deceased wife's sister. It appeared that Hugh McNeil, the intestate, had in 1825 married one Eliza Hutchinson, that she died in 1849, and that in March 1860 he married Anne her sister, who now claimed to be entitled to dower.

The question raised was whether the English Act 5 & 6 Wm. IV. ch. 54, declaring "all marriages within the prohibited degrees of consanguinity or affinity absolutely null and void to all intents and purposes whatsoever," was in force in Upper Canada.

The Canadian Marriage Acts, 33 Geo. III., c. 5, containing the words "canonical disqualification;" 38 Geo. III. c. 4, "legal disqualification;" 11 Geo. IV. c. 36, "canonical disqualification" and "legal disqualification;" 18 Vic., c. 129, "canonical disqualification," and other Acts: and the following authorities, in addition to those mentioned in the judgment, were referred to by counsel: *Brook* v. *Brook*, 4 L. T. N.S. 93, and 7 Jur. N. S. 422; *Regina* v. *Roblin*, 21 U. C. Q. B., 352; *Goodhue* v. *Whitmore*, 7 U. C. L. J., 124; *McQuan* v. *Chadwick*, 11 Q. B., 173; *Middleton* v. *Crofts*, 2 Atk., 650.

Hodgins, plaintiff, in person.

Hector, for Mrs. McNeil.

Strong and *Fitzgerald*, for the infant defendants.

ESTEN, V. C.—Before 25 George 2nd, ch. 33, (the Marriage Act) clandestine marriages were illegal, although not void, and subjected the parties to ecclesiastical censure, *i.e.*, all marriages were required to be solemnized in *facie ecclesiæ* and by bonds or license, and, if a minor, by consent of parents; such marriages were rendered void by 26 Geo. III., ch. 33, which is generally in force here under the Constitutional Act, but probably not the eleventh clause, which makes such marriages void. They are, however, illegal, and in breach of the usual bond condition that no impediment exists.

The 33 Geo. III., ch. 5, was said by Mr. Hodgins to have introduced the canon law; but in fact the canon law, so far as it was part of the law of England, had been already introduced by the Constitutional Act. The 33 Geo. III., ch. 4, authorises Presbyterian, Lutheran, and Calvinist ministers to celebrate marriage between certain persons, provided they were not under any legal disqualification. It presupposes the ecclesiastical law in force and probably did not authorise those persons to marry a man to his wife's sister because an unlawful marriage. 11 Geo. IV., ch. 36, confirms marriages previously celebrated of persons "not under any canonical disqualification," authorizes ministers of certain denominations to solemnise marriage between persons "not under legal disqualification," Dwarris 526. "Acts amending acts in force in colonies are themselves in force."

This seems to apply to acts extended to the colonies by the parliament when passed, not when the colonies voluntarily adopt an act not originally in force there. *Livingstone* v. *Fenton*, 5 Jur. N. S., 1188.

The *lex loci rei sitæ* must govern in all questions of succession to real estate; therefore it was held in this case that the ancestor of the respondent, having married his wife's sister in England, the marriage not having been annulled in the lifetime of the parties, such a marriage being by the law of Scotland void, and the parties to is criminal, the respondent was to be deemed illegitimate in Scotland; and even if he should have been deemed legitimate, supposing the marriage valid in England, it was not so, but unlawful and voidable, although it could not be avoided after the death of either of the parties.

Such a marriage is void in England, but after the death of either of the parties, the temporal courts, which had no jurisdiction themselves, and which must regard every marriage *de facto*, as good until it is declared void by the ecclesiastical courts, and will not permit them to declare the marriage void after the death of one of the parties, where their sentence can have no effect on the marriage itself; it being already dissolved by death, and its only effect will be to bastardize the issue. The result is, that after the death of the parties, the marriage is valid and the issue legitimate *de facto* but not *de jure*.

I think the statute 5 & 6 Wm. IV., ch. 54, does not extend to this province, and therefore, that the marriage in question, which I assume to have been celebrated according to the law of England, as introduced into the province by the Provincial Act, 32 Geo III. ch. 1, has become by the death of one of the parties to it, indissoluble, and the children of such marriage have also become legitimate. My reasons are that the colonies are not mentioned in the act nor included by any necessary or even strong intendment; that the act is one of convenience and policy; that the law of England was not introduced into this province by the imperial legislature, but adopted by our own; that we have a local legislature competent to deal adequately with such matters; that the inconvenience intended to be remedied by the act 5 & 6 Wm. IV., ch. 54, is practically unfelt here; that such marriages are recognised as valid by many foreign systems, and that their being in violation of God's law, is, to say the least, extremely doubtful, although so declared by the statute law of England. No doubt the act of the 32nd of the late king introduced all the law of marriage as it existed in England at that date, excepting, perhaps, some clauses of the 26 Geo. II., ch. 33. It introduced the acts 25 Hy. VIII., ch. 22, 28 Hy. VIII., ch. 7, 28 Hy. VIII., ch. 16, and 32 Hy. VIII., ch. 38, so far as they remained in force, and so much of the canon law as had been adopted by the law of England.

The Provincial Statutes, cited by Mr. Hodgins, do not, I think, affect the question. They were passed to confirm certain void marriages, and to authorise the ministers of certain denominations of christians to solemnise matrimony. Both enactments contained the qualification that the marriages in question should have been or should be between persons under no legal or canonical disqualification, thereby meaning, no doubt, that they should not be disqualified to enter into the contract of marriage by the law as it stood: that is, by the law of England as introduced into this province, both statute law and canon, so far as adopted by the law of England. These statutes did not mean to introduce any new law, not already introduced into the province, nor is it necessary for Mr. Hodgins' argument that such an effect should be attributed to them. Its only effect would be to show that this marriage was unlawful and void, but, nevertheless, it must be recognised as a marriage *de facto* by the temporal courts until annulled by sentence of the ecclesiastical, which could only be done during the lifetime of both parties to it. But this is clearly the law of the province. It cannot be doubted that the marriage in question in this case was unlawful and void at the time of the celebration, and could have been annulled by the sentence of the ecclesiastical court at any time during the lifetime of both parties. But it is equally clear that, it never having been so annulled, has become indissoluble, and the children springing from it are for all practical purposes absolutely legitimate.

I therefore think this lady is entitled to her dower and thirds, and that her childhen are entitled to share the estate of the intestate with the children of the first marriage.

BLAIN v. TERRYBERRY.

Donatio mortis causa.

A testator having agreed to sell a portion of his real estate, had taken the note of his vendee for a sum of $900, being the amount of interest accrued due on the purchase money. This note, and the papers relating to the sale, the testator had been frequently heard to say he intended to give to his son, who was named as an executor of his will. Shortly before his death, and in anticipation of it, he directed the case containing the papers to be brought to him, and from amongst them directed certain notes to be selected, and delivered them to his wife for her own use; the rest of the papers, amongst which were the note for $900, and the papers relating to the sale, together with several notes and documents, including his will, the testator handed to his son, with a direction that if he recovered they were to be brought back; but in the event of his death then that he (the son) should keep them. *Held*, that this did not constitute a good *donatio mortis causa* of any of the securities.

The bill in this cause was filed by a legatee, under the will of her father, one William Terryberry, under which she was entitled to a legacy of £250, and also a share of his residuary estate which remained undisposed of, against Jacob Terryberry who was the acting executor under the will, and who claimed to be entitled to certain securities by virtue of a *donatio mortis causa*, alleged to have been made to him by the testator under the following circumstances, which appeared in the evidence taken in the cause. It appeared that the testator had sold an estate to one Cramer for £1250, and in the year 1847 an arrear of interest had accrued due

under the contract; and no part of the purchase money had ever been paid. On this occasion Cramer gave the testator his promissory note for the arrears of interest. In that year the testator, while labouring under a mortal disease, and about six weeks before his death, and in expectation of his decease, desired his wife to produce his papers, and from among these he directed Jacob Terryberry to select five notes, which he delivered to his wife for her own use; and the rest he directed Jacob to take home with him, and in the event of his recovering from the disease under which he was then labouring, to bring them back to him, but in the event of his death he directed Jacob to keep them, and as stated by Jacob in his evidence, as his own property. Under these circumstances Jacob claimed the security for the whole purchase money arising from the sale which had been effected to Cramer. On the other hand, the plaintiff alleged that the whole of this fund was to be accounted for by Jacob as part of the personal estate of the testator; the contract for sale remaining in force at the time of the death of the testator, the fruits of it became and formed part of the personal estate. It was shewn that Jacob had since re-sold the estate, in consequence of Cramer having abandoned the purchase, and had received the proceeds of the sale. Amongst the papers delivered to Jacob by the testator were his will and several other documents not connected in any way with the Cramer property.

The evidence shewing the donation to have been made was somewhat indefinite, none of the witnesses agreeing with the statements of Jacob Terryberry himself, that the testator directed him, in the event of the testator's illness terminating fatally, that he (Jacob) should keep the papers as his own property.

The effect of the evidence is fully stated in the judgment.

The cause came on originally to be heard before his Honor V. C. Esten, who disallowed the claim of Jacob Terryberry to any thing more than the note given by Cramer to cover the interest due on his purchase, and declared him entitled to the note for $900, as a *donatio mortis causa*. The claim of the widow to the notes delivered to her was not questioned by either party.

Jacob Terryberry being dissatisfied with the decree then pronounced, set the cause down to be re-heard before the full court.

On the cause coming on to be re-heard,

Blake and *Spohn* for the plaintiff.

Freeman for Jacob Terryberry.

For the plaintiff it was contended that the decree already pronounced should be varied in this, that it ought to declare the defendant not entitled to any portion of the Cramer purchase, whether principal or interest. As put by defendant, all the papers in the box were delivered to him for his own benefit, but he says only the Cramer notes were intended to pass. Now the box contained several other notes and securities, also the will of the testator, and no distinction is alleged even by defendant as to any one more than another being intended for him: being named in will as executor, he was the proper hand to deliver it to, and yet it cannot be contended for a moment that it was intended to be kept by Jacob as his own property.

For the defendant it was insisted that sufficient was shewn in the evidence to indicate an intention on the part of the testator to, give the Cramer papers, and all the benefits derivable under them to Jacob; the witnesses agree in this respect; and if after a lapse of so many years one witness has forgotten what another remembers, it is not a matter of surprise that it should be so. It is shewn that Jacob immediately after the death of the testator claimed this as a gift, and acted as the owner of it: in this the plaintiff has always acquiesced until after a lapse of fourteen years, when the present suit is instituted.

Ward v. *Turner*, 2 Ves. Sen., 431; *Walter* v. *Hodge*, 2 Swan. 92. The editorial article in 6 Jur. N. S. Pt. 2, 55; *Gardner* v. *Parker*, 3 Mad. 184; *Miller* v. *Miller*, 3 P. W. 356; *Lawson* v. *Lawson*, 1 P. W. 440; *Edwards* v. *Jones*, 1 M. & C. 226.

Vankoughnet, C.—I think the only thing wrong in this decree, and I regret to have to come to this conclusion, is the allowance to Jacob Terryberry as a *donatio mortis causa* of the note for $900 made by Cramer. I have a very strong belief that the testator intended that Jacob should have the moneys payable by Cramer as the purchase money of the land in question. As a layman he would not be likely to have any knowledge of the doctrine by which land sold is converted into personalty; and dying intestate as to this land, the legal title in which would descend to Jacob, as his heir, he would naturally think that Jacob having that title would not and could not be compelled to part with it till he had received the purchase money secured by the papers, which, with others, he some time before his death delivered to him under the circumstances detailed in the evidence. But it requires something more than conjecture or moral certainty of conviction to sustain a *donatio mortis causa*. Not that any peculiar rule of evidence distinguishes the case of such a gift from any other, but that when it is sought to be established, the evidence must be such as to satisfy the court of the fact; and the evidence in the present case does not. The testator had made his will, of which he had appointed Jacob one of the executors. He calls for the papers deposited in a particular place—the side board—in a room where he, his wife, and Jacob were. He speaks of the Cramer papers, being, as I understand the bond, for the purchase money, and the note for $900, for arrears of interest. He hands these with the other papers of which there were several, including his will, to Jacob, and says to him: "If I get well bring them back; if I die, keep them;" or, "they are yours," as Jacob says. Now it is not pretended by Jacob that the testator intended to give him anything more than the Cramer papers, and yet the words used by the testator, as quoted, would be, and were, as applicable to all the other papers as to the Cramer papers; and if the words be so applicable, then they are more properly treated as applicable to the position Jacob would hold as executor, than to any claim in his own right. We cannot apply the words for one purpose to the Cramer papers, and for another purpose to the others. Evidence there is of previous declarations by the testator of his intention that Jacob should have the moneys payable by Cramer, but there is no evidence that he so expressed himself subsequently to the delivery to him of the papers, and there was none such, as I have explained, at the time of that delivery. I do not think that the remark made by the testator that if Cramer paid in the spring $500 of the $900 note, Jacob, would be able to proceed with the building of his mill, sufficient to separate that note from the rest of the papers, at the time of their delivery, and so to allocate it to Jacob's use. No distinction was made by the testator as to any of the papers on delivering them to Jacob, and they were all to be brought back to him if he survived, and so far as evidence of his previously expressed intention could prevail, it was equally strong as to the principal money secured by the bond.

The decree so far as relates to the note for $900 will be varied in accordance with this expression of opinion.

Esten, V. C.—I think the evidence of Bennet, Mrs. Terryberry, Mrs. Reid, and Jacob Terryberry insufficient to prove the *donatio mortis causa*, unless the general expressions indicating an intention that Jacob should have the Cramer moneys, are sufficient to discriminate between the Cramer papers and the other papers, and to give the transaction a different character with regard to them respectively, but I think they are not. I think, therefore, that the decree should be varied to the extent of disallowing the claim of Jacob Terryberry to the note for $900.

Spragge, V. C.—I think the interview spoken of by Bennett must have been made before the interview or interviews spoken of by the other witnesses. Mrs. Terryberry and Jacob evidently speak of the same interview, and I think Mrs. Ried also. At that interview certain notes were taken out from a number of papers, and handed to and kept by Mrs. Terryberry, and other papers were handed to Jacob, and none of those handed to either were returned to the testator.

I think from the evidence that all the papers spoken of by Mrs. Terryberry as placed in the sideboard were handed to Jacob, and that among them was Cramer's bond; it is certain that the will was among those handed to him; and Mrs. Terryberry says, that besides the notes handed to her, there were a good many deeds and papers in the sideboard. I think, further, that all the papers handed to Jacob were handed to him with the same direction as to their custody; expecting, of course, the notes selected out of them for Mrs. Terryberry.

Jacob was named as an executor in the will, and it is obvious that the papers handed to him *might* have been handed to him in that character, and the inference would be that they were so. To

rebut that inference there is what took place at the interviews with Bennet, and what took place at the subsequent interview at which Mrs. Terryberry and Jacob, and I think Susan Reid, were present. What passed at the interviews with Bennet can go no further than evidence of an intention on the part of the testator to give some notes to his wife, and some papers, probably some evidence of Cramer's debt and the Cramer purchase money to Jacob. The papers spoken of by Bennet must in some way have got back into he cupboard, otherwise this dilemma must arise; either the papers then laid aside for Jacob were not the Cramer papers, or else the Cramer papers were not among those delivered to Jacob at the subsequent interview; for all those so delivered were brought from the cupboard. They were then, after the interview with Bennet, replaced in the cupboard, either for future disposition, or it might be urged in revocation of the testator's intention to give them to Jacob. At the most, what then took place is evidence of an intention to give, not then carried out.

Then at the second interview, what is there to rebut the presumption that the papers were delivered to Jacob as intended executor, and what in favour of that presumption? The direction given to Jacob by the testator in relation to the papers delivered to him, was, as stated by the wife, to take them home; and in case of his recovery, to bring them back; and in case of his death to keep them. The testator's direction, as stated by Jacob himself, differs from his mother's only in this, that in the event of his father's death they were his.

In relation to the Cramer debt is this, as stated by Mrs. Terryberry, "My husband told Jacob if Cramer paid the $500 he had better go on with the mill; and if not, he had better stop. $500 was mentioned because Cramer had said he was not prepared to pay any more: a great deal more was due." Jacob, himself, says nothing as to what his father said in relation to the Cramer debt; probably because the plaintiff did not think fit to ask him any question upon it.

I cannot reconcile the evidence of Mrs. Reid with that of Mrs. Terryberry and Jacob. According to her evidence the Cramer papers were selected from the other papers, and laid on the window seat, and the direction to Jacob was to take those papers home, and if he got well to bring them back. If this had been the case, Jacob could hardly have put the direction in a way so far less favourable to himself, as he did—he, as well as his mother, in narrating what passed, say nothing about separating the Cramer papers from the rest, though they do speak of separating the notes for Mrs. Terryberry, a circumstance which would naturally lead them to speak of the separation of the Cramer papers, if it occurred. Mrs. Ried must, I think, refer to the same interview as Mrs. Terryberry and Jacob, not to any interview spoken of by Bennet, though the placing of the papers in the window seat is a point of resemblance: but it is obvious from Bennet's evidence that Jacob was not present, and probably not Mrs. Terryberry either; and Mrs. Ried does not speak even of the presence of Bennet, whereas at the interview spoken of by himself he took a prominent part in what was done. If she speaks of any other interview before the one spoken of by Mrs. Terryberry and Jacob, it is immaterial for any other purpose than that spoken of by Bennet, and for the same reason; and there is no pretence of any subsequent interview: indeed it is impossible, for Mrs. Terryberry and Jacob both say that they kept the papers taken away by them respectively.

For these reasons I think the plaintiff's case must rest upon the evidence of Jacob Terryberry and Mrs. Terryberry. Jacob states the direction of the testator as to what he was to do with the papers more strongly for himself than does his mother; his mother saying that the direction was in the event of his father's death that Jacob should keep them; Jacob's version being, that in that event they were his.

I think we should take the mother's account as more reliable, even though there were nothing but the position of the parties to turn the scale. But what Jacob attributes to the testator, it is perfectly certain the testator could not mean, and cannot be supposed to have said; for it would involve the gift to him as his own property not only of the Cramer papers, but of the money, deeds, and papers, and of the will which were handed to him.

I think, then, we must take Mrs. Terryberry's account of what passed as the true one: that Jacob, in the event of the testator's death, was to keep the papers handed to him: the word "keep" being used in antithesis to what he was to do in another event, his father's recovery, to bring them back. Then in what sense was he to keep them? There are two reasons against its being understood that he was to keep them as his own, one, that the same direction was given to all; and it is certain he was not to keep all as his own; the other, that he was an executor named in the will, which was handed to him. In the other sense, that he was to receive and keep them as executor, the direction was sensible and proper, that in the event of the testator's death he was to keep all the papers handed to him, and this is in accordance with the inference, Jacob being named as executor, that the papers were handed to him in that character.

There is indeed very little to rebut that inference. One may speculate upon the probability that the testator may have been under the idea that inasmuch the land sold to Cramer, would, if unsold, have gone to Jacob as his heir-at-law, so as the legal estate still remained in him, his heir could take it as he himself held it, to convey upon receiving the purchase money; and this idea is countenanced by some of the expressions used by the testator.

But of evidence there is but little in favour of the *donatio* claimed by Jacob. There is the intention which we may gather from the interview with Bennet, and what Mrs. Terryberry speaks of in relation to the $500 to be paid by Cramer in the spring; and its enabling Jacob to proceed with the building of the mill. It would be assuming a good deal to infer from that, that Jacob was to have the whole of the Cramer purchase money, close upon $6000.

The decree pronounced proceeds upon this, that the money payable by Cramer was devisible, and that there was sufficient evidence to shew that the $900 note given for interest, and of which the $500 to be paid in the spring was a part, was so effectually given by the testator as to enable Jacob to claim it as a *donatio mortis causa*.

There is perhaps some room for this distinction. Jacob was certainly to be at liberty to apply the $500 to his own individual use at an early day. The testator may have meant certainly that Jacob should receive the $500 as executor, as well as receive other moneys as executor and apply the $500 to his own use, but that is not the ordinary import of the words, and besides he was not sole executor, and the money, if paid to a co-executor, might not reach the hands of Jacob at all, which it was certainly contemplated that it should do.

Then the note, of which the $500 was a part, was among the papers delivered. If given by itself, with the words used, I incline to think it would be a good donation as to the whole $900. Its being among others, ought not, perhaps, to make any difference, if the court could see with a reasonable degree of certainty that a distinction was to be made, for it would certainly be competent to the testator to say upon the delivery of these papers, "out of these papers you are in the event of my death to retain the $900 note to your own use." What was done and said was however materially different.

I am quite satisfied that Jacob can claim nothing, at all events, beyond the $900 note. To constitute a valid donation there must be sufficient words of gift, an act. I think that in this case there was neither. The words used do not necessarily imply a gift of any thing beyond the $900 note, if they go so far. Nor is there any act: for the delivery of papers not necessarily connected with the words used, and to an executor, is not necessarily or by inference a delivery by way of donation. My doubt is, not whether the whole of the Cramer purchase money passed, but whether any of it passed; for I cannot but feel the force of Lord Loughborough's language in *Tate* v. *Hibbert*, 2 Ves. Jur. 117; that however fair and honest a particular case may appear to be, "yet those cases are liable to the observations that have been made that to make a stretch to effect gifts made to persons surrounded by relations who give evidence for each other, would be attended with great inconvenience."

There is this observation applicable to the whole of this case, that the alleged gift accompanied the actual delivery of the will, in which, and by mere verbal gift, it ought properly to have found a place, so that the deceased is made to dispose of his property at

the same time partly by will, and partly by verbal disposition and delivery. This circumstance did not occur in any of the cases that I have seen, and is in my mind strongly against the claim set up by Jacob.

Upon the whole, my conclusion is, that Jacob's claim fails in *toto*. I should be glad to be able to support the decree sustaining his claim as to the $900 note; but I think the cases and the principles upon which they proceed do not warrant it.

THE BANK OF MONTREAL V. BAKER.

Registered judgment—Notice—Absconding Debtor.

Held, [affirming the decree reported 9 Grant, 95,] that whether the deed there mentioned as having been executed in blank, operated as a deed or as a mere parol agreement, it created a charge upon the equitable estate of the debtor; and that a registered judgment creditor having notice thereof before the registration of his judgment would be bound thereby.

Held, also, [affirming the decree,] that the *bona fides* of proceedings taken against a person as an absconding debtor with a view to obtaining a priority could be questioned in this court at the suit to a creditor or third party.

The facts of this case appear in 9 Grant, 95. After that decree had been pronounced, the defendants, the Commercial Bank, obtained a re-hearing of the cause. On the re-hearing

Strong, appeared for the plaintiffs.

Reaf, for the Commercial Bank.

A. Crooks and *Blake*, for the defendants Rigney and Brown.

VANKOUGHNET, C.—For the decision of this case I have not found it necessary to examine the ground upon which my brother Spragge rested his judgment in favour of the plaintiffs, as we are of opinion that irrespective of it the plaintiffs are entitled to priority and to a decree. Whether or not the instrument of the 25th of May, 1857, delivered by Lavis, as the agent of and under the instructions contained in the letter of Baker, from Halifax, operated as a deed or as a mere parol agreement, is in our judgment immaterial, because in either shape it constituted a charge upon the equitable estate of Baker in the premises; and if it required registration to give it priority over the legal proceedings adopted by the Commercial Bank to secure a preference to themselves over the plaintiffs, it was well registered before those proceedings were had; and if by reason of its being to be treated merely as a parol instrument it could not be registered, then we are of opinion that the registered judgment could not prevail against it, as in such case the registry acts as to it could have no application. *McMaster* v. *Phipps*, 5 Grant, 253, *Sumpter* v. *Cooper*, 2 B. & Ad. 223. It is, however, argued that by the deed poll executed by Baker on the 11th of October, 1857, this instrument of the 25th of May, which purported to be a mortgage, was converted into a deed, and so, as a parol contract, ceased to exist, and that thus being changed in its character, it required registration to give it effect against the judgment of the Commercial Bank registered a few days afterwards. The bill alleges that this deed-poll bill, which is called a deed of confirmation, was registered, but there is no evidence of this furnished. It is not in fact, and could not be, a deed of confirmation. Either the instrument of the 25th of May was a deed, or it was not. If it was, it required not, and could not receive as such, confirmation. If it was not, it was as a deed void, or rather no deed, and the deed-poll of October would have no other effect than by its reference and relation to it, executing it, and for the first time making it a deed.

But admitting that this instrument of May assumed the condition of a deed in October, still the charge which was created by it did not by that higher character which it assumed cease. It only received greater efficacy, and has never been destroyed or abandoned. I was much struck with the argument that if the instrument of May was a parol instrument, it was merged and swallowed up in the deed of October, but, on reflection I think this is not so, because the charge which that instrument created was not destroyed, but continued, enforced and enhanced in character by the deed. The case of *Sumpter* v. *Cooper*, already referred to shews this; there one of two joint purchasers of an estate having borrowed from the other his share of the purchase money, to effect the purchase, deposited with him the title deeds as security for re-payment, thus creating, upon his share, in favour of his co-purchaser an equitable mortgage. Subsequently he conveyed his moiety to his co-purchaser by deed, in discharge of this loan, and this instrument was capable of registration. After this he became bankrupt, and the assignment of his estate from the commissioners in bankruptcy was duly registered. The co-purchaser Cooper *after* the conveyance to him by the bankrupt received the whole rents of the property, and the assignees then sued him to recover the moiety. The plaintiffs were nonsuited, and the late Lord Campbell, as counsel for the plaintiffs, moved to set aside the nonsuit, taking as a principal ground, that the equitable mortgage created by the deposit of the title deeds was merged in the subsequent conveyance executed by the bankrupt, and that as this had not been registered it was cut out by the assignment to the assignees, which had been registered. After taking time to consider Lord Tenterden, delivering the judgment of the Court of Queen's Bench, refused a rule *nisi*.

I cannot admit that a judgment creditor has by virtue of the registration laws any higher position or rights than a purchaser for valuable consideration. What I think the legislature intended to do was to bind such interest as the defendant had at the time of, or acquired after, its registration, that he might not afterwards part with it; and but for the 3rd section of the act 13 & 14 Victoria, this would be sufficiently plain. That section, in its language, at all events, carries the effect of a registered judgment further, but while it associates registered judgments with registered conveyances, I can see nothing in it which indicates that the former are to have any better position or greater effect than the latter, and in the absence of express words declaring it, we should not give it. It is sufficiently hard to say that a creditor may sweep away that which the debtor does not own, but which honestly belongs to another, without extending the right so as to relieve a judgment creditor from the consequence of a notice which would affect the registered title of a purchaser for value.

While the act declares that registration shall be notice, it does not provide that notice of an unregistered conveyance shall not affect a registered conveyance or judgment; and we must take it that the legislature had knowledge of the doctrine of a court of equity on this head; and indeed they appear to have had it expressly under consideration, when they declared that registration should be notice. I am of opinion that a registered judgment is at least equally affected by notice with a registered conveyance, and that here the Commercial Bank, having had notice of the charge created by Baker in favour of the plaintiffs prior to the issuing of their writ against Baker as an absconding debtor, and certainly prior to its being placed in the hands of the sheriff, hold their registered judgment subject to it, *Leneve* v. *Leneve*, 2 White and Tudor Lead. cases, 23.

Then as to the proceedings against Baker as an absconding debtor, with a view to determining the respective positions and priority of the Commercial Bank, and of the defendants Rigney &]Brown: unless the Commercial Bank can sustain these proceedings, so that the judgment recovered by them against Baker can relate back to them, and thus gain priority over Rigney & Brown, it is admitted that the claim of the latter must prevail against that of the Bank. I am of opinion that the proceedings against Baker as an absconding debtor are wholly void or a nullity, because in the first place he never was an absconding debtor; and in the second place it is evident that the Commercial Bank abused the process of the court in treating him as such with the sole object of thereby gaining a priority, particularly over the plaintiffs. To say that a man can be made and dealt with and treated as an absconding debtor, contrary to the fact, and for the express purpose, fraudulent as it must be under such circumstances, of obtaining an undue advantage, without the process and proceedings thus had against him, being questionable by a third party, a creditor, because the plaintiffs to the process have procured its issue upon affidavits which have been made honestly or dishonestly in the belief of the party making them, would be monstrous, and contrary to all principles of justice. Such process might issue with or without the connivance of the debtor, and might be maintained by his subsequent assent or inaction; and are other parties having claims against him, or interested in his estate, because of this, to be without a remedy, and to be compelled to stand by and see his estate swept into the power of a particular creditor, under a state of facts which by law did not entitle him to it? Such proceedings could be undoubtedly questioned at law

in an independent action; the only remedy which a third party might have, as he would most probably not be heard on a motion to set aside the proceedings against the debtor; (and indeed it was admitted on the argument that he could not make such a motion;) and, if at law, so of course here.

The right to issue a commission in bankruptcy, and the title of assignees under it, may be always questioned, and is an analagous case. So the right of a prior execution creditor may be questioned in an action by a subsequent execution creditor, on the ground of fraud or otherwise; and in this court we must necessarily enquire into the circumstances under which impeached judgments are recovered when they are brought before us as incumbrances. Chapter 25 of the Consolidated Statutes of Upper Canada, in section 1, provides: "If any person resident in Upper Canada, indebted to any other person, departs from Upper Canada, with intent to defraud his creditors, and at the time of his so departing is possessed of, &c., he shall be deemed an absconding debtor;" and the marginal note to that section is in these words: "who to be regarded as an absconding debtor." Section 2 provides that process may issue upon affidavit: "that any such person so departing, &c." Baker never was an absconding debtor, and as his whole conduct before and on leaving, and on returning to the Province proved, never intended to abscond. He went to England to endeavour to raise money to pay his creditors here, as he apprised the Commercial Bank before-hand, and failing to get it, he honestly returned and faced his creditors.

The Commercial Bank, though they issued process against him as an absconding debtor, never in reality treated him as such—never acted against his personalty—never interfered with his business—(that I believe of miller and merchant)—which went on during his absence and on his return, as usual, and in fact they openly avowed and said that all they wanted was to obtain priority of charge upon his real estate. To uphold these proceedings under such circumstances would be making the court a party to a mockery, if not a fraud.

ESTEN, V. C.—I think there was a good equitable charge, and that the deed of confirmation did not supersede or impair the instrument of the 25th of May, 1857, which retains all the force it ever had; but I think that Baker was not an absconding debtor, and not therefore the object of a writ of attachment, and that the writ of attachment in this case was void, and conferred no priority on the Commercial Bank, who issued it, and that the validity of the writ may properly be questioned by third persons in collateral matters. I think, therefore, the plaintiffs are entitled to succeed on two grounds: first, that they had a good equitable charge not superseded or affected by the deed of confirmation to which the registry laws do not apply, and that on the ground of the invalidity of the attachment the defendants Rigney & Brown are also entitled to priority over the Commercial Bank. Even, however, if it should be held that the deed of confirmation superseded the instrument of the 25th of May, 1857, I think that this latter instrument should prevail over the judgment of the Commercial Bank, on the ground of notice had by them of the original instrument of the 25th of May, 1857.

I think it is very just and proper to apply the doctrine of notice to judgment creditors; the question must be in every case whether the registration of the judgment was with fraudulent intent. Here are two general creditors, one obtains an instrument which creates a specific lien in equity, and the other has express notice of it. Under these circumstances it would be a fraud, I think, for the latter to commence an action and register a judgment for the purpose of obtaining priority over the equitable lien; and although the instrument creating the equitable lien may have subsequently become merged with the deed of confirmation, which conferred a legal title, I think the fraud continued, and should postpone the judgment to the latter instrument. The action was commenced with a fraudulent intent, and prosecuted with that same intent, until the Commercial Bank had notice of the deed of confirmation, and did not thus, I think, become a fair proceeding, but retained its fraudulent character.

The action was commenced with a fraudulent intent; that is, the attachment was issued with such an intent, and although that particular intent was defeated, and although the instrument of the 25th of May, 1857, would not be affected by the registration of the judgment, yet fraudulent intent must be deemed to continue, should an opportunity occur of carrying it into effect, and such an opportunity did occur, when the deed of confirmation was made, absorbing the previous instrument, and duly capable of being registered; and that the suit must be deemed to have been prosecuted, and the judgment registered, with intent to gain priority over this deed, which intent must be deemed to be fraudulent. I think judgment should be postponed to the deed of confirmation, on the ground of fraud.

SPRAGGE, V. C., concurring—decree affirmed with costs.

BOULTON V. CAMERON.

Injunction—Equitable plea.

Where, upon a motion for an injunction to restrain proceedings upon an execution at law, it was shewn that the facts upon which the right to the injunction was founded had been raised as a defence to the action by way of equitable plea the court refused the application.

Fitzgerald, for the application.

The defendant in person, *contra*.

VANKOUGHNET, C.—I refuse the injunction in this case upon the ground that the same matters upon which it is sought to obtain it formed the subject of an equitable plea by way of defence to the action at law, in which the then plaintiff, the present defendant, has recovered judgment, execution upon which it is the object of the present motion to restrain. It is true, as the plaintiff contends that the judgment of the Court of Common Pleas which had this equitable defence under consideration finds two material variances between the allegations in the plea and the proof; and these it is urged are of no importance in the eye of a court of equity. This may or may not be so, but then either a court of law exercising equitable jurisdiction ought so to have treated them, or if it be required there that the proof should exactly correspond with the statement even in an equitable plea, then the defendant should either take care that he made his statement correctly; or if he made a slip, should have applied to amend: the discretion as to which is as wide at law as in this court. Were any different doctrine to be maintained the result would be, that a party without any regard to accuracy in his statement, would raise an equitable defence at law, and failing there by reason of his mistake or omission, would then fly to this court, thus availing himself of the double opportunity of litigating the same matters. This was not the intention of the legislature when they gave him the option, without imposing upon the necessity of invoking the equitable jurisdiction of a court of law. He has chosen his tribunal, of co-ordinate power, in respect of the case made here, with this court. Though the cases in England are not very decided on the question, I decline to interfere, or sit in judgment upon the decision of another court in respect of the same matters; the injunction must therefore be refused.

STARRATT V. CHINGUACOUSY.

Principal and surety—Forbearance.

The members of a municipal corporation, prior to 1858, borrowed moneys belonging to such corporation, and gave notes with sureties, as joint makers, for repayment. Before taking the oaths of office, in 1859, they procured the sureties and others to make new notes to the corporation, and then, as members of the council, did not press for payment of the notes when they fell due. On a bill filed by the sureties of one borrower, who had continued a member of the council throughout, to restrain an action at law, and alleging that time had been given to the principal debtor, it was

Held, that as no binding agreement between the corporation and the principal debtor had been proved, they were not entitled to the relief prayed for, and the bill was dismissed with costs.

One Andrew Starratt, being reeve of Chinguacousy, applied to the Council in 1857, in the name of Robert Starratt, his brother, for a loan of £400, and gave security by the joint note of himself, Robert Starratt, and one Adam Scott. About the beginning of 1859, just before taking the oath of office, he induced the Council to accept a new note from one William Starratt, Adam Nixon and said John Scott, and thereupon the old note was given up to the last named parties. Andrew Starratt paid the interest each year until 1862, but the money was credited in the books of the Corporation to the parties above named, namely, William Starratt, Adam Nixon and John Scott. Andrew Starratt had in the meantime become insolvent, but continued to act as member of the

Council. In 1862 the Corporation called in the money, and on William Starratt, Adam Nixon and John Scott refusing to pay, sued for the amount of the note, and recovered judgment. They thereupon filed their bill to restrain the action, and to relieve them from the liability, on the ground that time had been given to Andrew Starratt.

Cameron, Q. C., and *Boulton*, for plaintiffs.

R. A. Harrison for the Corporation.

Hodgins for defendant R. C. McCollum, the treasurer.

VANKOUGHNET, C.—I have carefully read over the evidence in this case, and I can find no binding agreement with the Corporation for time. Mr. Cameron seemed to assume that this was plainly made out, but Mr. Harrison, for the Corporation, denied it; and as Mr. Cameron was not present to reply, I should be glad to hear him again on the subject. The most that I can see is the by-law of January, 1860, directing the moneys to be called in by instalments; but this is not an agreement—was not binding even on the Council itself. The individual members intended and endeavoured to give as long a time, and make the payments as easy as possible; but then this after all was mere forbearance to sue, or refusal to sue, which does not seem binding on any one, and which could not, it seems to me, be set up as a defence by Andrew Starratt, had his securities proceeded to compel him to pay, either in their own names or that of the Corporation. I should like to have the matter mentioned again at an early day, in my chambers or in court, in presence of both parties.

The cause was afterwards re-argued by *Cameron*, Q. C., for plaintiffs, and *Hodgins* for defendants, when the bill was ordered to be dismissed with costs.

SCOBLE v. HENSON.

Appeal from Chambers—Discretion of Judge—Change of venue—Laches.

Where a judge in Chambers grants or refuses an application in a matter purely within his discretion, the court will not entertain an appeal from his judgment.

In this case the bill had been taken *pro confesso* against the defendant; but on application of his solicitor to allow the defendant to answer, on condition that he would take short notice, and that the costs of the order should be costs in the cause, the plaintiff's solicitor consented. The answer was not filed for some time after, and until the time was over for setting down the cause at the place where the venue had been laid. The plaintiff, on the answer coming in, amended his bill and changed the venue to Woodstock, not a regular circuit of the court. The defendant's solicitor was then served with the amended bill; and after the time allowed by the general orders had expired, the plaintiff filed his replication, and in a few days afterwards set the cause down for examination, and served the usual notice. Thereupon the defendant moved in Chambers, before Esten, V. C., to strike the cause out of the list at Woodstock, on the ground that there was no venue in the bill, and that Chatham was the proper venue, and on other grounds. The Vice-Chancellor refused the motion with costs, on the ground that the defendant had not come promptly, and that by his laches he had prevented the plaintiff from setting his cause down at Goderich or Sarnia, or some other of the regular circuits of the court. Thereupon the defendant appealed to the full court.

Blain for the appellant. *John Paterson* for the respondent.

The judgment of the court was given by

SPRAGGE, V. C.—We agree that Vice-Chancellor Esten was right in treating the laying of the venue at Woodstock as no more than an irregularity, which was waived by the defendant omitting to move against it, and especially as by the delay of the defendant the plaintiff was precluded from getting an examination of witnesses in another county. The absence of one of the defendant's witnesses in Hayti, we think, was not necessarily a ground for postponing the hearing of the cause, and opening publication for that purpose. The pendency of an arbitration might be a strong reason for staying proceedings during its pendency, if shown that by the terms of the reference authority is given to the arbitrator to deal fully and finally with the matters in question in the suit; but this is not shown. The reference, whether by submission or order, is not produced, and the Vice-Chancellor, with the materials before him, in the exercise of his discretion, decided against staying proceedings; and we think that we cannot properly interfere with that exercise of discretion. His refusal to postpone the examination of witnesses, on account of the alleged absence of a witness at Hayti, who, for all that appears, might have been examined by commission, and his refusal to change the venue back to Chatham, were also instances of exercise of discretion, and which, we think, we ought not to interfere with.

Appeal dismissed with costs.

MILLER v. MILLER.

Sequestration—Delivery of possession—Rent set off against alimony.

The plaintiff having obtained a writ of sequestration against the defendant's lands, applied to the court for the delivery up of the possession to herself, instead of renting said land by the sequestrator; and the court, on her petition, made the order.

This was a petition by the plaintiff to be allowed to go into possession of a farm sequestered by the sheriff under a writ of sequestration, and to set off an annual rental against the alimony she had been declared entitled to.

Hodgins for plaintiff.

The defendant did not appear.

SPRAGGE, V. C.—The property sequestered by the sheriff, and of which he has dispossessed the defendant, is lot 18 in the 8th concession of East Gwillimbury. It is not the whole real estate of the defendant, but a farm which was devised to plaintiff by her father. The alimony allowed is £100 a-year, and more than a year and a half is in arrear, besides costs. The plaintiff asks that possession may be delivered to her by the sheriff, the sequestrator, at a rental to be allowed on account of the alimony, or that he may let it to some other person. The annual value is stated, in a petition presented by the plaintiff some time since, at from $135 to $150 per annum. The defendant has represented its annual value at much less, and has stated in his answer that it would not bring $100 a-year besides the taxes. The plaintiff's brother has stated the value by affidavit at $135. If it is let at its full value to the plaintiff or any one else, the defendant cannot complain. I see no necessity for a letting by the sequestrator. A more direct course will be to give possession to the plaintiff until the further order of the court. I think she should be charged with the full value, as stated by herself, and she should be entitled to possession until all arrears of alimony and costs are paid, and then possession should be restored only on proper and just terms as to growing crops and the like. Each party should be at liberty to apply. The rental or quasi rental I should fix at $150 a-year—that sum to be taken during her occupation as in lieu of so much alimony. (2 Daniel, 1265.)

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

COWAN v. WHITE.

Debt on bond conditioned to abide by award—Pleading—Con. Stat. U. C., ch 22, secs. 108, 119.

In an action on a bond, where the plea is that the bond was conditioned to perform an award, and no award made, the plaintiff must either deny that the bond was subject to a condition as alleged, or reply specially setting out an award and assigning a breach. He will not be permitted to reply by "taking issue" on the plea under the 108th section Con. Stat. U. C., ch. 22, and such a replication will be struck out under sec. 119, as being calculated to embarrass, prejudice and delay, the fair trial of the action.

[16th April, 1863.]

Debt on bond in the penal sum of $2,000.

Plea—that the bond in the declaration mentioned was and is in the words following (setting out a common money bond made by defendant to plaintiff, dated 19th August, 1862, in the sum of $2,000); that the said bond was and is subject to a condition (setting it out verbatim) that defendant should submit to the decision and perform the award of, &c.; and that no award was made.

Replication—joinder of issue.

Osler obtained a summons, calling on plaintiff to shew cause why this replication should not be struck out or amended, on the

ground that the same was calculated to embarrass and prejudice defendant, as it tendered no certain or definite issue on the plea.

J. B. Read shewed cause.

Cases referred to—*Sim* v. *Edwards*, 15 C.B. 214; *Glover* v. *Dixon*, 9 Ex. 108; *Gwynne* v. *Burrell*, 6 Bing. N. C. 458; Russell on Awards, 578-4, 814-5; *Bullen & Leake*, 466; *Stewart* v. *Webster*, 20 U. C., Q. B., 469; *Folwell* v. *Hyde*, 20 U. C., Q. B., 567; *Webb* v. *James*, 8 M. & W. 645.

DRAPER, C. J.—At first, I thought the plea was fully as open to the objection of being calculated to embarrass and prejudice, as the replication, but on reflection I have come to a different conclusion.

The plea contains two propositions. 1st, That the bond is subject to a condition. 2nd, That defendant has not broken the condition. These two put together constitute the defence relied on.

By this general form of replication the plaintiff endeavours to put the whole in issue; and conceding to the plaintiff that he may thus traverse the allegation that the bond declared on was subject to the condition stated, on which it is unnecessary to say any thing, the taking issue on the allegation that there was no award is clearly bad pleading, for the plaintiff should on replying to such a plea set out an award and assign a breach.

I am strongly inclined to think the replication might have been demurred to; but as some doubt is expressed on this point, and as I have no doubt of the insufficiency of the replication as an answer to the second proposition in the plea, I will not drive the defendant to try that point against the impression of the pleader.

I think the replication comes within the 119th section of Con. Stat. U.C., ch. 22, as being framed so as to embarrass, prejudice and delay, the fair trial of the action, and that it should therefore be set aside.

To save the plaintiff the necessity of another application, he may, if so advised, reply *de novo* to the plea, treating it, as I think it should be treated, as a plea of no award simply. Or he may reply by denying the allegation that the bond declared on is subject to a condition as alleged in the plea. If he desire to reply double, that is separately, to each proposition, he must apply on affidavit. If he act on the suggestion above, by replying, the costs should be costs in the cause.

IN THE MATTER OF WILSON AND HECTOR, TWO, &C.

Con. Stat. U. C. cap. 35, sec. 28—Chancery—Bill—Reference by Common Law Judge—Waiver—Jurisdiction.

It is in the power of a common law judge sitting in chambers to refer for taxation to the proper officer of the Court of Chancery, a bill rendered by solicitors for services performed in that court.

If such an order be waived or abandoned by the party who obtained it, it is necessary to move to set it aside.

Whether it has or no can be properly decided in the Court of Chancery, especially in a case where one party treating the order as in force obtained from the Master of that Court a warrant for the taxation of the bill under and pursuant to the order, and the other party treating the order as waived or abandoned, obtained an independent order of that court for the taxation of the bill.

A common law judge will, under such circumstances, decline to interfere.

(Chambers, 18th April, 1863.)

Messrs. Wilson & Hector were, at one time, the solicitors of Connel James Baldwin, deceased.

After his death they caused a bill of costs for services rendered in the Court of Chancery to be rendered to Messrs. Lynch & McVean, who were administrators, with the will annexed, of Connel James Baldwin.

Within one month after the delivery of the bill the administrators obtained an order from Morrison, J., under and pursuant to Con. Stat. U. C. cap 35 sec. 28, for the reference of the bill to be taxed by the proper officer in the Court of Chancery, with liberty reserved to the administrators to dispute the retainer.

The order was made upon summons in the usual manner. It was issued on 6th October, 1862.

Not having been served Messrs. Wilson & Hector, on 1st April, 1863, notified the attorneys of Messrs. Lynch & McVean that, if not served with a copy of the order within two days they should treat it as abandoned.

Before the expiration of the two days the attorneys were informed that the reason the order had not been served was that it was mislaid.

On 4th April, 1863, a duplicate order was obtained from Morrison, J.

On 7th April, 1863, the Master-in-Chancery, by warrant, appointed Monday, 21st of same month, for the taxation of the costs under and pursuant to the order of Morrison, J.

On 11th April, 1863, the attorneys, upon an application to the Court of Chancery, treating the order of Morrison, J., as of no effect, obtained an *ex parte* order of that court for the taxation of the same bill.

On 13th April, 1863, the order of Morrison, J., with appointment for 21st of same month was served.

James Beaty thereupon obtained a summons calling upon Messrs. Lynch & McVean to shew cause why the order of Morrison, J., of 6th October, 1862, should not be rescinded, and all proceedings had thereunder be set aside, on the ground that the administrators had waived the order by neglecting and refusing to proceed thereunder, and on the ground that before the service of the said order Messrs. Wilson & Hector had obtained the order in the Court of Chancery for the taxation of the bill of costs referred to in the order of Morrison, J.

Robert A. Harrison shewed cause, filing an affidavit of the administrators wherein the cause of the delay in serving the order of Morrison, J., was fully explained; and the administrators distinctly swore they had not and never had any intention of abandoning the order of Morrison, J. Mr. Harrison admitted that delay unexplained was evidence of an intention to abandon, but submitted that the delay was so explained as to rebut all presumption of an intention to abandon. He also argued that it was in the power of the attorneys themselves to have obtained a duplicate of the order of Morrison, J., and upon it have proceeded to the taxation of the bill, instead of obtaining the order for that purpose from the Court of Chancery. He referred to Con. Stat. U. C. cap. 35 secs. 27, 28, 32, 43. *In re Sheriff*, 4 A. & E., 338.

James Beaty, contra, contended that the time which had elapsed without service of the order was positive evidence of abandonment and such as could not be explained. He referred to *Sedgwick* v. *Allerton*, 7 East. 542; *In re Hare*, 10 Beav. 187.

DRAPER, C. J.—The order of Morrison, J., is perfectly regular. If it has been waived or abandoned, it is unnecessary to set it aside. Whether it has or no can be properly decided in the court of Chancery, in which both parties are taking proceedings. I decline to interfere. The Court of Chancery is the proper tribunal to deal with the question. The whole matter, except the summons and order of 6th October last, arises in that court, the bill to be taxed arising wholly out of a suit instituted there. I discharge the summons.

Summons discharged.

CHANCERY CHAMBERS.

Reported by THOMAS HODGINS, ESQ., M.A., *Barrister-at-Law.*

MILLER V. MILLER.

Irregularity—Time to move against—Waiver.

A party complaining of an irregularity must come promptly and move against it, either within a reasonable time, or the time limited in the order or notice complained of. Thus, where a party was directed to pay a certain sum of money within eight days, but did not move against an irregularity in the order for several weeks after.

Held, that he came too late to complain of the irregularity.

An order had been made in this case directing the defendant to pay to the plaintiff certain monies by way of alimony, and also her costs within eight days after service of the order. He was served with the order but did not obey it, and after the lapse of several weeks moved to set it aside for irregularity.

Connor, Q.C., for the defendant.

Hodgins, for plaintiff.

SPRAGGE, V. C.—Held that the defendant came too late to move against the order; that he should have applied within the eight days limited by the order, and thereupon refused the motion with costs.

Lewis v. Jones.

Irregularity—Notice—Waiver—Dismissal of bill for want of prosecution.

Held, 1st—That where a party files a pleading without serving notice thereof to the opposite party, such pleading may be taken off the files for irregularity with costs.

2nd—That though a party may search the papers filed in a suit, yet unless it is shown that he had actually seen the pleading complained of as irregular, he may move after the next step in the cause to have it taken off the files.

3rd—That under the circumstances the bill may be dismissed for want of prosecution.

The plaintiff after filing a replication, moved, on notice, for leave to amend, and obtained an order from Esten, V. C., for that purpose. Subsequently on motion of the defendant to dismiss for want of prosecution, an order was made by Spragge, V. C., directing the plaintiff to file a replication within two months, and go down to examination of witnesses the following term. The plaintiff annexed his replication within the two months, on the 12th December, but did not serve notice of such amendment. It appeared however that the defendant searched the papers of the suit on the 15th or 17th December. The plaintiff on the 28th January set the cause down for examination and hearing for the 10th February, and served the usual notices. On the 5th February the defendant moved to take the replication off the files on the ground that no notice of filing had been given, and that it was not in accordance with the last order to strike the cause out of the list for examination, also to dismiss the bill for want of prosecution.

S. H. Blake, for defendant.

Hodgins for the plaintiff contended that the application was too late, that the defendant had notice on the 15th or 17th December, several weeks before the cause was set down; that the cause was being prosecuted in being set down for examination, and cited *McDougall* v. *Bell* and *Miller* v. *Miller* (in Chambers, *ante*) Chitty's Archibold, 1204, &c.

Esten, V. C.—After looking into the cases, said he could not follow the case of *McDougall* v. *Bell*, and that where a party files a pleading without notice of it to the opposite party it may be taken off the file for irregularity with costs. That though the defendant had searched the papers filed in the suit, yet as it was not shown that he had actually seen the replication, he was in time and had not waived his right to move, that the replication was irregular, and must be taken off the files, and that the bill must be dismissed with costs for want of prosecution.

McDougall v. Bell.

Notice of filing Pleadings——Irregularity.

Notwithstanding the order (of 1853) xix requiring notice to be served of filing any pleading, a party cannot move to take such pleading off the files where no notice of filing has been served.

In this case one of the defendant's filed his answer to the plaintiff's bill, but served no notice of filing. The plaintiff on applying for an order *pro confesso* against him found the answer on the files, thereupon he moved to take the answer off the files for irregularity.

Scott for plaintiff cited *Watkins* v. *Fenton* (8 U.C.C.P. 289) and Orders (1853) xix.

Crickmore contra.

Spragge, V. C.—After taking time to look into the practice refused the motion with costs.

DIVISION COURTS.

In the First Division Court of the County of Carleton, before His Honor Judge Armstrong.

Cocker v. Lee.

Action of replevin for unjustly detaining a mastiff dog—Stolen property—Sale at Auction.

This was an action of replevin for the unjustly detaining by the defendant of a mastiff dog, alleged to be the property of the plaintiff. Case came on for trial before his honor Judge Armstrong, at Ottawa, in January last.

From the evidence given on the part of the plaintiff it appeared that he had bought the dog, in the month of May last, at a public auction sale of the stock-in-trade of the firm of Sineaur & Levy, dealers in Sheffield goods; that they had been in possession of the dog for some months, and he had been kept on their premises as a watch-dog; that for three days prior to the sale the dog had been on view on the public street in front of their premises, and had been duly advertised for sale in printed hand-bills; that the dog was sold publicly, and the plaintiff, being the highest bidder, became the purchaser; that Sineaur & Levy had purchased the dog from one Duchesney, who purchased from a boy by the name of Joyce, who informed Duchesney that he had raised the dog; that from the time the plaintiff purchased he had kept the dog on the premises of his employers as a watch-dog until December last, when he got out of the yard, and was next found in the possession of the defendant, where he remained until replevied in this action.

Plaintiff proved demand of possession and refusal on the part of defendant to deliver up the dog.

It was admitted by the defendant that he had personally no claim to the dog, but had kept possession for one White, whose property the dog was alleged to be, and from whom he was said to have been stolen.

Evidence submitted on part of defence proved conclusively that the dog belonged to one White in the month of February, 1862, and had been in his possession from a pup up to that time; that during the latter part of that month he had been taken from off his premises, believed to have been stolen, from the fact of the strap having been cut by which he was fastened. It did not appear from the evidence that White had ever taken any trouble whatever in trying to recover the dog, or had ever made any enquiry concerning him.

Plaintiff objected to admission of evidence of the right of property being in White, the action being to try the question as to the right of property between plaintiff and defendant; and contended that supposing it was granted that the property had been originally in White, as he had bought the dog in open market, that White must first prosecute the thief to conviction before he would have the right to recover, or must at least have taken some steps to bring or in trying to bring the offender to justice, which he had not done; and that, therefore, under the circumstances detailed in evidence he was entitled to a verdict.

On the part of the defence it was urged that the evidence was admissible, and that White's right to recover his property was unquestionable, wherever found, and under whatever circumstances acquired by the party in whose hands the same might be found.

His Honor reserved his decision for one week, and then he gave judgment for the defendant (viewing the action as directly between the plaintiff and White) on the ground that the dog was not purchased in the usual course of trade; that a sale at public auction is not a sale in market overt; that the plaintiff thereby acquired no better title than that which was in Sineaur & Levy; and that therefore White was entitled to his property wherever he might find it.

UNITED STATES REPORTS.

Peck v. The Delaware and Hudson Canal Co.

Master and Servant.

The defendants, a Coal Company, held not liable for damages to one of their car runners, by reason of an injury occurring through the breaking of a bridge upon their railroad, the breaking of the bridge happening in consequence of a defective iron bolt, put in by another workman of the Company—the defect being unknown to the Company or its agents, not discoverable by ordinary examination, and the workman having the reputation of a good and competent workman.

[C. P., Luzerne Co.]

The charge to the jury was delivered by

Conyngham, P. J.—(The Court, after explaining the case, observed:) The plaintiff while running a train of cars in the employ of the defendants, upon their railroad, was seriously injured by the cars breaking through a bridge which had been but recently constructed. The Company aided the plaintiff by the payment of a physician during his confinement of several months, employed a nurse, and paid him wages for some nine months, but the plaintiff having been permanently injured, seeks to recover for additional expenses and general damages. The evidence establishes the fact that the breaking of the bridge was caused by the defective welding of a bolt, which was done in the workshop

of the defendants; the defect in which, however, was not discoverable by the eye, or from the outside appearance.

This is not the case of a passenger, travelling on a passenger railroad, for the ticket money paid for his passage. If it were so, most unquestionably the Company would be responsible for damages sustained by a party such as now proved. Such companies towards such passengers by their contract imply, among other things, that their road is safe and in good and proper order; and, when through a defect in the road, such as is said to have occurred here, an accident happens, the law raises at once the presumption of negligence, which the Company must disprove to avoid liability, and which they certainly could not disprove by the kind of evidence, however true and reputable it may be, which they have offered in the present case. Railroad Companies in such cases are liable unless they can show that the accident occured through the Act of God, or that it was caused by something against which no ordinary human foresight and prudence could protect, where there had been no negligence on the part of the passenger.

But in the present case this is not a passenger railroad carrying passengers, but the plaintiff was a car runner on certain gravel cars engaged on the coal road of the defendants, running them in the employment of, and for the benefit of the Company; he was their servant, in their employ, into which he had voluntarily entered, and to abide by all the risks connected with his duties in their business, he is to be considered as having impliedly undertaken.

In the present case, the evidence, as well on the part of the plaintiff as the defendants, without any dispute establishes the fact that the accident occurred through the defective iron bolt, which gave way under the train and cast the cars through the broken bridge. It is also undisputed under the evidence that the bridge was constructed on a proper plan, fully able to answer the purpose of the road, which when put in, in itself appeared to be good and sound, free from any apparent defect so far as any outside examination by the eye, at any rate, could discover. Such is the testimony, with no contradiction, of the engineer and the workmen who have been examined here, and who were employed in the construction of the bridge. Again, the evidence is equally undisputed and free from contradiction, that the workmen employed by the Company to prepare the iron and put up the bridge were all men having the character and reputation of good, competent and experienced workmen in their different lines of work, and that the iron out of which the bolt was made was Ulster iron, the best kind for the desired purpose. No one has spoken unfavorably of either Wylie, the foreman of the blacksmith shop of the Company, or Lindsay, the workman who made the bolt, or of the competency of Marsh or Sleigh; but all who have spoken on that subject have testified in their favor. It is not pretended that the Company or any of its agents had any knowledge of this defective bolt until after the accident, though if the testimony of Mr. Bohe, and perhaps Mr. Wylie be correct, Lindsay, the workman, might, by proper care, have ascertained the fact without much trouble when the iron began to cast, and afterwards by blows upon it effectively applied. It is not improbable, then, that Lindsay was guilty of negligence, and in a suit against him the case might be different; but of such negligence no notice, or anything from which notice can be inferred, is brought home to the contrary to the defendants.

The evidence, then, establishes the fact that the Company did employ good iron for the bolts, and no fault is found with the other materials of the bridge, and workmen competent in every respect from their character to make good work of the bridge, and unless something else be shown in a case like the present, there is nothing to make them responsible for the injury to the plaintiff in the way of damages in this suit. He was the servant of the defendants, in their employ, and though he may have been injured through the undiscovered negligence of Lindsay, another servant of the Company, the common and general employer, the company is not in law considered liable to an action of damages in such case. It is part of the risk which every employee of a railroad impliedly undertakes to abide, and against which he cannot complain if he receive an injury from causes such as are shown in the present case.

This ruling is founded on no new principle applied to railroads alone, but it rests upon the principle of the relative situation of master and servant, employer and employed, in the varied business and duties of common life. (The Court then referred to the opinion of the Supreme Court in *Ryan* v. *The Cumberland Valley Railroad Co.* 11 Harris, 357, and read a portion of the same, and then said further:) If we should declare a different opinion, the rule would equally apply to all who are in business, and have others employed under them—the merchant, the farmer, the mechanic, and every one carrying on business by the aid of others in their employ. Suppose the case of a farmer who employs a competent workman to make him a wagon, and there is in the wagon, when finished, some defect unseen and unknown by the owner, arising, perhaps, from the carelessness of the workman, and the teamster or driver should be injured by the breaking of the wagon from this cause, the owner would not be liable in damages.

The plaintiff and Lindsay, through whose defective work the accident occurred, were servants of a common master, whom the defendants employed in different branches of business, one in running cars, and the other, among other things, preparing iron for the railroad. Some Courts have in such cases varied or modified the rule we have already laid down, but we cannot discover the force and effect of the distinction in a case like the present. Here the Company are the owners of the road, and run the cars upon it, and their different employees are employed in different branches of the same common business, their duties being all directed to bring about a common object, the carrying coal to market. Their particular employments may be distinct and differently exercised, but the object and end is the same. The master is not to be held liable unless there is blame or fault upon his part. If he has employed competent workmen and proper materials to be worked, and apparently good mechanical works and machinery, without any neglect or fault upon his part, we cannot discover any obligation which will make him liable at law for the consequences of an accident occurring from an unknown and undiscovered difficulty, as in the case before us.

We further say, that there is no conflict of testimony in the case; there are no disputed facts, no material inferences from facts about which the counsel differ; there is no evidence to submit to you from which in law negligence, which would make the Company liable, can be discovered or inferred, and we therefore charge, as matter of law, that under the whole case the plaintiff cannot recover, and that your verdict should be for the defendants.

Tht jury found a verdict for the defendants.

KEITH v. THE INHABITANTS OF EASTON.

A daguerreotype saloon, a portion of which was within the limits of a highway (which was laid out four rods wide), and about fifteen feet from the travelled part of said highway, upon which the plaintiff was going with his horse and wagon, does not constitute a defect in such highway, so as to make the town liable for damages to a person for injuries done to himself and carriage, by his horse taking fright, either at the saloon, or some piece of canvass attached to it. The proper attributes of a highway discussed.

This was an action of tort against the defendants for damages caused by an alleged obstruction of a highway in Easton. The obstruction was a daguerreotype saloon, which was placed upon a grass plot in a triangular area on "Grist Mill Green," so called, in said town. The nearest part of the saloon to the tavelled track of the road was about five feet and eight inches, and three-fourths of the saloon were in the limits of the highway, (which highway was laid out four rods wide,) and about fifteen feet from the track upon which the plaintiff was going with his horse and wagon to mill, when his horse took fright, either at the saloon or some pieces of canvass attached to it, the plaintiff was thrown out of his wagon with great violence, and himself and carriage injured. It was not claimed by the plaintiff that there was any defect by reason of a want of railing, and the evidence showed that, except in regard to the saloon and the condition and position thereof the way was sufficiently smooth and level to enable the plaintiff to travel with safety by his using due care, and it was not pretended that the plaintiff's team came in collision with the vehicle or saloon.

At the trial, the defendants asked the court to instruct the jury, among other things, that the said saloon was not a defect, or want

of repair, for which the defendants were liable; that the facts proved did not disclose such a defect or want of repair of the highway as to make the town liable under the statute, even if it did cause the fright to the plaintiff's horse, and cause the horse, with the carriage, to run against some object or embankment, which, of itself, was no defect or want of repair, of a public highway. The presiding judge declined so to instruct the jury, who returned a verdict for the plaintiff, and assessed damages in the sum of twenty-one hundred dollars. The defendants excepted.

E. H. Bennett and *Carpenter* and *White*, for the plaintiff.

Ellis Ames and *H. J. Fuller*, for defendants.

CHAPMAN, J.—This case presents a new question of great importance. In the cases thus far reported the defects in highways for which towns have been held liable, are all included in four classes. These are, want of railings; obstructions to the travelled path, by stones or rocks, wood or timber, posts, snow or ice: holes or excavations in the path; and defective bridges or causeways, that would not support the traveller. In *Drake* v. *Lowell*, 13 Metc. 292, an awning of wood and timber, and supported by posts standing on the highway, which had been broken by a heavy body of snow and ice lying upon it, and which extended across the sidewalk a few feet above the heads of travellers, and fell upon the plaintiff and crushed him down upon the walk, was held to be a defect in the highway.—But in *Hixon* v. *Lowell*, 13 Gray, 59, this case is said to have reached the limit of the liability of towns for defective ways; and in the latter case, the town was held not to be liable for any injury caused to a traveller by the fall of an overhanging mass of ice from the roof of a building, although it overhung the highway for more than twenty-four hours, and for the space of eighteen inches or two feet. So rocks and stones within the limits of the highway, but not obstructing the travelled path, are not defects for which a town is liable. *Howard* v. *North Bridgewater*, 16 Pick. 189; *Smith* v. *Wendell*, 7 Cush. 498. So where a locomotive engine injured a traveller by crossing the highway on a railroad illegally existing there. *Vinal* v. *Dorchester*, 7 Gray, 421.

In no case has it been held that an object existing within the limits of a highway, but leaving the travelled path unobstructed, so that the traveller is safe from all collision with it, is a defect in the way, merely because it exposes the traveller's horse to become frightened by the sight of it, either at rest, or in motion, or by sounds or smells that may issue from it. In this case, the plaintiff contends that a daguerreotype saloon, standing partly within the limits of the highway, but without the limits of the travelled path, and several feet distant from it, is a defect, because it was so situated that the plaintiff's horse became frightened, either by seeing it at rest, or by seeing the fluttering motion caused by the wind, as it blew upon some pieces of loose canvass upon the covering. There was no collision with it, and no danger of collision.

In *Hixon* v. *Lowell*, *ubi supra*, it is stated, as a general proposition, that "a town, if it has done its duty in making the way safe and convenient, in all the proper attributes of a way, is not obliged to insure the safety of those who use it." It becomes necessary in this case to draw the line between what are and what are not the proper attributes of a way; so that it may be seen whether a cause of fright, such as existed in this case, is a defect in one of these attributes. The distinction is of very great practical importance; for it is to be considered that surveyors have power and are bound to remove, without delay, all defects in highways; and towns are liable, though the defects have not existed twenty-four hours, if the proper officers happen to be present, and have knowledge of their existence. The doctrine contended for by the plaintiff would make their powers and duties very extensive; much more so than is generally supposed.

In *Hixon* v. *Lowell*, instances are stated of things that might obstruct a traveller, but which would not be defects in any of the attributes of a way. They are quite pertinent to this case. The court decided that freedom from ice and snow on roofs overhead is not one of these attributes, and therefore that the town is not bound to remove the ice or snow from the roof. By way of illustration, the court state several other things, which, though they may obstruct a traveller, are outside the limit of the proper attributes of a way. "He might be annoyed by the action of the elements, by a hail storm, by a drenching rain, by piercing sleet, by a cutting and icy wind, against which, however long continued, the town would be under no obligation to furnish him protection. He might be obstructed by a concourse of people, by a crowd of carriages; his horses might be frightened by the discharge of guns, the explosion of fireworks, by military music, by the presence of wild animals; his health might be endangered by pestilential vapors, or by the contagion of disease; and these sources of discomfort and danger might be found within the limits of the highway, and continue for more than twenty-four hours; and yet that highway not be, in any legal sense, defective or out of repair. It is obvious that there may be nuisances upon travelled ways, for which there is no remedy against the town, which is bound by law to construct or maintain them.

"If the owner of a distillery, for example, or a manufactory, adjoining the street of a city, should discharge continually from a pipe or orifice opening toward the street, a quantity of steam or hot water, to the nuisance and injury of passers by, they must certainly seek redress in some other mode, than by an action for a defective way. If the walls of a house adjoining a street in a city were erected in so insecure a manner as to be liable to fall upon persons passing by, or if the eaves-trough or water conductor was so arranged as to throw a stream from the roof upon the sidewalk, there being in either case no structure erected within or above the travelled way, it would not constitute a defect in the way."

The discussion of the present case suggested many other illustrations. Cattle or horses running at large might frighten the traveller's horse; the sight of flags displayed, or a window curtain fluttering in the wind over a street, through a raised window, the goods displayed in front of shops, and the numberless operations of business and amusement constantly carried on in cities and villages, within the limits of the highway, the gathering at agricultural fairs, military trainings, and other public occasions, may any or all of them tend to frighten many passing horses; yet it would be a novel doctrine to hold that highway surveyors may interfere in such cases, under their authority to repair highways, or that the attributes of a way include them because they may frighten horses.

And we think that the daguerreotype saloon, described in the report, though it may have been a nuisance, for which the proprietor might be liable to an action or indictment, yet, since it did not obstruct the travelled path in any other way than by the fact that it was in sight of the plaintiff's horse, did not constitute a defect, as to any of the proper attributes of the way.

Exceptions sustained.—*Monthly Law Reporter.*

GENERAL CORRESPONDENCE.

To THE EDITORS OF THE LAW JOURNAL.

Proposed Law Association.

GENTLEMEN,—I avail myself of your valuable journal to offer some suggestions to the legal profession in regard to the advisability of forming a Law Association for the protection of the interests and the furthering of the well-being of a large and influential portion of the community.

This society, which should be composed of delegates from every county, meeting as occasion might require at Toronto, the seat of the Upper Canadian Law Courts, might, and if properly conducted undoubtedly would, exercise a great and beneficial influence over law legislation and law matters in general. Subjects of importance would not be wanting to its deliberations, and if not trespassing on your space I would venture to suggest a few matters with which it might most advantageously deal.

A great and constantly increasing evil in the profession is the immense number of men and boys who are daily entering

its ranks without the education necessary to fit them for its duties. Law in Canada seems to be the refuge of incapacity, and men who have failed of success in any other course of life betake themselves to its bosom as criminals of old to a sanctuary in some heathen temple. There is certainly a standard of qualification fixed by the Law Society of Osgoode Hall for those desirous of becoming members of it, but the examinations as now conducted are utterly inefficient as tests of education and fitness, and any boy of ordinary intelligence can be *coached* up for the ordeal in a few months without any previous knowledge of the subjects set out, and without in fact any previous education at all, to use the latter word in its proper and more extended signification; and more than this young men can enter on the study of the law, if they design merely to become attorneys, without any preliminary examination whatever.

An association of the nature I have mentioned might devise some plan by which this evil would be abated and the recklessness of legal gentlemen, in taking articled clerks into their offices, checked. At present they in this matter go to the full extent allowed by law, namely, four to each attorney, utterly regardless of qualification or fitness to become worthy members of the profession, but merely for the purpose seemingly of getting their office work cheaply done.

Another point which might be advantageously dealt with would be the rates of charges to be made in cases such as conveyancing, where there is no tariff fixed by law. The question also of retainers and fees thereon might be reduced to some intelligible form.

I am afraid, however, that I am trespassing too much upon your space, and will therefore conclude by suggesting the most important matter that would come up before such an association, namely, the subject of law reform. By bringing to this important question a mature deliberation as well as knowledge and technical skill, a great deal of crude legislation would be avoided and *acts amending acts amending acts* and *acts interpreting acts interpreting acts* would be less frequent, and our Consolidated Statutes run less risk of becoming what by frequent alterations they promise to be, almost useless.

In these remarks hastily thrown together I have merely attempted to bring the subject under the notice of some of the many talented gentlemen of whom the legal profession in Canada can boast, and to induce them to give the matter their attention, and if practicable to inaugurate a Society which would I am convinced be of very great advantage.

All other professions are taking every means of self-protection, and why should that one only, whose organ you are, take no steps to preserve their privileges and improve their position. Encroachment appears to be the order of the day; mere passive resistance is of no avail, and communities as well as individuals must by self-assertion make good their claim to the enjoyment of their rights.

I remain, gentlemen, yours respectfully,

Ottawa, March 24. 1863. EVINS.

[We recommend the careful perusal of the above letter to those interested in the well-being of the profession of the Law in Upper Canada. There is much in the letter to recommend it. The association suggested would not be without precedent; there are several associations of the kind in England, and we think the time is fast approaching, if not now at hand, for the formation of some such association in Upper Canada.—EDS. L. J.]

Con. Stat. U. C., cap. 25 sec. 2—Absconding debtors—Affidavit.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Justice cannot be flattery. You deserve thanks for the able manner in which the *Law Journal* is conducted.

In reference to the oath required to be made by creditors, for proceeding against "Absconding Debtors" by attachment, the words of the Statute are, "*with intent to defraud.*"

Now, the question which I wish to submit, after offering my own views, is, what is the strict meaning of these words, or rather, what is not their meaning, which will be seen as I proceed to be more strictly the question.

I must admit, had it not been demonstrated to me, by the two facts which I shall state, that the prevailing opinion on the point is an erroneous one, and also a prejudicial one, that the thing would appear too plain and simple to demand the very serious attention of any lawyer, if even more than a second thought.

The facts were these: A., a client seeking advice and stating his case, said, "that B. was indebted to him, that he (B.) was about to leave the Province (taking with him all his effects), and that he (B.) intended to defraud him, as he believed, of said debt." He was answered by both the members of the firm, of whom he sought the advice, that unless he could swear that he believed, &c., B. was so leaving the Province *for the purpose of defrauding him*, he could not procure the attachment. Being a student in the office, and hearing the case and the reply, and looking at the words of the statute, "*with intent to defraud*," I concluded, in my own mind, that our client had a good case; for although he could not swear that B. was about to leave the Province *for the purpose of defrauding him*, he could and was ready to swear that he (B.) was about to leave the Province, and *that it was his intention to defraud him*, which latter would, I submit, answer exactly the requirement of the statute.

Every one will readily perceive, when thus presented, the very great difference between the two expressions, *for the purposes* and "*with the intent.*" That the latter by no means implies the former; that while the former means that the party is about to leave *for* the *purpose* of defrauding, &c., that is, the defrauding is his purpose, the latter only means that he *is going*, and that at the same time it is *an* intention of his to defraud, &c., but that such may not be the *only reason* of his going. The oath, that a party is about to leave, &c., "*with intent to defraud*," can be made where the other cannot be.

The other fact which I wish to mention, to show the prevalency of this erroneous view, is, that after the above circumstances I asked several lawyers for their opinion, through curiosity, and in every instance, amounting in all to five, the

opinion expressed was the same, and was that "*with intent to defraud*," meant "*for the purpose of defrauding*."

JUNIUS.

[The intention of a person may in general be gathered from his acts. The property, and in some degree the person, of a debtor within the jurisdiction of the Court are liable for the payment of his debts. If a debtor much involved withdraw either his property or his person from the jurisdiction of the Court, the fact of his doing so, otherwise unexplained, is sufficient to raise the belief of his intention to defraud. This is all that a creditor is called upon to swear. He need not swear that the debtor has departed for the purpose of defrauding him. He need not positively swear that the debtor hath departed with intent to defraud. All the creditor is called upon to do is to make affidavit that he "hath good reason to believe and doth verily believe such person hath departed from Upper Canada, &c., with intent to defraud the plaintiff of his just dues, &c." The very words of the Act had better be used, and they are not in our opinion susceptible of the meaning that the debtor's sole purpose of departing was to defraud. That may or may not be the case, and yet the facts be such as to justify a plaintiff in making the necessary affidavit.—EDS. L. J.]

Penal action—Compounding—Effect thereof.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—A., a J. P., is threatened by B. and C. with an action for not returning two convictions, and he (A.) gives them a note for $100, payable in three months' time, to stop all proceedings against him. A week after such note is given, B. and C. issue a writ, but it is not served. At the expiration of the three months, A. refuses to pay the note, on the ground that there is no consideration. Can B. and C. proceed with the action for not returning the conviction, or are they debarred, under the 18th Eliz. cap. 5, by accepting the note?

IGNIS FATUIS.

Campbellford, March 31, 1863.

[The statute to which our correspondent refers enacts, that no informer or plaintiff shall compound or agree with any person who shall offend, or be surmised to offend, against any penal statute, for such offence, committed or pretended to be committed, but after answer made in court; and that if any person or persons shall offend in making a composition or other misdemeanor, contrary to the true intent and meaning of the statute, he or they so offending, being thereof lawfully convicted, shall stand in the pillory, and shall "*from* and *after* such conviction forever be disabled to pursue or be plaintiff or informer in any suit or information, upon any statute, popular or penal." The inference is, that *until* conviction, the person offending is capable, like any other person, of being plaintiff in a penal action. In answer, therefore, to our correspondent, we think, as at present advised, that, under the circumstances stated by him, B. and C. are in a position to proceed with the penal action.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q.B. HOLLINGSWORTH V. WHITE AND OTHERS.

Bill of sale—Property in grantor—17 & 18 Vic. cap. 36.

P. executed a bill of sale, assigning goods to the plaintiff. The bill of sale was afterwards cancelled, and a second one executed, comprising the same goods; and subsequently a third bill of sale, also comprising the same goods, was executed, but the second bill of sale was not cancelled. The defendants seized the goods under a *fi. fa.* before either of the bills of sale had been registered. The third bill was afterwards, and within twenty-one days from its execution, registered.

Held, that, though the property passed out of the grantor by the first bill of sale, the execution of each of the new bills amounted to a redemption of the goods, and a granting of fresh security; so that, the first two having been annulled, the third became operative, and, having been filed within the twenty-one days, was available against the execution creditor, on the authority of *Marples* v. *Hartley*; 30 L. J. Q. B. 92; 9 W. R. 334 & 520.

The third bill was executed on the 31st December, 1860, and the jurat of the affidavit of execution purported to have been sworn on the 10th January, 1860.

Held, that this was a mere clerical error, and might be amended if material.

EX. C. WAKE V. HARRISS AND ANOTHER.

Principal and agent—Equitable plea—Parol evidence to explain written contract—Agent in terms contracting as principal—Mistake.

Where a defendant, on the face of a charter-party, contracts as principal, it is competent to him by way of equitable plea to an action against him on the charter party to show that, in fact, he signed as agent for a third party; that the plaintiff verbally agreed that he should not be responsible as principal, and is inequitably taking advantage of a mistake in drawing the charter-party, so as to make the defendant personally liable.

Judgment of the Exchequer affirmed.

Quære, whether the facts stated in the plea would be a good defence at law.

EX. HILTON V. GREEN.

Practice—Change of venue.

It is a good ground for an application to change the venue, that the attorney for the defendant is under-sheriff of the county where the venue is laid, and has made it a special jury case.

EX. WALTON V. THE SWANAGE PIER COMPANY.

Arbitration—Award—Setting aside or sending back to arbitrator—Mistake of arbitrator.

The court will not send an award back to the arbitrator, to correct an alleged mistake, which, when applied to, he does not admit, even although it be in a matter not within the original submission, but included in the award by virtue of some new agreement between the parties, pending the reference.

EX. MARGRETTS V. GREGORY.

Contract—Principal and surety—Dealings between creditor and co-sureties as to securities—Effect of, in discharge of co-sureties.

Whether certain moneys received by the creditor on a dealing or transaction between him and a co-surety, as to a security given by another co-surety, has amounted to payment, will be a question of fact depending on the intention of the parties. There is an equity to which a surety is entitled—that the creditor shall not waste the securities given by the principal debtor; but if this extends to a security given by a surety, it does not extend further than to exclude such wasteful dealing with the security. And a fair dealing with the surety's security under which the creditor

sets off the surety's share of the debt due to him against the proceeds of the security does not preclude a resort to the other sureties for their respective shares of the debt.

EX. DOWLE v. NEALE.

Practice—Mortgage, ejectment—Staying of proceedings.

In ejectment by mortgagee, the court, or a judge, under the Common Law Procedure Act, 1852, can include in the condition of an order for stay of proceedings, the payment of the costs of an abortive attempt at sale under a power.

EX. CURLING v. BINGHAM.

Practice—Setting aside judgment.

It is irregular and improper for a plaintiff's attorney, whose judgment has been set aside as irregular, with costs, to go and strike it out and sign judgment again, so as to avoid payment of costs.

EX. LOCKWOOD v. SMITH.

SMITH v. LOCKWOOD.

Arbitration—Setting aside award—Alleged mistake of arbitrator—Remitting award to him.

An award will not be set aside, nor even sent back to arbitrator, for an alleged mistake, not manifest nor apparent on the face of it, nor admitted by any affidavit or statement of the arbitrator.

C.P. ALLEN v. SMITH.

Innkeeper—Lien.

A trainer of race-horses went to an inn with a horse, and remained the night. On the following day his helper came with another horse. From that period they remained at the inn with the horses, and put both horses in training, occasionally going away with the horses to races, and returning. The innkeeper, previous to each departure, ascertained where they were going. In an action of trover and detinue for the horses against the innkeeper,

Held, that the defendant had a lien on the horses for his charges, he having received them as the horses of a guest, and not at livery.

EX. HORSFALL AND OTHERS v. THOMAS.

Bill of exchange—Defence—Failure of consideration—Contract—Fraud.

In an action on a bill of exchange, it is no defence that it was given in consideration of a contract for a specific article which is made, delivered, renewed, tested, tried and retained, but which turns out to be useless, through a latent fault or defect in the making of it, though known to the maker, and not being at all looked at by the buyer, and there being no express representation of its soundness prior to the giving of the bill.

EX. OXENHAM v. SMITH.

Practice—Trial—Demurrer—Verdict subject to leave—Entry of issues—Postea—Amendment of entry of issues—Costs.

When a cause is taken down to trial, while demurrers to some counts of the declaration are pending, and at the trial there is a general verdict for the plaintiff, subject to leave to enter it for the defendants on those counts, and the courts hold the counts bad, and also direct the verdict to be entered for the defendant on those counts, the plaintiff is not entitled to the general costs of the trial on those counts, save as to particular issues, on which he has really succeeded in point of proof. And the application to settle the postea in accordance with the judgment ought strictly to be made to the judge who tried the cause, though he will act under the direction of the court. *Quære*, whether, if a bad count is not proved in omnibus, the verdict ought not to be entered on all the issues for the defendant.

And, *quære*, whether an issue on a bad count can be material, and whether rule 62 H. T. 1853, that the costs of the issues of law or fact shall follow the findings, applies where the plaintiff has taken a cause down to trial, pending demurrers, and has obtained a verdict on a count afterwards held bad?

Q. B.

REG. v. THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY (LIMITED).

Highway—Nuisance.

On an indictment for a nuisance in obstructing a highway by erecting telegraph posts upon it, the judge directed the jury, 1st, That in the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences and the public are entitled to the use of the entire of it, as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages: 2ndly, That a permanent obstruction erected on a highway, placed there without lawful excuse, which renders the way less commodious to the public, is an unlawful act and a public nuisance at common law; and that if the jury believed that the defendants placed, for the purposes of profit to themselves, posts, with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages and horses or foot-passengers upon the parts of the highway where they stood, the jury ought to find the defendants guilty upon this indictment; and that the circumstances that the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or, that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict.

Held, that these directions were right.

EX. PENNINGTON v. CARDALE.

Practice—Special case—Amendment after judgment.

Although the court may have power, even after judgment on a special case, to order an amendment by the statement of a fact omitted, and intended to be introduced, it will not do so when the fact is disputed or the intention denied.

WEBBER v. SHAW.

Practice—Drawing up rules—Amendment—Signing judgment—Costs.

When a rule, usually moved and drawn up with costs, is moved without costs, it is for the opposite party to see that it is directed to be so drawn, or, if it be erroneously drawn up with costs, to apply at once to the court to have it amended.

C. C. R. REG. v. FRANCIS FRETWELL.

Murder—Death resulting from taking poison to procure abortion—Accessory—Self-murder.

A married woman having become pregnant by the prisoner and having herself unsuccessfully endeavoured to procure a poison in order to produce abortion, the prisoner, under the influence of threats by the woman of self-destruction if the means of producing abortion were not supplied to her, procured for her a poison from the effects of which, having taken it for the purpose aforesaid, she died. The prisoner neither administered the poison, nor caused it to be administered, nor was he present when it was taken, but he procured and delivered it to the deceased with a knowledge of the purpose to which the woman intended to apply it, and he was accessory before the fact to her taking it for that purpose.

Held, that prisoner was not guilty of murder; that the case was distinguishable from *Reg.* v. *Russell*, 1 Mood., c. c., 356.

Quære, whether the woman was guilty of self-murder.

EX. TIMMINGS v. THE BIRMINGHAM GAS COMPANY.

Practice—New trial—Surprise.

A new trial on the ground of surprise will not be granted in regard to a matter which was raised by the party at the trial, and merely to enable to support it by further evidence not in its nature more conclusive.

C. C. R. REG. v. WILLIAM STEPHENSON.

Evidence—Depositions, admissibility of, where a prosecutrix is expecting confinement—Discretion of presiding judge.

Upon the trial of the prisoner for obtaining money by false pretences, it was proved, by a female servant and the brother of the prosecutrix, that she was daily expecting her confinement, and the latter stated that she was "poorly otherwise," and was, therefore, too ill to travel.

Held, that upon this evidence, the statute 11 and 12 Vic. c. 42, s. 17, authorised the presiding judge to receive the depositions of the prosecutrix taken before the committing magistrate, that there may be incidents with regard to parturition to bring the case within the statute; that it is in the discretion of the presidlng judge to determine whether the evidence of illness is sufficient; that it is not necessay in such case to produce medical evidence.

EX. EVERTON v. MATTHEW.

Sale of meat—Warranty of soundness and fitness for human food.

On a sale of meat by a meat salesman in a market (he not being himself the butcher) there is no implied warranty that it is sound and fit for human food.

CHANCERY.

M. R. PLEASE v. HEWITT.

Partnership—Dissolution before expiration of term—Return of proportion of premium—Ground of dissolution—Mutual incompatibility of temper—Alleged misconduct of the partner paying the premium.

Where a partnership was dissolved before the expiration of the term fixed by the articles, upon the ground of mutual incompatibility of temper on the part of the partners (the court considering both partners to have been in the wrong) and one of the partners had paid a premium on entering the partnership.

Held, that he was entitled to a return of a part of the premium, the proportion to be calculated with reference to the number of years of the term which were unexpired:

Partnership for ten years. Premium paid, £1,000. At dissolution two years were unexpired. Return of £200 of the premium allowed.

M. R. WILLIAMSON v. MOORE.

Will—Construction—"Nephews and nieces"—"Descendants of brothers and sisters.

A trust fund was directed to be divided between all the testator's nephews and nieces "being descendants of my brothers and sisters" alive at a certain period.

Held, that the gift did not extend to grand-nephews and grand-nieces.

L. C. BLEET v. BROWN.

Bond by surety—Misrepresentation—Unfounded allegations of fraud in amended bill—Costs.

A surety is bound only to the letter of his engagement and if that engagement is in any way altered, his obligation is at an end.

Accordingly when M. had contracted to supply bread made of flour of a certain quality to the Government, and B. and X. had agreed to supply him with flour of the required quality for that purpose, and the plaintiff joined in a bond with M. as surety to secure B. and X. payment of the price of such flour, in order, as stated in the bond, to enable him to carry out the contract. On a bill filed by the plaintiff against B. and X., who had never supplied M. with flour for the purpose of the contract—

Held, that the plaintiff was entitled to have the bond, as far as he was concerned, cancelled.

The plaintiff having introduced into his amended bill allegations of fraud against the defendant, which the evidence failed to support—

Held, that, though entitled to the relief prayed for, he must pay the defendants all the costs of that part of the bill containing such allegations, and the evidence taken thereunder.

V. C. K. WALTER v. STANTON.

Practice—Administration claim by a mortgagee—Solicitor—Costs.

Where a mortgagee, who is also solicitor of the testator and executrix, institutes a suit—in which a common administration decree is made—he is entitled to be paid his principal and interest out of a fund in court, but not his costs, those being costs of an administration and not a mortgagee's suit.

Where a mortgagee, who is also solicitor to the executrix, files a bill, in which a common administration decree is made, and the next of kin subsequently get the conduct of the cause by reason of the plaintiff's peculiar position, they must stand *pari passu* with him as to costs, both before and after the conduct of the cause is taken away from him, and he is not liable to pay the costs of an administration summons taken out by them, though without notice of his suit.

V. C. W. RE CHAPELL'S TRUST.

Will—Construction—Condition, precedent or subsequent—Substantial fulfilment of condition.

A testator gave stock upon trust for his wife for life, and after her decease to be divided equally between her four sons, J., E., H., G., provided that E. should be of sound mind at such time, and capable of managing his own affairs; but in case E. should be insane at the time of his wife's decease, then he directed the stock to be equally divided between his other three sons, J., H., and G. E. died insane in the lifetime of the wife. There was a gift of the residue to J. H. and G.

Held, that it appearing from the whole of the will that E.'s sanity at the time of receipt was what the testator intended to provide for, this was a contingent limitation to take effect after the wife's decease, and that, either on the principle of *Jones* v. *Westcomb*, or as being undisposed of, E.'s share went to J., H., and G.

V. C. W. DOWLING v. BETJEMAN.

Jurisdiction—Specific chattel—Remedy at law.

Although the court will order the delivery of a specific chattel, such as a picture, to the person seeking to enforce his right to it, on the ground that he ought not to be left to recover that value merely which a jury might put upon it; yet where the person has himself placed definite price upon the chattel the court will not interfere in aid of what is a mere money demand, and as such, capable of being enforced by action at law.

M. R. JONES v. RICKETTS.

Vendor and purchaser—Reversion—Purchase at undervalue—Unfounded allegations of fraud—Costs—Evidence—Tenancy by the courtesy—Live birth.

Where in a suit to set aside the sale of a reversion, a case of fraud was alleged by the plaintiff (the bill praying that the conveyance might be set aside as fraudulent and void) which failed, but the court was satisfied that the purchase of the reversion was

made at an undervalue. The court, in making a decree in favour of the plaintiff, ordered him to pay all the costs of the suit, except such as related to the question of inadequacy of consideration as to which no costs were given on either side.

Under the circumstances of the case, the midwife and mother being dead, the court accepted the evidence of the father upon the question of whether an only child of the marriage was born alive, so as to entitle the father to a tenancy by the courtesy of the freehold lands of his wife.

V. C. S. LUCAS V. WILLIAMS.

Administration—Executor carrying on business—Judgment against executor—Liability de bonis propriis.

An executor, while carrying on his testator's business, signed a promissory note, *per proc*, in the name of the firm, for goods supplied during testator's lifetime. The court made an administration decree, and several orders thereunder, by which the assets were withdrawn from his control. Subsequently, a creditor sued him on the note, and recovered judgment by default. The court restrained the creditor from enforcing the judgment.

REVIEWS.

THE WESTMINSTER REVIEW, January, 1863. New York: Leonard, Scott & Co.

The contents of this number are as usual varied and interesting. The first article is on the all-absorbing topic in London—"Convicts, and what shall be done with them;" the second is not so attractive—"The Literature of Bohemia;" the third is an able critique on Bishop Colenso and the Pentateuch; the fourth is an equally able critique on the scarcely less celebrated work of Victor Hugo, "Les Miserables." The remaining articles, though not of such striking interest are worthy of perusal. The number abounds with food for the intellectual.

THE NORTH BRITISH, February, 1863. New York: Leonard, Scott & Co.

The contents of this number in some respects resemble the contents of the *Westminster*, so far as the heads of the articles are concerned, but in other respects are essentially different. In it we find the convict question discussed with much earnestness; also a most satisfactory answer to the recent attacks of Colenso and others on the Pentateuch. A paper is devoted to a sketch of the history of that splendid but erratic man Professor Wilson. The remaining articles, such as Novels and Novelists of the Day—The Prospect of Parties—&c., are well worthy of perusal by the scholar, the statesman, and the gentleman.

THE LONDON QUARTERLY, January, 1863. New York: Leonard, Scott & Co.

This being cotemporary to the two preceding Reviews discusses many of the topics discussed in them. Thus we find a sensible article on the ticket-of-leave system, and an interesting article on the Life of John Wilson. The remaining articles are: Peru—Institutes for Working Men—Constitutional Government in Russia—New Testament—South Kensington Museum—The Stanhope Miscellanies—Four years of a Reformed Administration.

THE EDINBURGH REVIEW, January, 1863. New York: Leonard, Scott & Co.

In this we find an article on Victor Hugo's "Les Miserables," and the Convict System. The remaining articles are: India under Lord Dalhousie—Diaries of Frederic von Gentz—Gold Fields and Gold Miners—Contributions to the Life of Rubens—The Campaign of 1815—Modern Judaism—Public Affairs.

BLACKWOOD, Feb., 1863. New York: Leonard, Scott & Co.

In this number is the continuation of Caxtonia, Part XIII., No. 19—Progress in China, Part II.,—Lady Morgan's Memoirs—Henri Lacordaire—the conclusion of the Sketch from Babylon—Our New Doctor—and Politics at home and abroad. The reading is not so heavy as that in the Quarterlies.

THE SYSTEM OF LANDED CREDIT. By Geo. Henry Macaulay.

This brochure is the best we have seen on the far-famed and with us much maligned "Credit Foncier" system, and we must say that a better acquaintance with the monster much lessens our dread of him. It is explained by Mr. Macaulay that the system is by no means the bantling of M. De Boucherville. An institution of the kind was first organized in Silesia, a province forming the south-east portion of Prussia, after the seven years' war, when the inhabitants were so deeply in debt that they could not meet their pecuniary engagements. Other Societies were formed in different parts of Europe between 1777 and the present time. It is explained that the system works well in Russia, Prussia and France. It does not follow that it will work well in Lower Canada; but this is a point which we have neither the inclination nor the space to discuss at present. We agree with those who say that the best mode of relieving Lower Canada farmers from depression is to instil into them habits of industry and energy. They make indifferent farmers, and unless they alter their ways a Credit Foncier in every village would be of little avail to them. Mr. Macaulay has done much to place the system before his readers in its best light. His familiarity with the writings of others on the same subject gives additional weight to his remarks. His pamphlet is very creditable to him.

GODEY'S LADY'S BOOK for May is received. The May fashion plate contains five beautiful colored figures. The steel plate, which is an excellent one, is called "Playing May party." Besides the colored fashion plate there are five other full-length figures, wood-cuts, music, &c. The first article in the letter-press is "A morning at Stewart's." A full and faithful description of the emporium of this New York merchant Prince is given. We observe that Godey will publish fashions in each future number, furnished by A. T. Stewart & Co., in addition to the ordinary colored fashions. This arrangement without doubt will add to the value of Godey.

APPOINTMENTS TO OFFICE, &c.

QUEEN'S COUNSEL.

JOHN BELL, JOHN HECTOR, GEORGE W. BURTON, JAMES COCKBURN, ALBERT N. RICHARDS, SAMUEL H. STRONG, MATTHEW CROOKS CAMERON, EMILIUS IRVING, CHRISTOPHER ROBINSON and ADAM CROOKS, of Osgoode Hall, Barristers-at-Law, to be Queen's Counsel. (Gazetted March 28, 1863.)

CORONERS.

MARTIN PHILLIPS, Esquire, M.D., to be an Associate Coroner for the County of Wellington. (Gazetted March 28, 1863.)

JONAS CANNIFF, Esquire, M.D., to be an Associate Coroner for the County of Hastings. (Gazetted April 25, 1863.)

CLERKS OF COURT.

SAMSON HOWELL GHENT, Esquire, to be Clerk of the County Court of the County of Wentworth, in the room and stead of Andrew Stuart, Esquire, removed from that office. (Gazetted April 4, 1863.)

REGISTRARS.

ALEXANDER McDONELL, Esquire, to be Registrar of the County of Glengary, in the room and stead of Duncan McDonell, Esquire, resigned. (Gazetted April 25, 1863.)

TO CORRESPONDENTS.

R. WILLIAMS—A SUBSCRIBER—Under "Division Courts."

EVIRE—JUNIUS—IGNIS FATUUS—Under "General Correspondence."

DIARY FOR JUNE.

25. Monday..... Recorder's Court sits. Last day for notice of Trial for Co. Ct.
26. Tuesday ..... Chancery Sittings Cornwall.
3. SUNDAY..... *1st Sunday after Trinity.*
5. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
24. SUNDAY ..... *2nd Sunday after Trinity.*
10. SUNDAY..... *3rd Sunday after Trinity.*
23. Thursday .... Sittings of Court of Error and Appeal.
17. SUNDAY ..... *4th Sunday after Trinity.*
19. Tuesday ..... Last day for Co. Coun. finally to revise Assess. Rolls, and for sp. sch. moneys by C.S.S. Chief Sup. to report state of Gram. Sc.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

JUNE, 1863.

A BANKRUPTCY LAW REQUIRED.

If all men were able to pay their debts, and honestly disposed to do so, there would be no need of a bankruptcy law. But when, in a community, many persons are found unable, from some cause or other, to pay their debts in full, it becomes necessary that there should be such a distribution of a debtor's effects among his creditors, that there shall be no preference or priority—that all shall share alike—that after a lawful and equitable distribution, the debtor shall be protected in the enjoyment of future acquired property.

The property of the debtor is the fund to which the creditor looks for payment. So long as that fund is sufficient to pay all demands upon it, the ordinary remedy by action is all that is required; but when ascertained that the creditor's fund is insufficient for the payment of his debts, so that some creditors are likely to be paid in full at the expense of others less fortunate, and that the debtor himself, for all time to come, is likely to have the millstone of debt about his neck, something more than the ordinary remedy by action is needed.

The creditors have their rights. The debtor has his rights. It is an object of solicitude so to dispose of the debtor's effects, and of the debtor himself, as not to trench upon the rights of either. For that purpose our present law of insolvency is, and for a long time past has been, utterly insufficient.

That which should be managed under the well regulated provisions of an act of Parliament, applicable alike to all persons and all cases, is left to the caprice of debtors or the caprice of creditors, to the certain injury and loss of the one party or the other. As the law stands, an insolvent debtor either honestly gives up all that he has for the benefit of his creditors, or, under pretence of an assignment for the benefit of his creditors, makes a dishonest assignment for the benefit of himself, and protection of his effects as against the demands of his creditors; but the latter, we are sorry to say, is too often the case.

It is a mistake to allow the debtor to dictate on what terms his creditors shall have his effects. It is a mistake to allow these effects to be assigned, as is often the case, to the son, the brother, or brother-in-law of the debtor, whose interest is not that of the general body of the creditors, but rather that of the debtor, his relative. It is a mistake to allow the effects from year to year to be tied up under the assignment, so that none but the debtor himself and his chosen assignee shall derive any benefit from the assignment. It is a mistake to allow the debtor himself to decide upon his own insolvency, and perhaps, under plea of insolvency, so make away with his property as to place it beyond the reach of his creditors, and yet have the full enjoyment of it, as if no assignment were made.

These are all dishonest but too common practices; and the law (to our shame be it said) rather encourages than discourages them. If a debtor, disposed to be honest, really strips himself of all that he has, he is left without support and without protection. Through misfortune, he finds himself so embarrassed that it is necessary to compound. Some creditors, whose demands are small, but whose expectations are large, will not release without payment in full. Payment in full is impossible. The consequence is, that the future earnings of the debtor are subject to be pounced upon to satiate the demands of a few hard-hearted creditors. He sees before him men prepared to dispute the very bread that enters his mouth for his daily sustenance and support. He sees before him, as the reward of honesty, a life of penury; and not merely so, but a life of turmoil with greedy creditors. He sees around him debtors, once insolvent like himself, who, notwithstanding assignments for the benefit of creditors, live in affluence, and who appear to grow richer and richer after each assignment. He has a family to support. The choice is between honesty and penury, or dishonesty and plenty. The law favors the latter, and the latter is his choice.

Now, this should not be. The law which tolerates it is defective. The law which encourages it is disgraceful. But such has been the state of our law for many years. No one has been found able or willing to make the necessary amendments. All admit the necessity of them, but none has the courage to make them. The country suffers for the want of a legislative doctor, possessed of sufficient

skill to apply the remedy. The seat of the disease is well known, but there is not one equal to the task of grappling with it and destroying it.

During the late sitting of the Legislature, our hopes were raised, owing to reports that reached us, of a measure introduced by the late Solicitor-General of Lower Canada, Mr. Abbott, by and with the sanction of the Government of which he was a member. It was introduced, read twice, referred to a special committee, by whom it was amended, and prematurely killed off, owing to the dissolution of Parliament. Though for the present lost, its language is still preserved, and we hope to find it revived during the next session of the Legislature.

A copy of the bill, as amended by the special committee, is before us. We cannot say that the bill is perfect. Perfection is not to be had in anything human. The existing law must be amended, and amendments must be from time to time made, as needed, according to the teachings of experience. Rome was not built in a day. We do not expect in a morning to wake up and find a perfect law of insolvency placed on the statute book. Still we welcome the bill before us, not because it has any claim to perfection, but because it is a step in the right direction—an earnest of something more to be done.

One feature of the bill, which gives it a strong claim to our regard, is, that it is intended to apply equally to Upper and Lower Canada. Another is, that its aim is to combine as far as possible economy with sound administration of law. The latter aim is, of all aims in the preparation of insolvency laws, the most difficult to be attained. The Bankruptcy law of 1843 was found to be too expensive, and for that reason was allowed to die a natural death. The danger now is that the Legislature will be driven to the opposite extreme—economical but beggarly management. Time alone can prove the worth of a bankruptcy or insolvency law. It is impossible to please every one. No bill can be so framed that some one will not find fault with it. Even the Bankruptcy Act of England, the ripe fruit of ages of experience, collected and classified under the superintendence of the present Lord Chancellor, is, by some, heartily condemned. But we are at present disposed to think that any reasonable bill would be better than no bill. In despair we welcome any measure of reform. Let us give it a trial. If found wanting, amend it; if incapable of improvement by amendments, repeal it. Let us have something. Cowardice has long enough had its sway. The do-nothing policy, in respect of insolvency, has been the policy of successive Governments. It is time that such a policy should be reversed. We want measures, not men. We care not what the legislators call themselves—Reformers or Tories, Grits or Conservatives—so long as they prove themselves capable of sound legislation on this all-important subject.

Mr. Abbott's bill, as introduced to the Legislature, was carefully drawn. It was carefully and judiciously amended by the special committee to whom it was referred.

The bill first provides for voluntary assignments, and then for compulsory liquidations.

First, as to voluntary assignments. The bill enables any person unable to meet his engagements, and desirous of making an assignment of his estate, to call a meeting of his creditors at his usual place of business. The debtor, at such meeting, is to exhibit statements showing the position of his affairs, containing the names and residences of all his creditors, and the amount due to each, distinguishing between those amounts that are actually overdue, or for which he is directly liable, and those for which he is only liable indirectly as indorser, surety or otherwise; the statements to show the amount due to each creditor, and the amount and nature of his assets. He must at the same time produce his books of account, and all other documents and vouchers, if required to do so by any creditor. Each notice of the meeting, sent by post, is to be accompanied by a list containing the names of all creditors whose claims exceed $100, and the aggregate amount of those under $100. At the meeting the creditors are to name an assignee, to whom the assignment is to be made. If no assignee be named at the meeting, or if the assignee refuses to act, it is to be in the power of the debtor to assign his estate to any solvent creditor resident within the Province not related, allied or of kin to him, and being a creditor for a sum exceeding $500. Provision is made for the settlement of disputes, if any, in regard to the right to vote at the meeting of creditors. The deed of assignment is to be in a given form; if executed in Upper Canada, to be in duplicate. The assignment is to be held to convey to and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, all moneys and negotiable paper, stocks, bonds and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and all other his assets and effects, excepting only such as are exempt from seizure and sale under execution. Upon the execution of the deed, the assignee, if appointed in Upper Canada, is to deposit a duplicate thereof in the office of the proper Court. If real estate be passed by the assignment, then provision is made for its registry in the proper register office. If the deed be executed in Upper Canada, according to the form of execution of deeds prevailing with us, it is to have the same force and effect in Lower Canada as if executed there, and *vice versa*.

Second, as to compulsory liquidations. It is declared that a debtor shall be deemed insolvent, and his estate subject to compulsory liquidation, 1st, if he absconds or is immediately about to abscond from the Province with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process, or if, being out of the Province, he so remains with a like intent, or if he conceals himself within the Province with a like intent; 2nd, if he secretes, or is immediately about to secrete any part of his estate and effects with intent to defraud his creditors, or to defeat or delay their demands or any of them; 3rd, if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them; 4th, if with such intent he has procured his money, goods, chattels, lands or property to be seized, levied on or taken under or by any process or execution having operation where the debtor resides or has property, founded upon a demand in its nature proveable under the act, and for a sum exceeding $200, and if such process is in force and not discharged by payment or in any manner provided for by law; 5th, if he has actually been imprisoned or upon the gaol limits for more than thirty days, in a civil action founded on contract for the sum of $200 or upwards, and and still is so imprisoned or on the limits; or if in case of such imprisonment he has escaped out of prison, or from custody, or from the limits; 6th, if he wilfully neglects or refuses to appear on any rule or order requiring his appearance, to be examined as to his debts, under any statute or law in that behalf; 7th, if he wilfully refuses or neglects to obey or comply with any such rule or order made for payment of his debts or any part of them; 8th, if he wilfully neglects or refuses to obey or comply with the order or decree of the Court of Chancery, or of any of the judges thereof, for payment of money; 9th, if he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by this act.

If a trader cease to meet his commercial liabilities generally as they become due, any creditor for a sum exceeding $200 may make a demand upon him in a given form, requiring him to make an assignment of his estate and effects for the benefit of creditors. If the trader on whom the demand is made, contends that the claim of the creditor does not amount to $200, or that it was procured in whole or in part for the purpose of enabling him to take proceedings under the act, or that the stoppage of payment by the trader was only temporary, and not caused by fraud or fraudulent intent, or by the insufficiency of the assets of the trader to meet his liabilities, he may within five days from demand present a petition to the judge, praying that no further proceedings be taken upon the demand. Provision is then made for the disposal of the prayer of the petition.

In Upper Canada, in case any creditor, by affidavit in a given form, of himself or of any other individual, shows, to the satisfaction of the judge, that he is a creditor of the insolvent for a sum of not less than $200, and also shows by affidavit such facts and circumstances as satisfy the Judge that the debtor is insolvent within the meaning of the act, and that his estate has become subject to compulsory legislation, the judge may order the issue of a writ of attachment in a given form against the estate and effects of the insolvent, and other subsequent proceedings, with a view to compulsory liquidation. If the Board of Trade in the county in which is situate the place of business of the debtor, has appointed official assignees, as hereafter mentioned, for the purpose of the act, the sheriff is to place the estate and effects attached in the custody of one of the official assignees; but if not, the sheriff is to appoint as guardian such solvent and responsible person as may be willing to assume the guardianship.

Authority is given to the Board of Trade at any place, or the Council thereof, to name any number of persons within the county in which the Board exists, or within any county adjacent thereto in which there is no Board of Trade, to be official assignees for the purposes of the act, and at the time of nomination to declare what security for the due performance of his duties shall be given by each of such official assignees before entering upon them. The powers and duties of an official assignee are then detailed. His remuneration is to be fixed by the creditors, at a meeting called for the purpose; but if not fixed before final dividend, it is to be put into the dividend sheet at a rate not exceeding 5 per cent. upon cash receipts.

Dividends are not, as at present, to be lost sight of, or otherwise conveniently forgotten. Upon the expiry of the period of two months from the first insertion of the advertisement giving notice of an assignment, or the appointment of an official assignee, or as soon as may be after the expiration of such period; and afterwards, from time to time, at intervals of not more than six months, it is made the duty of the assignee to prepare and keep constantly accessible to the creditors accounts and statements of his doings as such assignee, and of the position of the estate, and at similar intervals prepare dividends of the estate of the insolvent. The creditors entitled to rank in the estate are carefully described. Clerks and other persons in the employ of the insolvent in and about his business or trade are to be collocated on the dividend sheet by special privilege for any arrears of salary or wages due to them at the time of the

execution of the deed of assignment, or of the issue of the writ of attachment under the act, not exceeding three months of such arrears. All dividends remaining unclaimed at the time of the discharge of the assignee, are to be left in the bank where deposited for three years; and if at the expiration of that period still unclaimed, are to be paid over by the bank, with the interest accrued thereon, to the Provincial Government; and if afterwards duly claimed by persons entitled thereto, are to be paid over to such persons with interest at the rate of 3 per cent. per annum from the time of receipt by the Government. If any balance remain of the estate of the insolvent, after payment in full of all debts due by him, such balance is to be paid over to the insolvent, upon his petition to that effect, duly notified to the creditors by advertisement, and granted by the judge.

Strict provision is made against fraud, and fraudulent preferences of every kind. It is unnecessary here to detail them. Suffice it to say that they are such provisions as one would expect to find in an act of the kind, including some of those now in existence. Many of them are traceable to the English Bankruptcy Act, and so far the parentage is no disgrace to them. They are both wise and necessary.

Finally, provision is made for the discharge and protection of the debtor, under certain circumstances. A deed of composition and discharge, signed by the majority in number of his creditors for $100 and upwards, and who represent at least three-fourths in value of the liabilities of the insolvent, is to have the same effect with regard to the remainder of his creditors as if they also were parties to it. The operation and effect of the discharge is all that can be expected, and such as usual in such cases. Every discharge obtained by fraud or fraudulent preference, or by means of the consent of any creditor, procured by the payment to such creditor of any valuable consideration for such consent, is declared to be null and void.

The burthen of the administration of the law in Upper Canada is to be thrown upon the county judges. This, no doubt, is owing to motives of economy. We cannot say that we approve of it. The county judges have quite enough to do to discharge effectually the duties properly appertaining to their office. The jurisdiction of their courts has of late been much increased, and their labour and responsibilities in proportion augmented. In addition, the Legislature has of late years cast many duties upon them which, strictly speaking, appertain to the judges of the superior courts. The fact is, there is too strong a disposition to throw work upon the county judges, without previously considering what has already been cast upon them. They are looked upon as "legislative conveniences," upon whom may be thrown as much or as little work as the Legislature in its humour may see fit to impose. It will not do to crowd them to the earth with the burthen of official duties. We think the last straw that can be safely placed on their backs, has already been placed there. The addition of these new duties will be too much for them. Its effect will be to cause them either to neglect their duties proper, or the intended new duties, or perhaps both. In any view, the step is a false one. This we regard as the most objectionable feature of Mr. Abbott's bill. It is the penny-wise and pound-foolish system in all its hideousness. It is false economy to require judges of county courts, already sufficiently burthened, to administer a new system of insolvency law. Better far to leave that system to be carried out by specially organised tribunals, possessed of sufficient ability, and having sufficient leisure, to do the system justice. Money so spent will be well spent; and this, we feel satisfied, will be the only mode of securing for the new bill, in the event of its becoming law, a hearty and popular support, without which it will in a short time go the way of its predecessors.

We are aware that a cry for economy is now rampant, and perhaps not without reason; but there is nearly as much danger in yielding to it a blind obedience, as there is in neglecting it. If a system of insolvency law is to be had at all, we should have it properly administered; and we are satisfied that the proposed system will not be properly administered by the machinery devised by Mr. Abbott. New machinery is needed. The cost of it will be of no account, compared with the benefits to be derived from a healthy administration of the proposed law. Better far to have no law at all, than to have it so administered as to be a curse instead of a blessing. It is a great mistake to have too few judges for the administration of law. It is no less a mistake to pay them inadequately. The only way to secure a sound administration of law, is to have enough of judges, and the best men that can be had for the purpose. The only way to secure the best men, is to pay them enough to tempt them to leave the foremost ranks of the profession.

EASTER TERM, 1863.

During this term Hon. Adam Wilson was sworn in, and took his seat as a puisne judge of the Court of Queen's Bench.

During the same term the following gentlemen were called to the bar, Edward Boyd, LL.B.; Herbert S. McDonald, M.A.; Carydon J. Mattice, M.A.; James Miller, A.B.; Joseph Donovan; J. Downey; J. Wetenhall; and J. Shaw Sinclair.

During the same term the following gentlemen having

passed their final examination, were admitted to practise as attorneys at law, J. Hoskins; Joseph Wright; A. H. Stuart, LL.B.; T. C. Patterson, B.A.; J. Edwin O'Reily, M.A.; R. Forsyth; Herbert S. McDonald, M.A.; Edward Morgan; C. S. Mattice; Peter Brown; James Canfield; James A. Miller, B.A.; P. S. Martin; S. Kneeshaw; George S. Philip; A. Boultbee; M. J. Hickie; E. B. Haycock; W. J. Hayward; D. G. Hatton; A. Hudspeth; James Heap.

LAW SCHOOL.

Books to be read for the scholarships of the Law School:

1st Year—Stephen's Blackstone; vol. 1.
Stephen on Pleading.
Williams on Real Property.
Story's Equity Jurisprudence; from the beginning to section 440.

2nd Year—Williams on Real Property.
Best on Evidence.
Smith on Contracts.
Story's Equity Jurisprudence; 2 vols.

3rd Year—Real Property Statutes relating to U. C.
Stephen's Blackstone; book 5.
Byles on Bills.
Hayne's Outlines of Equity.
Coote on Mortgages.

4th Year—Burton's Real Property.
Russell on Crimes.
Common Law Pleading and Practice.
Smith's Mercantile Law.
Dart on Vendors and Purchasers.
Mitford on Pleading; and
U. C. Equity Pleading and Practice.

GENERAL NOTE.

In each year the examination may comprise questions on the Canadian Statutes affecting the prescribed subjects, when the text is varied by such statutes.

The examinations during last term were closed in the following order—the minimum mark being 240.

R. Walkem, 320; J. Hutt, 302; G. Kennedy, 273; G. Holmstead, 263; J. S. Stephens, 262.

JUDGMENTS.

The days appointed for the delivery of judgments in the Queen's Bench and Common Pleas are as follow:—

Queen's Bench—Monday, June 15, 10 o'clock.
Saturday, June 20, 2 o'clock.

Common Pleas—Monday, June 15, 2 o'clock.
Saturday, June 20, 10 o'clock.

SELECTIONS.

THE OLD ABRIDGMENTS.

Statham's Abridgment of the Law, folio.

In French, without title, date, or pagination. This work the first of the Abridgments of the Law, and the first English law book ever printed, is a kind of digest, containing most of the titles of the law, arranged in alphabetical order, and comprising under each head adjudged cases from the reign of Edward I. to the end of the reign of Henry VI., concisely abridged from the Year Books, together with many original cases not extant in the Year Books of those reigns. It has served as a model for others in later times, but was superseded by the Abridgment of Fitzherbert, which was published about the same period. There is only one edition, which is in folio, without date, and is supposed to have been printed by W. Tailleur, at Rouen, for Pynson; at the end of the Table are the words: "Per me, R. Pynson," and at the end of the volume is Tailleur's device. This Abridgment consists of 380 pages, and is a chef-d'œuvre of splendid typography, the singular beauty of which has rarely been exceeded in modern times. "The paper is of a very firm, silky texture," says Judge Story, "forming a strong contrast to the sleazy linen and cotton of our day; the ink is of a bright jetty and unfaded black; the type, though small, and partly composed of abbreviated characters has a sharp and distinct face; and the mechanical execution is so exact, that scarcely a letter exhibits a blur, and the surface of every page presents a uniform appearance, putting to shame many of the standard volumes of our times."

In Fuller's Worthies, published in 1862, * is the following account of our author sub nom., John Stathom:—

"He was born in this county [Derbyshire,] in the reign of King Henry the Sixth; and was a learned man in the laws, whereof he wrote an 'Abridgment,' much esteemed at this day for the antiquity thereof: for otherwise lawyers behold him (as soldiers do bows and arrows, since the invention of guns) rather for sight than service. Yea, a grandee in that profession hath informed me that little of Stathom (if any at all) is law at this day; so much is the practice thereof altered: whereof the learned in that faculty will give a satisfactory account; though otherwise it may seem strange, that, reason continuing always, the same law grounded thereon should be capable of so great alteration. The first and last time I opened this author I lighted on this passage: Molendinarius de Matlock tollavit bis, eô quod ipse audivit Rectorem de eâdem villâ dicere in Dominicâ Ram. Palm. Tolle, tolle.† 'The miller of Matlock took toll twice, because he heard the rector of the parish read on Palm Sunday, Tolle, tolle, *i. e.* Crucify him, crucify him.'‡ But if this be the fruit of Latin Service, to encourage men in felony, let ours be read in plain English."

Fitzherbert's Grand Abridgment of the Law.

This is one of the most ancient and authentic legal records, containing a great number of original authorities, quoted by different authors, which are not extant in the Year Books, or elsewhere to be met with in print. It has also the advantage of being a very copious and useful common-place or index to the Year Books, down to the twenty-first year of the reign of Henry the Seventh.

In the Library of Lincoln's Inn there is a beautiful copy of the first edition of this work, which is a very correct edition, printed in 1516, presented by Ranulph Cholmeley, and as there seems to be some uncertainty respecting the date of the first edition, some bibliographers having stated that it was printed in 1514, we give a description of this copy by Mr. Spilsbury, the accomplished librarian of Lincoln's Inn.

* We print from the edition of 1811. † Stathom, Tit. Toll, last case of the Title.
‡ It is the Gospel appointed for the day.

"This edition is in three parts, each having a frontispiece. Prefixed to the first part is a woodcut of the king on his throne, crowned, and holding sceptre and mund, and over this cut are the words: Prima pars hujus libri. To the second part is prefixed a woodcut of the royal arms, crowned, supported by a dragon and greyhound, with a portcullis on each side of the arms: above, two angels, bearing scrolls with an inscription encircling a rose; and over this cut are the words: Sequitur secunda pars. The third part has the same frontispiece as the second, and over it the words:

Ultima pars hujus libri.

¶ The price of the whole boke (XIs.) which boke conteynyth iii grete volumes

At the end is the following colophon:

Finis tocius istius operis finit XII die December,
A.°dni Millecimo quingentesimo sextodecimo.

"Beneath the colophon is a cut of the royal arms, but of smaller size than the former, and with some variations.

"From the evidence of the woodcuts, the same having been used in the 'Fructus Temporum' printed by Wynkyn de Worde in 1515, Mr. Herbert concludes that the work was either executed by that printer, or printed for him in France. It is worthy of notice, however, that the same type is used by John Rastell in the Tables to this Abridgment printed by him in the following year, 1517, the smaller letter being used in the Prologue, and the larger chiefly in the Tables. A copy of this work was also presented to the Library by R. Cholmeley. In a notice of an edition of the Abridgment supposed to have been printed by Pynson 1514, Mr. Herbert says there is a copy in Lincoln's Inn Library. This is erroneous; for it is the edition of 1516, as just described, which is in that Library; nor can an edition of 1514 be traced in either of the Libraries of the Inns of Court, the Bodleian Library, or the British Museum. There is a copy at Holkham of the edition of 1516.

"The copy in Lincoln's Inn is bound in three volumes in a modern binding. On the inside of the covers of the first and second parts is pasted a paper label with the inscription of the donor: Ex dono Ranulphi de Cholmeley, &c.; and on one of the fly-leaves of the second part is the following quaint inscription: 'Of your charity pray for the soul of Robert Crawley sometime donor of this book which is now worm's meat, as as another day shall you be that now art full lustye, that remember, good christian brother. Farewell in the Lord. 1534.' At the end of the third part, also on one of the fly-leaves, is a Latin inscription in the same handwriting, nearly to the same effect."

The Abridgment was again printed by R. Tottell in 1565, two vols. folio: and with additional general Table by J. Rastell, in 1577, 4to.

Of this author old Fuller wrote:—

"Sir Anthony Fitzherbert, son of Ralph Fitzherbert, Esq., was born at Norbury in this county [Derbyshire]. He was first the King's Serjeant at Law; and was afterwards, in the fourteenth of King Henry the Eighth, made one of the Justices of the Common Pleas; so continuing until the thirtieth year of the said King, when he died. He wrote the excellent book 'De Naturâ Brevium,' with a great and laborious 'Abridgment of the Laws,' and a Kalendar and Index thereunto; monuments which will longer continue his memory, than the flat blew marble stone in Norbury Church under which he lieth interred."

"Mr. Fitzherbert," wrote Fulbecke in 1599, "must needs be commended for great pains, and for well contriving that which was confusedly mingled together, in many Year Books; but he was more beholden to nature than to art, and whilst he laboured to be judicial, he had no precise care of methodical points; but he was in conceit slow, so he was in conclusion sure; and in the treatises which be of his own penning, he sheweth great judgment, sound reason, much reading, perfect experience, and in the whole conveyance of his discourses giveth sufficient proof, that he sought rather to decide than devise doubtful questions."

Brooke's Grand Abridgment of the Law.

In this work which is disposed under more titles than that of Fitzherbert, many readings are abridged which are not now extant, except in a work entitled Brooke's New Cases. Of this author in comparison with Fitzherbert, Fulbecke says: "Mr. Brooke is more polite, and by popular and familiar reasons hath gained singular credit, and in the facility and compendious form of abridging cases, he carrieth away the garland. But where Mr. Fitzherbert is better understood, he profiteth more, and his abridgment hath more sinews, though the other hath more veins; but I am loath to make them countermates, and therefore leave the judgment thereof to others."

Sir Robert Brooke was Chief Justice of the Common Pleas in the reign of Philip and Mary. The first edition was printed in 1568, 4to; it was reprinted in 1568, and in 1570; in 1573 it was printed in two vols. royal folio, by R. Tottell, and again in 1580.

In Fuller's Worthies is the following note:—

"Reader, be charitably pleased that this note may (till better information) preserve the right of this county [Suffolk] unto Sir Robert Broke, a great Lawyer, and Lord Chief Justice of the Common Pleas in the reign of Queen Mary. He wrote an Abridgment of the whole law, a book of high account. It insinueth to me a probability of his birth herein, because (lawyers generally purchase near the place of their birth) his posterity still flourish in a worshipful equipage at Nacton, nigh Ipswich, in this county."

"The character of the Abridgments of Fitzherbert and Brooke," says Judge Story, * "may be summed up in a few words. They are mere Indexes, under general heads, of the principal adjudged cases up to their own times, in which the points are accurately stated, but without any attention to order or any attempt at classification. As repositories of the old law, they now maintain a very considerable value, and may be consulted with advantage. Whoever examines them (for a thorough perusal of them will be a mere waste of time) will probably feel inclined, when he can, to ascend to the original sources; but if these should not be within his reach, he may rely with confidence, that these learned judges have not indulged themselves in a careless transcription, or a loose statement, of the law. In our own practice we have frequently found them the safest guides to the old law, and particularly to the contents of the Year Books. At the times when these Abridgments were originally published, they must have been very acceptable presents to the profession. But many of the titles are now obsolete; and the works lie on the dusty shelves of our libraries rarely disturbed, except upon some extraordinary inquiry, touching the feudal tenures, or the doctrine of *seisin*. The modest motto prefixed to both of them deserves to be remembered: *Ne moy reproves sauns cause, car non extent est de bon amour.*"

Rolle's Abridgment of Cases and Resolutions in the Law.

According to Lord Campbell, Rolle, while a student at the Inner Temple, London, "composed that wonderful Digest which, with additions and corrections made by him in after-life was given to the world under the title of 'Rolle's Abridgment,' and which shows not only stupendous industry, but a fine analytical head for legal divisions and distinctions." And when this work was cited at the bar in a case in the King's Bench in 1670, two years after it was published, Twisden, J. remarked: "That was his opinion, it may be, when he was a student. You have in that work of his a common-place which you stand too much upon; but otherwise it is nothing but a collection of Year Books, and little things noted when he made

* Miscellaneous Works, pp. 324, 325, ed. 1852.

his common-place book. His private opinion must not warrant or control us here."* There is a preface addressed to young students in the law of England, by Sir Matthew Hale, which has been reprinted in the first volume of the Collectanea Juridica. Lord Hale says: "Though it is of excellent use and worth, yet it comes far short of the worth and abilities of him, that compiled it, and therefore is an unequal monument of him."

Mr. Hargrave speaks of this work as excellent in its kind, and in point of method, succintness, legal precision, and many other respects, fit to be proposed as an example for other abridgments of the law.† Judge Story says the chief advantage that it possesses over the earlier compilations is in a more scientific arrangement of the materials, and a greater subdivision of the general heads, so as to bring together matters of the same nature or relative to the same branch, instead of heaping them up in one undistinguishing mass.

Henry Rolle was Chief Justice of the Upper Bench during the Usurpation. The work was printed in 1668, in two volumes, folio, in French.

The preceding works constitute the principal of the old Abridgments. We have purposely passed over, as of no account, Hughes's, which was published in 3 vols. 4to. 1660-1663; and Sheppard's, which was printed in 1675 in 3 vols. 4to; and also Nelson's, which is chiefly, and very inaccurately copied from Hughes's and published in 1725 in 3 vols. folio. D'Anvers's Abridgment, which extends only to title "Extinguishment," is a translation of Rolle's with the addition of more modern cases. The second edition was printed in 3 vols. folio, in 1725, 1732, 1737.—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(In the County Court of the County of Lambton, before Chas. Robinson, Judge.)

Lucas v. Elliott.

Division Courts—Jurisdiction—Detinue.

Held, That the Division Courts of Upper Canada have jurisdiction in actions of detinue.

Where therefore plaintiff sued in a County Court, and the value of the article detained was found to be $1, and no certificate for full costs was obtained from the judge who tried the cause, plaintiff was restricted to the recovery of Division Court costs only, and so much of defendants costs between attorney and client as exceeded the whole costs of defence that would have been incurred by the defendant in the Division Courts were allowed to be set off against the amount of plaintiff's costs and verdict.

(May 22, 1863.)

This was an action of detinue. Verdict for plaintiff $1.

The value of goods detained was found by the jury to be $1. The clerk taxed the plaintiffs costs on entering judgment at full County Court costs.

Mr. Pardee thereupon took out a summons to shew cause why the clerk should not be directed to revise the taxation and be directed to tax Division Court costs only, and why so much of the defendants costs taxed as between attorney and client as exceeded the taxable costs of defence that would have been incurred by the defendant in the Division Court should not be set off by the said clerk against the plaintiff's Division Court costs, and verdict upon the following grounds, viz.: That the said action was a suit of the proper competence of a Division Court, and that only Division Court costs should have been taxed by the clerk to the plaintiff, there having been no certificates granted by the judge, as required by the 328th sec. of Con. Stat. U. C. cap. 22, and why the said judgment should not be set aside or amended according to said revision.

F. Davis showed cause.

Robinson, County J.—The question for me to decide is, whether, under the provisions of the Division Court Act, the Division Courts have jurisdiction over actions of detinue.

The 54th and 55th sections of the Division Court Act (Con. Stat. U. C. ch. 19) define the jurisdiction of the Division Courts.

Section 54 carefully enumerates the cases in which they shall not have jurisdiction, viz.:

1. Actions for any gambling debt.
2. For liquors drunk in any tavern or ale house.
3. On notes of hand given wholly or partly in consideration thereof.
4. Actions of ejectment, or in which the right or title to any corporeal or in-corporeal hereditaments, or any toll, custom, or franchise comes in question.
5. In which the validity of any devise, bequest, or limitation under any will or settlement may be disputed.
6. For malicious prosecution, libel, slander, criminal conversation, seduction, or breach of promise of marriage.
7. Actions against a Justice of the Peace if he objects to it.

By sec. 55 the judge of every Division Court may hold plea of and may hear and determine, in a summary way, for or against persons, body corporate, or otherwise.

1. All personal actions, when the debt or damages claimed do not exceed forty dollars.
2. All claims and demands of debt account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100. And he may make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience.

If detinue is to be considered an action ex-contractu, it would come within the 2nd sub-section; but I hardly think it was the intention of the Legislature that detinue might be maintained when the value of the chattel detained was $100, while trover could only be brought to the amount of $40; besides, in the forms of pleading given by the Com. Law Pro. Act, detinue is classed among the actions on wrongs.

I shall therefore treat it as coming under the 1st sub-section of sec. 55.

It has been argued that the words "debt" or "damages" claimed, limit the meaning of the words "all personal actions," and exclude the action of detinue; because the object of that action is not to recover debt or damages but the specific recovery of a chattel. But, if that argument is a sound one, the County Courts would not have jurisdiction over this action any more than the Division Courts. The Act respecting County Courts (Con. Stat. U. C. cap. 18. sec. 17) confers jurisdiction in the following words, subject to the exceptions contained in the preceding section:—"The County courts shall have jurisdiction and hold plea in all personal actions where the debt or damages do not exceed the sum of $200." The language of the two Acts in reference to personal actions, it will be seen, is precisely the same, but the Com. Law Pro. Act (Con. Stat. U. C. sec. 300) takes it for granted that the County Courts have such jurisdiction, by directing that the County Court judges may order execution for the return of the chattel detained, without giving the defendant the option of retaining the chattel. Clearly then the argument founded on the wording of the section of the Division Court Act, conferring jurisdiction, fails.

It has, however, been urged, that the plaintiff in all cases of detinue is entitled to the benefit of the section of the Com. Law Pro. Act last cited, and therefore that the Division Courts can have no jurisdiction in such actions, as there is no provision that the Division Court judge may order execution as provided in that section, and that it is clearly against the meaning and provisions of the Division Court Act, that a Division Court Bailiff should enforce a writ against lands. Such is undoubtedly the case, for it has been provided that where a judgment has been recovered in the Division Court and an execution returned *nulla bona*, and the sum remaining unsatisfied amounts to $40, the plaintiff or defendant

* *Osborne* v. *Wallenden*, 1 Mod. 273.

† Notes on Co. Lit. c 9.

may obtain a transcript and file it with the Clerk of the County Court, and he is then entitled to the same remedy as if the judgment had been originally obtained in that court. I should certainly not think that I was empowered as a Division Court judge to order the execution to issue under the 300th sec. of the Com. Law Pro. Act, notwithstanding that the 69th sec. of the Division Court Act provides, "that in any case not expressly provided for by that Act, or by existing rules, or by rules made under that Act, the county court judges may in their discretion adopt and apply the general principles of practice in the superior courts of common law in actions and proceedings in the Division Courts."

If the powers conferred on the Division Court Judges by the section just cited, and the wording of the section as to jurisdiction, gives the Division Courts jurisdiction over detinue, (and I find it impossible to come to any other conclusion,) the subsequent conferring of additional powers on Superior and County Court judges and not giving them to Division Court judges, can hardly be construed to take away that jurisdiction.

A stronger argument against the existence of such jurisdiction is the silence of the rules and forms of the Division Court Act. No execution in detinue is provided by them, and the forms of claims though they make mention of trover leave out detinue. Now by the 66th section of the Division Court Act the rules and forms shall have the same force and effect as if they had been made and included in that Act, so that they should be read as if incorporated in that Act. They become then material in their bearing on the construction of the Act. But it would be too strict a construction to hold that such an omission would take away the power conferred generally by the Act, more especially when the statute seems to anticipate omissions of this nature by giving the judges powers to supply them by reference to the practice of the Superior Courts.

In *Taylor* v. *Addyman*, 22 L. J. C. P. 94, where the words "debt" and "damages," as used in the English County Court Act, were held to include detinue, the objection of want of machinery was not allowed to prevail. It certainly would impair the utility of the Division Courts if plaintiffs can be allowed in all cases of detinue, no matter how small or trivial, to sue in other courts and heap costs on defendants. I cannot think that this was the intention of the Legislature.

I therefore am of opinion that this action is of the proper competence of the Division Court, and that the order should be made absolute for revising the taxation of costs.

Summons absolute.

CORRESPONDENCE.

SIMCOE, *25th April*, 1863.

SIRS,—I wish to know if Bailiffs of Division Courts are or are not entitled to a fee on executions when returned *nulla bona?*

Please look at "Act respecting Division Courts" of 1859, sections 52 and 53, cap. 19, and give your opinion and oblige,

Yours truly,

Eds. *Law Journal*, Barrie, C. W. N. PEGG, *Bailiff.*

[We think that they are not. There is nothing in the tariff of fees to warrant the charge, and we do not think there is enough in the above sections to authorize it in the absence of an express provision, although they seem to give some ground on which to rest an argument in its favor.

We are aware that the fee is allowed to be charged in some counties; but we think the better opinion is that it is unauthorized, and that for a special and very obvious reason it was not intended to be allowed.—EDS. L. J.]

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

IN THE MATTER OF SHERIFF DAVIDSON AND THE COURT OF QUARTER SESSIONS IN AND FOR THE COUNTY OF WATERLOO.

Jury Law—Con. Stat. U. C. cap. 31, *secs.* 84, 87, 105, 161, *sub-secs.* 1, 2, 4; *sec.* 164 *sub-sec.* 87; *c.* 84, *sec.* 161, *sub-secs.* 1, 2, 4; *sec.* 164—*Sheriff's fees.*

Held, 1. That a sheriff is not entitled to be paid for certificates alleged to be furnished to persons under and pursuant to s. 105 of the Jury Act, without proving that the persons to whom the certificates were given requested the same.

2. That no appeal lies from the decision of the Court of Quarter Sessions as to the amount which a sheriff is entitled to receive for mileage to serve jurors, and therefore that the court will not, at the instance of the sheriff, grant a mandamus to compel that court to revise its decision in such a matter.

3. That the sheriff is entitled to be paid for copies of County Court Jury Panels furnished to the Superior Courts of Common Law for Upper Canada at Toronto

[Easter Term, 1863.]

In Easter Term, 1862, *R. A. Harrison* obtained a rule calling on the Court of Quarter Sessions in and for the county of Waterloo, on notice to their chairman, to shew cause why a mandamus should not issue commanding them properly to audit the accounts of the said sheriff, laid before said court at the sittings in October and March last, by allowing to the sheriff certain items deducted from the October account, viz:—

111 miles to serve jurors, at 8c.	$8.88
2 copies of juror's panels for Court of Assize	2.00
6 copies of same for Court of Quarter Sessions and County Court	6.00
125 certificates to jurors served, and certain items deducted from his account, rendered to said court in March, 1862	25.00
17 miles to serve jurors	1.36
6 copies of panels of grand and petit jurors for Quarter Sessions and County Court	6.00
21 certificates to grand jurors	4.20
	$53.44

And to order payment of the accounts, including said items, on the ground that the sheriff having performed the services is in law entitled to be paid for them, and that the disallowance thereof by said court is contrary to law, &c., &c.

In Michaelmas Term last *M. C. Cameron* shewed cause. He objected that the rule should be to the magistrates in Quarter Sessions and not to the court. That the court had audited and had acted in their discretion. That they had rejected the claim for mileage, considering the evidence insufficient. He filed several affidavits.

R. A. Harrison supported his rule.

HAGARTY, J.—I shall first notice the charges disallowed.

Of certificates of exemption to jurors.

Apart from any technical questions as to our right to review the decision of the Court of Quarter Sessions, I am not prepared to say with certainty that I think their view erroneous.

The whole question seems to turn on two clauses of the Juror's Act—

Sec. 105 says "Every juror who has attended, shall, upon application by him made to the sheriff or deputy sheriff before he departs from the place of trial, receive a certificate testifying his attendance, &c., and the sheriff or deputy sheriff shall give such certificate upon demand."

Sec. 161 provides a tariff of sheriff's charges "For the respective services performed by him under this act."

Sec. 5 "For every certificate given to any juror, of his having served (to evidence his exemption from serving again until his time for doing so returns in its course) the sum of 20 cents."

As I understand the disputed point it is this, the sheriff makes a certificate for every juryman, and has it ready and presents it to each or leaves it at the treasurer's office for each, whether the juryman asks for it or not. The Court of Quarter Sessions insist that unless the juryman expressly requires it, the sheriff should not prepare or charge for it.

I am hardly prepared to say that the latter view is not the true one.

The certificate seems certainly intended by parliament for the benefit of the jurymen, and the sheriff is compelled to give it upon demand. That the latter officer may not be compelled to work for nothing he is allowed 20 cents for every certificate given to any juror of his having served.

The juror is not bound to ask for it, nor is the sheriff I think bound to provide it unless asked for.

It would seem an unsafe principle to introduce into practice that whenever the law allows a party to get a certificate in a cause, or in any thing connected with legal proceedings, that the official who is bound to give it if required, may always take it for granted that it will be required, prepare it beforehand, and require payment from some public fund on which the burden is cast by law, if the officer be required to do the work.

I think the applicant fails on this part of his case.

I now turn to the disallowed mileage items.

The case made by the sheriff is that he put in the affidavits of his bailiff, stating the number of miles travelled to make such service.

He gives copies of them, he states that the Quarter Sessions examined them, that the bailiff examined them, that his evidence was to the same effect as his affidavits, but the court decided on striking off from one account 111 miles, and from another 17 miles, not specifying how many miles were taken from each service.

He also produces affidavits from two of the justices in Quarter Sessions advocating his view of the reasonableness of his claim.

His counsel rested chiefly on section 164 of the Jury Act, which is as follows:—

"Upon proof by affidavit, &c., of such several services having been executed, or in the case of the sheriff of such travel having been necessarily performed in going to effect the service of such summonses, the affidavits being accompanied with a detailed account shewing the number of miles actually and necessarily travelled in going to serve each juror, (so that at the end of the service the officer summoning the jury shall only be entitled to mileage for the number of miles actually travelled,) and upon the account being properly audited, and an order of the Court of Quarter Sessions being made for the payment thereof, the treasurer shall pay," &c.

It is conceded that the auditing of the sheriff's account justly pertains to the Court of Quarter Sessions. I assume that in making such audit the court acts judicially and not merely ministerially. As an inferior court we can of course compel them to audit, but where they do actually audit, examine, and pass judgment upon the account, disallowing part of the mileage claimed, and allowing the rest, I cannot see my way to the right to review their discretion. To do so would be of course to transfer the duty of audit, that is of any audit in which any discretionary power rested from the Quarter Sessions to this court.

The very statements made by the applicant of the kind of proof he offered, and the course taken by the court in orally examining his bailiff as to the services, to my mind justify the action of the Legislature in vesting in a local court, presided over generally by the county judge, and required to have a certain number of members always present, the duty of examining into the accuracy of the claims made by officials on a public fund. The members of such a court, from local knowledge, ought to be specially qualified to sift each claim for mileage, and to ensure due protection to the country treasurer.

I cannot enter into any discussion as to the peculiar accuracy or inaccuracy of the disputing parties, in disposing of the question.

No principle of law is suggested to be involved in the decision.

Assuming that the Court of Quarter Sessions act judicially in auditing these accounts, I must further express my regret at the production of affidavits from two of the functionaries there presiding, to aid an application against the decision of their coadjutors.

This part of the claim also, in my opinion, fails.

It remains for me to consider the charges for copies of panels.

No explanation has been offered in the papers before us, of any grounds on which these items were rejected.

Two copies are demanded for the Court of Assize, six copies for Courts of Quarter Sessions and County Courts, and in another account six copies of panels of grand and petit jurors for Quarter Sessions and County Courts.

Hardly aware of the view taken by the Court of Quarter Sessions on these claims, I must merely express my opinion, formed from the statute.

Under section 59 of the Jury Act, the Courts of Assize and Nisi Prius, and Sessions of the Peace and County Court, issue precepts to the sheriffs for a competent number of grand and petit jurors. By section 60, the sheriff may return the same panel of petit jurors for the Quarter Sessions and County Court, when the same day is appointed for their sitting. By section 75, the sheriff shall to each precept return a panel of the names of the jurors contained in the proper jury list for the year, whose names shall be drafted from the list in manner after provided. Section 84 directs the sheriff, on his return to vcen. fac. on precept, under authority of which the panel is drafted, to annex a panel to said writ or precept, containing the names, &c., of those drafted in such panel, and shall transmit one copy thereof to the office of the clerk of the peace for the proper county, and another to the clerk of the crown and pleas in her Majesty's Court of Queen's Bench at Toronto, or to the deputy clerks of the crown, as the case may be.

Then section 161, giving the tariff of sheriff's fees, provides for each panel of jurors, whether grand or petit, returned and summoned by him in obedience to any general precept for return of grand or petit jurors for any sittings, &c., of Assize and Nisi Prius Sessions of the Peace, or County or Recorder's Court, respectively, under this act, $4.

Sub-section 2. For copies of such panel, to be returned to the offices of the Superior Courts of Common Law at Toronto, each $1.

It seems to me that the propriety of the charges must rest on these clauses.

A difficulty occurs from the relative wording of clauses 84 & 161.

By the first clause (84), having annexed the panel to the precept (apparently without reference to the court from which it issues), the sheriff is to send one copy to the clerk of the peace of the proper county, to the clerk of the Queen's Bench at Toronto, or to the deputy clerk of the crown, as the case may be.

Now, if this clause stood alone, it might be assumed that only two copies of each panel annexed to a precept should be returned by the sheriff—one to the office of the clerk of the peace for the county, and if in York and Peel to the clerk of the Queen's Bench, and if in an outer county to the deputy clerk of the crown.

In no other way can I understand the peculiar wording, "as the case may be."

But the tariff (section 161), after allowing the sheriff $4 for every panel, grand or petit jurors, returned to any general precept for either superior or inferior courts, proceeds thus:

"For copies of such panel, to be returned to the offices of the Superior Courts of Common Law at Toronto, each $1."

Now, these words would appear to intimate that a copy of every panel for Assizes and Quarter Sessions, and County Court and Recorder's Court, is to be sent to the Queen's Bench and Common Pleas at Toronto.

It is not easy to understand the object of the Legislature in making any such provision for the inferior court panels, even if considered necessary as to the assize panels.

This reading, if adopted literally, would compel the sheriff, on every panel, from whatever court, to send one copy (under clause 84) to the clerk of the peace, and one to each of the superior courts, or three copies of each panel. But the only fee allowed by the tariff for copy of panel, is for copies to be returned to the offices of superior courts in Toronto, and his right to charge any fee whatever must depend on the language of the tariff.

At the Assizes there are two panels for grand and petit jurorrs. Thus he would seem to be entitled to one dollar for a copy of each for the Queen's Bench and Common Pleas in Toronto—$4 in all.

The same fees for copies would be allowed in the Quarter Sessions and County Court jury panels, as there would be three panels—thus, six copies.

As the act is drawn, I hardly see any other manner in which I can construe it.

EX PARTE POUSETTE AND THE COURT OF QUARTER SESSIONS OF THE COUNTY OF LAMBTON.

Clerks of the Peace—Their fees—Tariff 1862

Con. Stat. U. C., cap. 24 sec. 145; Con. Stat. U. C., cap. 31 sec. 78; Con. Stat. U. C. cap 19, sec. 6, 8, 15.

Held, 1. That clerks of the peace are entitled only to payment for one general quarterly return of all convictions which have taken place before any justice or justices or before the court of quarter sessions and not to payment for separate returns of the convictions had before each individual justice of the peace—in fact to payment for only four lists or schedules annually.

2. That the proceedings required under sec. 78 of the Jury Act for drafting the panel from the jury list, are not to be considered tantamount to a "special sessions of the peace," so as to entitle clerks of the peace to make a charge therefor.

3. That clerks of the peace are not entitled to charge for filing orders fixing the times and places of holding division courts, or for communicating the same to the clerks of the respective courts, but only for orders of sessions arranging, fixing or altering the limits of division courts, or other acts of the court of quarter sessions.

(Easter Term, 1863.)

Christopher Robinson in Hilary Term last obtained a rule *nisi* calling upon the Court of Quarter Sessions in and for the county of Lambton to shew cause why a writ of *mandamus* should not issue, commanding them to allow the following charges made in Mr. Pousette's account as Clerk of the Peace:

Drawing up quarterly returns of convictions from 18 lists of justices, for each list, $1	$18 00
Attending special sessions of justices to draft jurors for September sessions	2 50
Filing order for the times and places of holding division courts in the month of June	0 08
Entering above order in the book of orders	1 00
Copy for Provincial Secretary	1 00
Copies for clerks of seven courts	7 00

R. A. Harrison shewed cause, contending—1. That the clerk of the peace was entitled to charge only for one general return, and not for a separate return of the convictions of each magistrate, as charged. 2. That the meeting of justices to draft jurors is not a special sessions within the meaning of the tariff, and so charge therefor properly rejected. 3. That clerks of the peace have nothing whatever to do with the times and places of holding division courts, and so all charges in respect thereof properly disallowed.

Christopher Robinson supported the rule.

The statutes referred to in the argument are mentioned in the judgment of the court.

HAGARTY, J.—I do not feel any reasonable doubt as to the construction to be placed on cap. 124 Consolidated Statutes Upper Canada.

Every justice of the peace is by section 1 bound to make a return of every conviction to the next ensuing general quarter sessions, (and when two justices act the return is to be immediate) and he is also to make return of monies paid to him thereon, which return the clerk of the peace is to file with the records of his office.

Sec. 4 enacts that the clerk of the peace shall, within seven days after adjournment of the quarter sessions publish such returns, and also fix in his office for public inspection "a schedule of the returns so made by such justices," to remain up for a specified time; and for every schedule so made and exhibited by the said clerk of the peace, he shall be allowed in his accounts $4, besides expense of publication.

Sec. 5 directs the clerk of the peace within twenty days after the end of the quarter sessions to transmit to the Minister of Finance "a true copy of all such returns made within his county." Cap. 23 Consol. Stats. Canada, sec. 36, directs all clerks of the peace to return to the Board of Registration and Statistics, in triplicate, lists of all convictions had before either courts of quarter sessions or before individual magistrates in their respective counties.

I have no doubt that the act first cited merely contemplates one general schedule to be periodically prepared by the clerk of the peace, embracing all the returns made by the justices to such period, and that the sum of $4 is his fixed fee therefor.

We were referred to the Tariff of Fees settled by the judges in 1862.

No. 57 of that tariff allows a fee of $1 for making out and transmitting to the Inspector General a return or schedule of all convictions which has taken place before any justice or justices or before the court, each list $1.

This, I think, means each list sent by him, as directed by the statute, within twenty days after some court of quarter sessions —in fact only four lists or schedules annually.

I cannot consider the proceedings on drafting of the panel from the jury list, under sec. 78 of the Jury Law, cap. 31 U. C. Con. Stats., as tantamount to "a special sessions of the peace." The sheriff attends according to public notice at the office of the clerk of the peace, and in presence of the clerk of the peace and any two justices proceeds to draft. By sec. 83 he draws a ballot and declares the number, whereupon the clerk of the peace, or one of the justices of the peace present, declares the number aloud, and by sub-sec. 8 the sheriff marks down the name corresponding thereto, and, when all is done, the names of the sheriff or deputy and of the clerk of the peace and justices present, or at least of two of them, shall be entered in the book and attested by them, &c.

Nothing herein seems to indicate the acts of a court, nor is the clerk of the peace as such directed to record anything as the act of a court.

It remains to consider a class of charges made by Mr. Pousette, such as—"Filing order for times and places for holding division courts in month of June; entering that order in the book of orders; copy for Provincial Secretary; and copies for clerks of seven courts."

The point in dispute seems to stand thus. After each division court the judge names the time and place for the ensuing court, and the charges are all made in reference to this. The magistrates urge that unless some change be made by them in the limits of the division courts the charges are improper.

In the schedule of services performable by the clerk of the peace, attached to chapter 120 Consol. Statutes Upper Canada are several items:—

"Making up books and orders of sessions declaring the limits of division courts, and entering the times and places of holding the courts."

"Making out and transmitting copies (with letter) to the clerk of each division court of the divisions made by the quarter sessions."

"Drawing orders of sessions for altering limits of division courts."

"Making out and transmitting copies of such orders to the Government."

"Making out and transmitting copies of such orders to each division court affected by the alteration."

The items in the tariff of 1862, Nos. 38, 39, 40, 41, 42, 43, fixing fees for such services, describe them exactly as in the statute.

I am of opinion that these charges refer to the cases of fixing or altering the limits of division courts by the court of quarter sessions, under the authority vested in them by cap. 19 U. C. Consolidated Statutes known as the Division Courts Act.

Sec. 8 gives the power, and sec. 15 directs the clerk of the peace to record the divisions declared and appointed, and the time and place of holding the courts, and the alterations from time to time made therein, and he shall forthwith transmit to the Government a copy of the record.

Sec. 6 directs that a court be held in each division once in every two months, or oftener, in the discretion of the judge, and the judge may appoint and from time to time alter the times and places within such divisions, when and at which such courts shall be holden.

I cannot believe that the legislature intended to impose the duty on the clerk of the peace of notifying the Provincial Secretary and each of the seven clerks of division courts every two months of the days appointed by the judges for holding the ensuing courts.

It seems to me his duty is confined to recording and notifying to the Government and to the different clerks every act done by by the court of quarter sessions, under the authority of the statute, as to the arranging, fixing or altering the limits of the different courts.

Both statute and tariff seem to me clearly so to indicate.

It is quite true that in the list of services attached to the statute

there are the words—"Making up books and orders of sessions, declaring the limits of the division courts, and *entering the times and places* of holding the courts," and the tariff adopts the same words; and sec. 15 of Division Court Act, already cited, directs him to record the divisions declared and appointed, and the times and places of holding the courts. But we cannot, I think, avoid the conclusion, that to entitle him to do the work and charge therefor the fees prescribed by the tariff, he must shew that the appointments or orders for times and places of holding the courts, which he sends to the Government and the different clerks, are orders or acts of the court of quarter sessions.

This he cannot do, and I think he must therefore fail.

Per cur.—Rule discharged without costs.

Regina v. Shuttleworth.

Negligent escape—Conviction—Evidence.

One W. was brought before magistrates in the custody of defendant, a constable, to answer a charge of misdemeanor, and after witnesses had been examined he was verbally remanded until the next day. Being then brought up again, and the examination concluded, the justices decided to take bail, and send the case to the assizes. He said he could get bail if he had time to send for them and the justices verbally remanded him till the following day, telling defendant to bring him up then to be committed or bailed. On that day defendant negligently permitted him to escape, for which he was convicted.

Held, that W. was in custody under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody or discharge on bail; and that the conviction was proper.

Criminal Case Reserved.

At the Court of Oyer and Terminer and General Gaol Delivery for the county of Oxford, begun and holden in the town of Woodstock, on Tuesday, the twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two, and continued by adjournment until Saturday, the twenty-fifth day of the same month, James Shuttleworth, a constable of the said county, was indicted, tried, and convicted by a jury of his country of a misdemeanour, in permitting one Jesse Williams Woodward, charged with committing a rape on one Ellen Jane Carrol, to escape from his custody as such constable, after having been committed to his custody to be safely kept for further examination.

From the evidence given at the trial, it appeared that Woodward was on Thursday, the twenty-first day of August, 1862, brought before two of the justices of the peace for the county of Norfolk, under the said charge, on a warrant issued by one of the justices; that an examination of witnesses was had on that day, and Woodward was verbally remanded to the custody of the defendant until the next day, then to be brought before them for further examination.

On the next day, Friday, the twenty-second day of August, the defendant brought Woodward before them, and having finished the examination of the witnesses on that day, the justices concluded to admit Woodward to bail, and to send the matter to the assizes.

The prisoner stated he could procure bail if he had time to send for them, and the justices informed him that they would remand him for a day, and if the bail arrived in the meantime they would take it; and the defendant was verbally directed to bring Woodward before them the next day, to be committed or bailed as they thought fit. The next day Woodward escaped from defendant's custody, and was not brought before the justices; he escaped by defendant's negligence.

On the trial the defendant's counsel objected:

1. That Woodward was in the custody of the defendant only for the purpose of enabling him to procure bail, he having been remanded to defendant's custody by the magistrates to enable them either to bail him, if he could procure bail, or commit him if he could not obtain bail: that such remanding being illegal, defendant was not bound to detain Woodward, and he could not therefore be legally convicted of a misdemeanour for his escape.

2. That the allegations in the first count of the indictment are, that the defendant arrested Woodward on the charge of rape, and brought him before the justices, and that they remanded him to defendant's custody for twenty-four hours, and that he escaped whilst defendant had him in custody under such remand: that the evidence shewed that Woodward was really in custody on a second verbal remand, for the purpose of enabling him to procure bail, and therefore he was not in custody as alleged in the indictment; and that there being a variance, he ought to be acquitted. And further, that he was in custody under the second verbal instructions to enable him to procure bail after the justices had decided to commit him for trial: that such last instructions were illegal and not justified by the statute, and therefore defendant could not be properly convicted of an escape as Woodward was not legally in his custody.

It was left to the jury to say, as a matter of fact, if defendant negligently allowed Woodward to escape, and they found him guilty.

In consequence of the objections raised, the court, in the exercise of its discretion under the statute, reserved the question if defendant could be properly convicted, on the objections taken, and on the evidence, for the consideration of the justices of her Majesty's Court of Queen's Bench for Upper Canada, and postponed the judgment on the conviction until such question shall have been considered and decided, which said question is hereby referred to the consideration of the said Court of Queen's Bench.

It was held that the second count of the indictment could not be sustained, and the defendant was bound over to appear at the next sittings of the Court of Oyer and Terminer and General Gaol Delivery for the County of Oxford, to receive judgment. The indictment and copy of the evidence at the trial are herewith.

All of which is hereby certified to the Court of Queen's Bench aforesaid, pursuant to the statute in that behalf.

W. B. Richards,

Presiding Judge at the aforesaid sittings of the Court of Oyer and Terminer and General Gaol Delivery.

W. H. Burns for the Crown, cited Burns' Justice, titles "Arrest" and "Warrant;" *Wright* v. *Court*, 4 B. & C. 596; Hale P. C., vol. ii., p. 120; Archbold's Snowden's Magistrates' Assistant, 4th ed. p. 73.

D. G. Miller, for defendant, cited Consol. Stats. C., ch. 102, secs. 25, 40, 43; *Rex* v. *Fell*, 1 Salk, 272; Russell on Crimes, vol. i., p. 423.

Hagarty, J.—The first count in substance alleges that defendant being a constable, &c., brought one Woodward before the justices, and he was then charged on oath with felony, and the justices duly adjourned the examination, and remanded the prisoner from 21st of August to the 22nd of August, (being under three days,) and verbally ordered defendant to keep the prisoner in custody, and have him before them on the 22nd of August, and that the defendant so having him in custody negligently permitted him to escape.

The second count alleges that Woodward was charged on oath with felony, and a warrant duly delivered to defendant, a constable, to apprehend and bring him before justices; that he arrested and had him in custody, and allowed a negligent escape.

The facts were, that being brought up on the 21st of August, the justices adjourned to next day, remanding the prisoner. On the 22nd the examination was resumed, and the justices announced that they had resolved to send him to the assizes, but would take bail. The prisoner asked for time to send for bail. They agreed to remand him to next day for that purpose, and he escaped before being brought up next day on the remand.

My very strong impression is, that the defence urged is not open to the defendant, if the facts be sufficiently stated.

It appears to me that the prisoner was in custody on the original warrant till finally disposed of, by either commitment for trial or discharge on bail. Till disposed of finally by the justices, I think the custody on the warrant continues. The form of warrant given by our statute is to apprehend and bring before the said justices, &c., "to answer unto the said charge, and to be further dealt with according to law." I therefore do not see why the second count should not support a conviction. We have not to deal with any question as to an illegal remand for a longer period than the statute allows.

Nor can I accede to counsel's argument, that as the evidence was fully taken and the justices had made up their minds to send him to the assizes if he could not obtain bail, an adjournment for a day at the prisoner's instance, and for his accommodation, to enable him to send for bail, rendered the custody illegal, so that

the prisoner could lawfully escape by force if necessary; and it may well be doubted if defendant can justify a negligent escape on any such presumed illegality. See *Rex* v. *Fell*, (1 Ld. Raym. 424.) It would be throwing a needless difficulty in the way of administering justice so to hold. Till the final decision of commitment to gaol or discharge on bail, I think the matter may fairly be considered as still pending before the justices.

The only difficulty I feel is as to the counts. If I cannot refer to the second count, the first may seem not to meet the facts exactly as they occurred. In that count only one remand is alleged, while two remands or adjournments took place. Unless we may consider the last day's delay simply as a continuance of the custody, as if the constable, instead of a formal remand, kept the prisoner, as it were, all the time before the justices awaiting their decision, which depended on the success or failure of the attempt to procure bail.

The verdict is general, and the only question of fact left to the jury was, whether defendant negligently allowed Woodward to escape, not depending on the particular form of the charge in either of the counts.

That he remains in custody under the original warrant, I refer to Burns' Justice, vol. vi., p. 368: "And when he hath brought him to the justice, yet he is in law still in his custody, till the justice discharge, or bail, or commit him," referring to 2 Hale, 120, where it is said: "When he hath brought him to the justice, yet he is in law still in his custody till either the justice discharge or bail him, or till he be actually committed to the gaol by warrant of the justice."

Per cur.—Conviction affirmed.

MYERS V. CURRIE.

Slander—Evidence of plaintiff—Rule refused—General bad character—Leave to appeal.

Held, that in an action for slander, evidence of plaintiff's general bad character previous to the speaking of the words, is not admissible, even in mitigation of damages.

Held also, that where evidence offered at a trial and rejected, affects only the amount of damages, and the amount of damages assessed is small, the court in the exercise of the discretion vested in it by the Error and Appeal Act (Con. Stat. U. C. cap. 13, s. 24,) will refuse leave to appeal.

[Easter Term, 1863.]

This was an action for slander, tried before RICHARDS, J., at the last assizes for the county of Lambton.

The declaration contained four counts. The first, was for falsely and maliciously speaking the words "Myers stole James' four barrows and took them to the Oil Springs and sold them." The second, was for the use of the words "As soon as Andrew Clinton comes home I will put Myers through for stealing James' hogs, &c." The third, was for the use of the words "Myers stole James' hogs and took them to the Oil Springs and sold them, and left him with only two little pigs." The fourth, was for the use of the words "If Myers took James up he would miss it, for I believe it was Myers and Rueben Booth, and nobody else, that took James' hogs."

The only plea on the record was not guilty.

The defendant offered evidence of plaintiff's general bad character previous to the speaking of the words in mitigation of damages, but the learned judge rejected it.

The jury found a verdict for plaintiff $15 damages.

R. A. Harrison moved for a rule *nisi*, calling upon plaintiff to shew cause why the verdict should not be set aside, and a new trial had between the parties, upon the ground of misdirection and rejection of evidence. He cited Tay. Ev. 2nd edn., pp. 314 and 315; *Bell* v. *Parker*, 11 Ir. Com. L. Rep. 413.

HAGARTY, J.—In this case we refuse the rule. Though there are dicta in text books to shew that evidence such as tendered at the trial was admissible, we think the weight of authority is against the reception of such evidence in an action for libel or slander.

Wilson, J., concurred.

Per Cur.—Rule refused.

R. A. Harrison then, pursuant to s. 24 of the Error and Appeal Act, (Con. Stat. U. C. cap. 13,) applied for leave to appeal, submitting as the matter complained of was misdirection, the court should grant the leave asked, although the damages assessed were small.

WILSON, J., on a subsequent day, said that as the evidence offered affected only the amount of damages, and as the damages were only $15, the court had come to the conclusion in the exercise of the discretion vested in the court by the Error and Appeal Act, to refuse leave to appeal.

Per Cur.—Leave refused.

COMMON PLEAS.

(*Reported by* E. C. JONES, ESQ., *Barrister-at-Law, Reporter to the Court.*)

BISHOP OF TORONTO V. CARTWELL.

Ejectment—Prescription—Conveyance of right of entry.

The claimant set up title under deed from patentee of the Crown, dated 16th March, 1842. The defendant claimed 21 years' possession.

It was proved for the defence that defendant and his father had worked on the lot in question since 1833; that they put up a house on the lot in 1840 or '41; that previously they had been in possession, and claimed it as defendant's land. It was a wild lot when they took possession thereof: defendant's father bought it at a government sale at Hamilton, stating he bought it for his son.

In reply, a letter was proved from the defendant to T. C. dated 22nd May, 1836, in which he stated he would not lease or leave the land in question until he was paid for his improvements, complaining of the value put upon the lot.

It was proved T. C. was assistant-secretary of the Church Society, and had since died. Also, that plaintiff first knew the defendant was in possession in 1845.

The jury found for the defendant. On motion for new trial, *held*, that the defendant, being in possession at the date of the deed to the plaintiff, (16th March, 1842,) nothing passed to the plaintiff by that deed, as the statute of this province, Con. Stat. U. C., authorizing the conveyance of a right of entry, was not then passed.

[M. T., 26 Vic.]

Ejectment for the northerly half of lot No. 14. 3rd concession of Puslinch. Writ issued 24th of February, 1859. Defence for the whole. The claimant set up title under a deed from the Reverend George Mortimer, dated the 16th of March, 1842. The defendant claimed by twenty years' possession before the commencement of this suit.

The case was tried at Guelph, in November, 1862, before Richards, J. It appeared that on the 23rd November, 1835, the Crown, by letters patent, granted this half lot to the Rev. George Mortimer in fee. And by deed dated the 16th of March, 1842, the grantee conveyed the same in fee to the claimant, in trust as an endowment for the "See of Toronto," and for the benefit, maintenance, and support of the bishop of such see for the time being, and his successors in office for ever.

On the defence it was proved by a witness that he knew defendant and his father since April, 1833. That the father lived on lot No. 13, and the defendant on No. 14, and that they chopped, logged, built houses and barns ever since he could remember; that he first saw them working on the premises in question in 1834; that it was about 21 or 22 years ago, less or more, since they put a house on the premises; they had 15 or 20 acres cleared. Defendant and his father were in possession claiming it before that as defendant's land. There are now 50 or 60 acres cleared and a house and barn on it. It was a wild lot when they first took possession. Defendant bought it at an auction sale at Hamilton. This witness never heard of any other title than that got through the sale at Hamilton. Another witness swore that defendant's father made improvements on lot No. 14, to the best of his knowledge as much as 26 years ago, and put up the house over 22 years ago. That the defendant was in possession ever since anything was done upon the place. He got it from his father, who said he had bought it for his son. It was unimproved when they went there. Two other witnesses proved to the same effect, carrying the building of the house back to 25 or 26 years; and one of them said he was at Hamilton when the defendant's father bought the right, as the witness understood at Hamilton.

In reply, a letter written by defendant to Mr. T. Champion, dated the 22nd of August, 1846, was proved and put in, in which the defendant expressed his desire to know whether he shall have a deed to get from the proper authorities in course of time, "in case he takes a lease," and proceeding, "As every other settler is at present settling about their land I would wish to do so in like manner, as I am still improving on it. I should like to know for what? but I do not intend to lease it or leave it until I

am paid for my improvements, if I do not get this liberty such as the settlers of the township." The letter goes on to complain of the value set upon the lot, and requesting an early answer. It was proved that Mr. Champion was at that time assistant-secretary of the Church Society, and was since dead. Mr. Saunders, the clerk of the peace, proved that a note shown to him, dated the 18th of December, 1845, was written and given by him to defendant. It was as follows:

"Sir,—The bearer, Patrick Cantwell, is the person living on lot No. 14, 3rd concession Puslinch township, (the north half,) about which I wrote to you on the 2nd instant. He is about to go to Toronto and will see you there respecting said lot. I can recommend him as a trusty person." Signed, &c., and addressed to Thomas Champion, &c. An entry was also proved in a book kept for the Church Society: "Cash due to sundries, to lands, P. Cantwell, on account of north half of No. 13, in the 3rd concession Puslinch, 15s." This was proved to be the book in which Mr. Champion made his first entries. The same charge was carried through the books. The society did not own No. 13, but 14, in the 3rd concession, Puslinch. A witness proved that he called on defendant in 1855, and in 1858, about it; and that he did not then claim the land as proprietor. The plaintiff first knew the defendant was in possession in 1845.

The learned judge asked the jury to say whether at the time the conveyance was made to the plaintiff (16th March, 1842) the defendant, or those under whom he claims, were in the actual possession of this lot claiming to be owner, or at all events, claiming the right to maintain possession of the land. If the jury were satisfied that the defendant entered as a purchaser from the Crown, and the Crown afterwards granted to the party under whom the plaintiff claims, the title and the possession would be in harmony with each other. That the land being wild land, and no knowledge of the defendant being in possession being brought home to the plaintiff earlier than 1845, the Statute of Limitations would not affect the right to recover.

The jury found for defendant.

In Michaelmas Term *Galt, Q.C.*, obtained a rule *nisi* for a new trial without costs, the verdict being contrary to law and evidence, and the learned judge's charge.

M. C. Cameron shewed cause. He contended that under the statute H. VIII., (the Statute of Bracery,) the defendant being in possession claiming as owner, nothing passed to the plaintiff by the deed of 16th November, 1842, as the statute of the province which authorised the conveying of a right of entry was not then passed. He cited *Doe Dunn* v. *McLean*, 1 U. C. Q. B. 151; *Doe Bonter* v. *Savage* 5 U. C. Q. B. 223; *Doe Peterson* v. *Cronk*, 5 U. C. Q. B. 135; *Doe Beckett* v. *Nightingale*, 5 U. C. Q. B 518; *Doe Clark* v. *McInnis*, 6 U. C. Q. B. 28; *Doe Simpson* v. *Molloy*, 6 U. C. Q. B. 302.

Galt, Q. C., contra, referred to *Benns qui tam* v. *Eddie*, 2 U. C. Q. B. 286. He also contended that under the act respecting limitations of actions and suits relating to real property, Con. Stat. U. C., ch. 88, sec. 8, which was first passed in 1834, the statute of H. VIII. would not apply, unless the true owner had notice that the land was in the actual possession of another person.

Draper, C. J.—The statute of 32nd H. VIII., ch. 9, has been repeatedly held from very early times to have been only in affirmance of common law. The section of our statute of 1834, to which Mr. Galt refers, extends only to preventing the lapse of twenty years being a bar to an action to recover any land or rent under certain specified circumstances. It cannot be construed to give effect to conveyances of land, which at common law and under the statute H. VIII. were void.

The principle contended for on the part of the defendant is too well established to be questioned, until the statute was passed which legalized the conveyance of a mere right of entry into and upon lands whether immediate or future, vested or contingent. Till then the law was settled that while one person was in actual and exclusive possession of land which he claimed as his own, another, though the true title might be vested in him, could not make a conveyance of property so held adversely to him, which would have the effect of passing the fee. The possession must certainly be adverse in its character. If the defendant in this case claimed by any privity with the plaintiff, or had acknowledged him to be the owner; still more if he admits his seisin, then the principle does not apply; and if the defendant had entered under a contract to purchase, or as a tenant under the Rev. G. Mortimer, he could not dispute his title or right to convey. But the evidence very clearly shows that he or his father took possession before the grant to Mr. Mortimer claiming independently of every one except the Crown. For all that appears, they were intruders upon Crown lands, and continued to be in possession as such intruders when the Crown patent issued. Then as to the grantee, the defendant was in adverse possession. There was, however, some evidence of letters and acts from which, had the jury found an acknowledgment of the plaintiff's title and right to possession, and found thereupon a verdict for the plaintiff, it may be questionable whether we should have disturbed it. But that evidence was left to the jury, and with a direction of which the plaintiff's counsel does not and could not with reason complain.*

Looking at the length of the defendant's possession—at the extent and value of his improvements—at the lapse of time since it was known, the defendant was in occupation until the action was brought, while the defendant's letter of 1846, showing as it does a consciousness of the weakness of his own title, yet contains a refusal to accept a lease, or to give up possession unless on his own terms, I am not surprised that the jury leaned strongly on the defendant's side, putting on any doubtful circumstances a construction in his favour. And I should anticipate that in the event of another trial the same result would follow. I do not think under such circumstances it would be a sound exercise of discretion to grant a new trial.

Rule discharged.

Fraser v. Hickman.

Railway Clauses Consolidation Act—Railway Company—Stockholders of—Liability for amount of unpaid stock—Execution against company—Return of "nulla bona."

Declaration, under Railway Clauses Consolidation Act against defendant as a shareholder of the Port Hope, Lindsay, & Beaverton Railway Company, setting out the Recovery of a judgment against said railway company; return of writ "*nulla bona*;" that the defendant holds 25 shares of stock in said company unpaid.

Pleas.—1. Never indebted. 2. Never was or is a shareholder in said company. On the trial, among other things, plaintiff proved a judgment against the company for £3000; that a *fi. fa.* had been issued and returned "*nulla bona*;" also that defendant had signed the stock-book of company for 25 shares and paid 2½ per cent., £6 5s.

The jury having found for plaintiff, on motion for nonsuit, on several grounds, among them that on the trial it appeared that the words "twenty-five" had been written over the word "ten," opposite the defendant's name, and that the alteration should be accounted for. Also 9thly, that the contract under which plaintiff recovered his judgment was illegal, being for a loan at a usurious rate of interest. *Held*. that the first objection was rebutted by the facts proved at the trial, as the defendant had paid the sum, £6 5s. being the correct sum to be paid on the the first call on 25 shares of £10 each, being 2½ per cent. And as to the ninth objection, *held*. that if defendant wished to impeach the plaintiff's judgment on the grounds of fraud or collusion, he should have raised the defence by his plea.

Semble, "that the court will intend the judgment to be right and well founded in all respects, until the contrary be shewn."

The several grounds taken, on motion for nonsuit, not above referred to, have been decided by previous cases in this and the Court of Queen's Bench, as by reference below will appear.

The plaintiff declared under the Railway Clauses Consolidation Act, against the defendant as a shareholder of the Port Hope, Lindsay & Beaverton Railway Company, setting out that he recovered judgment against the company; that he has issued a *fi. fa.*, which has been returned *nulla bona*; that defendant holds 25 shares of stock on which nothing has been paid.

Pleas.—1. Never indebted. 5. That defendant did not become nor is he a shareholder in the company.

The trial took place at the assizes for York and Peel, in January, 1862, before *Burns*, J.

The plaintiff proved that he was a judgment creditor of the Port Hope, Lindsay & Beaverton Railway Company for upwards of £3000, and that he has issued a *fi. fa.* against goods which had been returned *nulla bona*. It was also proved, independently of the return of the *fi. fa.* made by the sheriff of Northumberland and Durham, that the Company had no goods or chattels anywhere. The defendant was one of the persons named as forming one of original company, incorporated by the act of 9 Vic., ch. 109. He was also proved to have signed the stock book for 25 shares, and

to have paid a call of 2½ per cent., made in 1847, amounting to £6 5s., the shares being £10 each. In 1853, two acts were passed, relating to the company extending the time for commencing the work, &c., &c. In the latter of these, 16 Vic., ch. 241, sec. 4, there is a provision, that no subscriber to the stock book, under the original act of incorporation, should be held to be a stockholder or responsible as such, if he should within one month from the passing of the act signify in writing to the president of the company his intention of withdrawing therefrom. Several of the original subscribers took advantage of this proviso, but there was no direct evidence that the defendant did so, and that was some evidence to the contrary. After the act 16 Vic., the defendant's name was omitted from lists made out of stockholders, which the secretary for the time being prepared, and notices of elections of directors, &c., were not sent to him as to others who were treated as stockholders. There was an new book made out in 1853, containing a list of shareholders, in which the defendant's name did not appear, but it always remained in the original stock book. The name of the company was changed by the act 18 Vic., ch. 36, but it was specially provided that the change of name should not be held to make the company a new incorporation, or to impair the effect of any former act relating to the company.

At the close of the plaintiff's case it was objected, 1. That the proceedings should be by *sci. fa.* 2. That the return to the *fi. fa.* was not valid, because, as it was proved, the sheriff of Northumberland and Durham was at the time he returned the writ of *fi. fa.* a director of the company, though at the time he received it he was not. 3. That the defendant was not shewn to be a shareholder, the book entry being only an agreement to take shares. 4. The agreement is not with the company, there being a variance in the name. 5. The company was not shewn to have gone legally into operation, as it was necessary to shew that five per cent. was called and paid in. 6. The words "twenty-five" in the stock book, opposite defendant's name, have been written over a word "ten" This alteration should be accounted for. 7. The original act had become dead for *non-user*, and the subsequent acts do not revive it so as to make the defendant liable. These objections were overruled, leave being reserved to move the court above for a nonsuit.

The learned judge left it to the jury to say whether the defendant had relinquished his stock, though the notice in writing addressed to the president of the company cannot now be found or proved. In considering this question, he drew the attention of the jury to the fact of the omission of the defendant's name from the new list of shareholders in 1853, and the lists subsequently made out. The jury found for the plaintiff.

In Hilary Term, *Hector Cameron* obtained a rule nisi for a new trial, on the ground that the verdict was against evidence, or for a nonsuit on the leave reserved, and on the further objection, that 8th, the original act having expired, the defendant's liability was at an end, and the revival of the company by the new act did not revive defendant's liability; and, 9th, that the contract on which the plaintiff recovered judgment was illegal and void, it being a loan of money by a director of the company at illegal interest, and contrary to the provisions of the statute in that behalf.

In the Michaelmas Term following, *John Paterson* shewed cause. He referred to *Smith* v. *Spencer*, 12 U. C. C. P. 277.

Moss, contra, urged that the plaintiff being a director of the company, the defendant might be permitted to go behind the judgment and shew that the dealing between plaintiff and the company was void on the ground of usury. If the judgment was fraudulent and collusive between the plaintiff and the company it ought not to be effectual against the defendant.

Draper, C. J.—The first objection is answered by the fact that actions of this character have have been repeatedly upheld in the Queen's Bench and in this court; and further by the fact, that the statute when declaring that each shareholder shall be individually liable to the creditors of the company, in respect of the amount unpaid upon his stock, declares also that he shall not be liable *to an action* before an execution against the company has been returned unsatisfied in whole or in part. I have no doubt if a *sci. fa.* had been brought, it would have been contended with equal force and more reason, that an action was the proper mode of proceeding.

The cases of *Ray* v. *Blair*, 12 U. C. C. P. 257, and *Smith* v. *Spencer*, 12 U. C. C. P. 277, answer the second objection. The sheriff was not made a director until after he received the writ and it was not proved he was a shareholder when he received it.

The case of *Smith* v. *Spencer* also disposes of the third objection, and the defendant here actually paid an instalment.

The case of the *Toronto & Lake Huron Railway Company* v. *Crookshanks*, 4 U. C. Q. B. 309, meets the fifth objection. The later act in this case goes as far as the reviving act in that, to recognise the company as legally existing.

The sixth objection is rebutted by the evidence of facts subsequent to the subscription. The amount paid by the defendant is consistent with a subscription for 25 shares.

The seventh objection is disposed of by the case of the *Toronto &c., Lake Huron Railway Company* v. *Crookshanks*.

The eighth is answered by the case of *Smith* v. *Spencer*, and by the 4th sec. of the 16 Vic., ch 241.

The ninth objection was not taken at the trial, nor is there a word on the learned judge's notes to sustain it. No evidence is given that there was illegal usurious interest contracted for when the plaintiff lent his money to the company. No affidavit of the fact alleged has been offered. This, like the second objection in the case of *Ray* v. *Blair*, is an attempt to get behind the judgment against the company. If the defendant desired to impeach this on any ground of fraud or collusion between the plaintiff and the directors or officers of the company, he should have raised the defence by plea. The court will intend the judgment to be right and well founded in all respects, until the contrary be shewn, and shewn in a proper manner. I continue of the opinion I expressed in *Ray* v. *Blair*, and think that the defence, if true, in fact, was not open to the defendant on the pleadings, and there is nothing before us to shew that it has the slightest foundation in fact.

I think therefore, there is no ground to order a nonsuit, nor yet for a new trial. The weight of evidence tends in my opinion to sustain the verdict, though defendant may, and most probably did think that he was relieved from liability by the company not going into operation under the first act. Before the case of the *Toronto & Lake Huron Railroad Company* v. *Crookshanks* was decided, a good many people shared his error in opinion. Perhaps it would have been as just to people in his position, if the legislature, instead of providing that no subscriber to the original stock book shall be held to be a stockholder, if within a fixed time he signified his intention to *withdraw*, they had said, unless he signifies his intention to *continue*. But they have adopted the former course, and we must follow their direction in determining the rights and liabilities of parties.

Per cur.—Rule discharged.

Fisher v. Jameson.

Dower—Marriage settlement—Infancy of wife—Lower Canada—Contract for payment after death of husband—Binding in Lower Canada, not in Upper.

In an action of dower the tenant set up as a defence a marriage settlement entered into by the demandant with her husband, to which her father and mother were parties, she being at the time under the age of twenty-one years, in Lower Canada, by which it was agreed that she should receive £300 upon the death of her husband, and £100 per annum in sums of £50, half-yearly, alleging also that these respective sums had been paid her during her widowhood. It was proved in evidence that this contract was a binding one in Lower Canada, and by registration there became the first charge upon the estate of the demandant's husband, whether owned at the time or acquired after marriage.

Held, that such a settlement was not binding in Upper Canada, and was consequently no bar to the action.

[M. T., 26 Vic.]

Dower, claiming as widow of John Fisher, deceased.

Pleas.—1. On equitable grounds. That before demandant's marriage to John Fisher, *i. e.*, on the 26th of October, 1821, a marriage contract was entered into at Quebec between the said John Fisher and demandant, which is a good and valid marriage contract and settlement according to the laws of Lower Canada, whereby it was agreed that the goods and chattels, lands, and tenements, which each then had or thereafter should acquire during marriage, should be the property of the one by whom they were so acquired. And in case demandant survived John Fisher, she should not be entitled to dower in the lands of John Fisher, or of those of which he should be seised during the marriage; and demandant did thereby renounce all claim thereto for the future.

And John Fisher agreed, that in the event of demandant surviving him, she should take by title paramount beyond what should belong to herself, all such effects, clothes and linen which should then be there found, with her watches, rings and jewellery; and that he should give her £300 in cash, and £100 per annum, payable half-yearly, with which payment John Fisher charged his lands, tenements, goods and chattels. That John Fisher and demandant were duly married, and John Fisher after the marriage, during his life-time, bargained and sold the tenements in the plaint mentioned to the Commercial Bank, and afterwards died. That demandant, after the death of John Fisher, took and received the goods and chattels, land and tenements, which by the marriage contract were agreed to be her proper goods, &c., and after the death of John Fisher, took and received the £100 annually of the moneys of the said John Fisher, in the hands of his personal representatives, year by year, from the day of the death of John Fisher, hitherto, and the said sum of £300, and the clothes, linen, watches, &c.; and that the contract and acceptance are a sufficient jointure and release of dower, and that demandant elected to take the same in lieu of dower.

2. On equitable grounds. That John Fisher, after his marriage with demandant, was seised of the lands in the plaint mentioned, and during his life-time sold the same, by deed of bargain and sale by way of mortgage, to the Commercial Bank for £1361 7s 7d., with covenant for quiet enjoyment, without the let, suit, or incumbrance of the said John Fisher, or any one claiming under him. That the tenant is seised in fee simple of the premises, and derives his title by deed from the Commercial Bank, made after John Fisher had conveyed to them. That John Fisher died, having first made his will duly executed, and thereby devised to demandant all the revenue to be derived from his estate in full of all benefit to be derived from his estate, not exceeding £500 per annum; that demandant, after the death of John Fisher, received the £500 annually, from the death of John Fisher, hitherto, and that demandant claims title to dower through John Fisher, and not otherwise, and thereby hath elected to take the same in lieu of dower.

Demandant takes issue on the first plea, and replies that at the execution of the marriage contract, and at the marriage of the demandant to John Fisher, she was an infant under the age of twenty-one years; that by the contract no good and sufficient jointure binding on the demandant, being an infant, was provided, and that she has never, since the death of John Fisher, accepted of any of the provisions made by the contract for her, nor hath she elected to take any provision thereby made in lieu of dower. On this the tenant takes issue.

Demandant takes issue on the second plea.

The demandant was called as a witness for the defence. She proved her marriage at Quebec, on the 27th of October, 1821, the day after the execution of the marriage contract. She was born on the 16th of January, 1802. John Fisher died on the 16th of January, 1858, in Montreal; he left a will. At the time of the marriage, John Fisher had no lands or houses. He bought the farm mentioned in his will after the marriage, and sold it during his life-time. He also bought a house in St. Antoine street, Montreal, in which he and demandant lived together, and which demandant has occupied since his death. At the time of his death, John Fisher left no property, except the house in Montreal, and the furniture therein. The demandant has not received the sum of £300, nor the annuity of £100 since his death, nor any other part of her deceased husband's property. An inventory was taken of the effects in the house, and they remain there still. John Fisher died in embarrassed circumstances. The widow continued to live in the house, making use of the furniture. It was proved that by the law of Lower Canada the marriage contract was binding on the demandant, though she was a minor when she executed it, as her parents were parties to it, and the contract would give her the first claim for the amount settled on her, and the house and farm would be subject to this claim. The marriage contract operates as a mortgage, if registered, and therefore, if this contract was, as was assumed, registered, it bound the farm, unless demandant released it. Whether she had or not did not appear.

The question for the court is whether on these pleadings and facts the defence is established.

Jellett, for plaintiff, referred to *Carruthers* v. *Carruthers*, 4 Brown Chy. Rep. 500; *Neve* v. *Hollands*, 16 Jur. 933; *Dyke* v. *Randell*, 2 DeGex McN. & G. 209; *Tinney* v. *Tinney*, 3 Atk. 8; *Foster* v. *Cook*, 3 Brown Chy. 347.

C. S. Patterson, for the defendant, cited *Drury* v. *Drury* 3 Brown, Par. Ca. 497; *Boynton* v. *Boynton*, 1 Brown Ch. R. 445; *Barrow* v. *Barrow*, 4 Jur. N. S. 1049.

Draper, C. J.—The first plea presents the question whether the marriage contract was binding on the demandant, as she was an infant when it was entered into. If the answer were to be given according to the law of England, there would be no doubt. Cockburn, C. J., says, "I take it to be quite clear that neither at law nor in equity can an infant enter into a contract," excepting for necessaries, &c., *Bartlett* v. *Wells*, 3 Jur. N. S. 762.

A general rule of law is stated by Lord Eldon, in *Male* v. *Roberts*, 3 Esp. N. P. Ca. 163, that the law of the place where the contract is made must govern the contract. And the present case is so far stronger than *Male* v. *Roberts*, that here, all the parties to the contract were resident in Lower Canada when the contract was made. According to the evidence given, this marriage contract is valid and binding by the law of that part of the province on the demandant, though she was a minor when it was entered into. Assuming the law to be as thus proved, then according to what was said by the Master of the Rolls, in *Carruthers* v. *Carruthers*, 4 Bro. Ch. C. 512, that an adult female "may take a provision out of the personal estate, or even a chance," in satisfaction of dower, acting with her eyes open; the demandant must be deemed as bound by this contract, whatever may be its legal construction and effect.

No question can arise, under the circumstances, as to the jointure. One consideration for the demandant's agreement to renounce dower would seem to have been the husband's contract, that she should be paid a gross sum of £300, and an annuity of £100, both depending on her surviving him. But the consideration for the husband's contract is stated to be the agreement previously set forth, that there should be no community of goods between them, while the renunciation of dower is not stated to form any part of the consideration for the contract to pay demandant these sums of money. The evidence, however, shews, that according to the law of Lower Canada, this charge would attach upon the after acquired real estate of the husband, and therefore, upon the farm and house in Montreal, and there seems to be no reason to doubt but that the renunciation of dower was, according to the law of Lower Canada, valid and effectual.

At the time of the marriage, and for some time after, the demandant could have had no inchoate right of dower, for her husband had no real estate. Still, the contract, that there should be no community of goods, took effect, and by it the husband was debarred from acquiring any right to or power over the demandant's after acquired property. There can be nothing inequitable in the contract, that on her part she should have no right to dower,

The question I have hesitated upon, is what effect we should give to the words of the contract, "Il n'y aura aucun douaire coutumier ou prefix ou conventionel, chacun des dites John Fisher et Margaret Hunter futures epoux renoncant, par ces dites presentes au dites douaires et a chacun d'icieux." It has been argued that the word "coutumier" (which has been translated "customary") cannot be considered applicable to the right of dower existing under our law, and that neither the word "prefix" (which is not translated) nor the word "conventionel" (which is translated "stipulated") are more applicable; that the renunciation is of these specific kinds of dower only, whatever they may be, and does not amount to a general renunciation of all and every kind of dower. The maxim *expressio unius*, &c., is invoked in aid of this argument.

The popular meaning of "coutumier" is probably as different from from its legal signification, as the legal and popular meaning of the word customary are with us. If a word of art, it is not expounded by the evidence, nor is it stated whether it is used as a word of art or in a popular signification. It would be, I presume, clearly wrong to apply any technical interpretration which we might give to the word customary, to the French word coutumier.

In the absence of such evidence, I think we should view the contract as referring to the law of Lower Canada, and intended to operate on real property, and on the rights of dower recognised and governed by that law, a conclusion which I feel fortified by the consideration, that according to that law the money covenanted to be paid to the widow forms a charge or lien on the real estate of the husband situate in that part of the province.

I therefore conclude that the plea itself, if all proved, would not afford an answer to the demandant's claims for dower out of land in Upper Canada, and the latter part of the plea is actually disproved. The defence is pleaded on equitable grounds, but unless a different construction than the one I have adopted be given to the contract, the defence would no more be available in equity than at law.

The second plea is certainly disproved.

In my opinion, the postea should be delivered to the demandant.

RICHARDS, J.—I concur in the construction placed on the marriage contract, and that by its terms it does not deprive the demandant of her dower in lands situate in Upper Canada, even if it were held to be binding and in force here.

Considering the way in which the instrument was executed, and the fact that the demandant was a minor at the time of its execution, as well as the effect it might have by the law of Lower Canada to bind the after acquired property of the intended husband, if duly registered there, I am not prepared to decide that such a contract can be considered as binding so far as relates to real property situate in Upper Canada, whatever may be its effect on personal property in this part of the province.

Per cur.—Judgment for demandant.

WESTBROOK V. CALLAGHAN.

Assault and battery—Conviction—Appeal—Certificate of acquittal—Chairman of quarter sessions—Has no power to give—Con. Stat. Can., ch. 91.

In an action for assault and battery the defendants pleaded that the assault took place after the passing of Con. Stat. of Canada., ch. 91, and that the plaintiff summoned them before two justices, who convicted the defendants, who thereupon appealed to the quarter sessions, and they were, upon such appeal, acquitted, and the justices then presiding, upon request, gave each of them a certificate of such acquittal in accordance with the 37th section of the act. Upon exception to the pleas,

Held, that the certificate must be obtained from the convicting justice on first hearing of the case, and that a certificate given by the chairman of the court of quarter sessions upon an appeal was no bar to the action.

Held, also, that the plea should allege that the party aggrieved prayed the magistrate to proceed summarily under the act.

(M. T., 26 Vic.)

The declaration alleged that the defendants assaulted and beat the plaintiff, whereby the plaintiff became sick and wounded, and was for a long time unable to transact his business, and incurred expense for nursing and medical attendance.

Plea of defendant, John Callaghan the elder, that the trespasses in the declaration mentioned were committed after ch. 91, of the Consolidated Statutes of Canada had come into force and effect, and amounted to no more than an unlawful assaulting and beating within the meaning of section thirty-seven, of the said act, and that afterwards, and before the commencement of this suit upon complaint of the plaintiff, the defendant, John Callaghan the elder, was summoned to appear, and did appear, before E. T. Bodwell and Charles G. Cody, Esquires, two of her Majesty's justices of the peace, in and for the county of Oxford, (the same being the county in which the said offence was alleged to have been committed,) and thereupon the said justices, after hearing the plaintiff and defendant, John Callaghan the elder, did convict the defendant, John Callaghan the elder, of the alleged assaulting and beating, and which is the same grievance in the declaration alleged, and the said defendant being dissatisfied with the said judgment, and feeling himself agrieved thereby, appealed to the first general quarter sessions of the peace. And at the said court the said appeal came on to be tried before the said court, and before a jury, who upon oath found him not guilty of the matter in the said information and conviction charged. Whereupon, by an order of the said court duly made in that behalf, the said conviction was quashed, set aside, and annulled, and thereupon the justices holding the said court, to wit, Henry Birkett Beard, Esq., Chairman of the said sessions, and William Gray, Esq., one of the justices of the peace for the said country, and sitting as a justice of the peace at the said court did, according to the said statute, forthwith and at the request of the said John Callaghan the elder, make out a certificate of the fact hereinbefore stated, and did deliver the same to the defendant, John Callaghan the elder, whereby and by force of the said statute the defendant, John Callaghan the elder, became released from the matters in the declaration mentioned.

The defendant J. Callaghan, jun., pleaded a similar plea.

Plea of Peter Callaghan was similar to that of the other two defendants.

The plaintiff replied to these pleas; and the defendants demurred to the replication.

The plaintiff also took an exception to the pleas on the grounds that the said pleas do not allege that the facts charged in the said complaint were enquired into or evidence taken thereon at the said sessions, and that the said Henry Birkett Beard, and William Grey, had no authority to give the certificates in the said pleas mentioned, and that the verdict of the said jury should have been to quash the conviction, or to affirm it, and not to find the defendants not guilty of the matters complained of in the information.

The case was argued by *D. G. Miller*, for the demurrer, and *Freeman, Q. C.*, contra.

DRAPER, C. J.—I am of opinion the pleas are bad.

They rely in the first instance on sec. 87, of ch. 91, Consolidated Statutes of Canada, and aver that upon complaint of the plaintiff each defendant was summoned to appear, and did appear, before certain justices of the peace therein named, and were, by the said justices, convicted of unlawfully assaulting and beating the plaintiff, which is the same identical grievance alleged in the declaration, whereupon each defendant appealed to the Quarter Sessions, and the appeal came on to be tried before the said court, or a jury who had acquitted each defendant, whereupon the court directed that the conviction should be quashed, and thereupon the justices holding the said court did, according to the said statute forthwith, and at the request of each defendant, give to each defendant a certificate of the facts aforesaid, whereby and by force of the said statute, each defendant became released from the matters in the declaration mentioned.

The 89th sec. of ch. 91, Consol. Stat. Canada, enacts that if any person unlawfully assaults or beats any other person, any justice of the peace, upon complaint of the party aggrieved, "*praying him to proceed summarily under this act*," may hear and determine such offence. It is not averred that the plaintiff, when he made his complaint, did pray that there might be summary proceedings. But assuming that this apparent omission is cured by the subsequent allegations, or has been waived by the plaintiff there remains the question, whether the certificate pleaded is a bar to this action.

Mr. Miller, for defendants, relied on ch. 114, of the Consolidated Statutes of Upper Canada, sec. 1, 2, and 3, as giving the appeal treating the accusation as not one of crime. It is not worth while to discuss the question whether the appeal is under that statute or under ch. 99 of Consolidated Statutes of Canada, sec. 117, 118, 119. Neither of these acts give to the court of quarter sessions power to grant the certificate relied on. That power is conferred by the 42nd sec. of ch. 91, already referred to which provides that, "if the justice, upon the hearing of any such case, deems the offence not proved, or finds the assault or battery justified, or so trifling as not to merit any punishment, he shall dismiss the complaint with or without costs in his discretion, and shall forthwith make out a certificate under his hand" stating the facts of such dismissal, and shall deliver such certificate to the party against whom the complaint has been preferred. And then by sec. 44—if the person against whom such a complaint has been preferred for a common assault or battery obtains such certificate as aforesaid, he shall be released from all further or other proceedings, civil or criminal for the same causes. I think the power of granting such a certificate is confined to the justice or justices, before whom the complaint of the party aggrieved was made, and who has been prayed to proceed summarily under the act.

In my opinion the plaintiff should have judgment on the demurrer.

Per cur.—Judgment for plaintiff.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

KEEP v. HAMMOND ET AL.

Award—Full costs—Certificate—Referring back to enable arbitrator to certify.

Held, 1. That a certificate for full costs signed by arbitrators after they had made their award, and after they had finally separated, and at a time when not all together, could not be supported as entitling plaintiff to full costs of suit.

2. That the words "costs of suit," as used in an award, have no reference to any particular scale of taxation, and so cannot *per se* be relied upon as entitling plaintiff to full costs of suit in a case where the amount awarded is within the jurisdiction of an inferior court.

3. That the meaning of arbitrators where an award is made, is not to be gathered from affidavits or from any other source than the award itself.

4. That after entry of judgment by plaintiff, it is too late to ask to be allowed to set aside the judgment, and have cause referred back to the arbitrators to enable them to certify for full costs in proper form, assuming that the omission to certify in proper form is a ground for so doing, but as to which *quære*.

(Chambers, May 4, 1863.)

Plaintiff entered into a contract with the defendants for the building of a church.

The church was built, but not within the time specified in the contract. Plaintiff thereupon sued defendants on the common counts, claiming $1,272 as the contract price for erecting the church, and $480 for extra work. Defendants pleaded never indebted, payment, and set-off.

The cause was entered for trial and a verdict taken for plaintiff for £250, subject to a reference with power to the arbitrators to certify for full costs, if necessary.

On 17th August, the arbitrators signed the following:—

"Award for plaintiff and $92 damages and costs of suit, and also costs of reference, $152—each party to pay their own witness fees.

(Signed) "A B, "C D, "E F, } *Arbitrators herein.*"

The result was arrived at in the following manner:—

Claim for extras		$480 00
Set-off allowed defendant in consequence of non-completion of church within time limited by contract	$315 00	
Payments not acknowledged	29 00	
		344 00
Balance		$136 00
Less one-third, costs of reference		44 00
Award		$92 00

On 19th August, the arbitrators signed the following certificate:

"We certify that this is a fit cause to be withdrawn from the Division Court and tried in one of the Superior Courts of law."

(Signed) "A B, "C D, "E F, } *Arbitrators herein.*"

Plaintiff thereupon treating the memorandum of 17th August as an award, and the certificate of 19th August, if not the award, as entitling him to full costs of suit, entered final judgment in Goderich for the amount of the award and full costs of suit.

Defendant then appealed to the principal office in Toronto, where the taxing officer held plaintiff not entitled to full costs of suit, and so revised the bill of costs.

James Paterson thereupon obtained a summons, calling on defendants to shew cause why the taxation of costs should not be revised, and why the master should not, on the revision of taxation allow plaintiff full costs of suit.

1. On the ground that the arbitrators to whom the cause was referred having certified for full costs of suit, in pursuance of the power given them by the order of reference, and such full costs having been taxed by the Deputy Clerk of the Crown, the master on revision cannot disregard the certificate without a judge's order to do so.

2. On the ground that the arbitrators, before making their award, considered the question of costs, and decided in giving the plaintiff full costs, and that the order in the award that the defendant should pay costs was intended by them to mean, and did mean, full costs, and that the formal certificate signed by them thereunder being merely to carry into effect their decision or award, is a legal and sufficient certificate.

3. On the ground that at the taxation of costs before the Deputy Clerk of the Crown, no objection was made to the certificate, or that the plaintiff was not entitled to full costs in the cause, and that therefore the master, on a revision of costs under a notice, could not properly raise or entertain that question.

Or why full Common Pleas costs should not be allowed to the plaintiff, on the ground that he was entitled to the same on the merits.

Or why the plaintiff should not be at liberty to waive his judgment and the same be set aside, and an order made that on re-entering the same the master do tax to plaintiff full Common Pleas costs of suit, on the grounds that the plaintiff's claim having been reduced be set-off, the cause was a fit and proper one to be withdrawn from the Division Court and County Court and brought into the Court of Common Pleas, and that plaintiff is therefore entitled to such full costs on the merits.

Or why, the judgment being so set aside, it should not be referred back to the arbitrators to make a proper award according to their decision and intention, and that the time for making the award be enlarged.

Or why such other order should not be made in the premises as may appear just.

And on grounds disclosed in affidavits and papers filed.

Amongst other papers filed there was an affidavit of each of the arbitrators that he meant and intended by the award to give plaintiff full costs of suit, and that the certificate subsequently signed by them was designed only to carry out that intention.

S. Richards, Q. C., showed cause. He argued—

1. That the award without the certificate did not entitle plaintiff to full costs of suit, and that the certificate having been given after the making of the award was a nullity. *Spain* v. *Cadell*, 8 M. & W. 129; *Geeves* v. *Gorten*, 15 M. & W., 186; *Smith et al* v. *Forbes*, 8 U. C., L. J., 72; Russell on Awards, 2 edn. p. 390.

2. That power to certify having been delegated to the arbitrators, and not duly exercised by them, neither court nor judge will afterwards interfere. *Richardson* v. *Kensett*, 6 M. & G., 712; *Bury* v. *Dunn*, 1 D. & L., 141; Russell on Awards, 2 edn. p. 390.

3. That neither court nor judge has power to examine affidavits or otherwise look outside of the award, to gather the intention of the arbitrators. *Caswell* v. *Grucutt*, 10 W. R., 91; *Holdgate* v. *Killick*, 10 W. R., 19; S. C., 5 L. T. N. S., 858.

R. A. Harrison supported the summons. He argued,

1. That there was no formal award made, but only a memorandum for an award. *Williams* v. *Squair*, 10 U. C., Q. B., 24; *Jones* v. *Reid*, 1 U. C., Pra. R., 247.

2. If an award, that it on the face of it gave plaintiff a right to full costs of suit; that the words used were capable of bearing that meaning if so intended; and that each of the arbitrators swore he so intended.

3. That if so intended, but not sufficiently expressed, the court was at liberty to look at the certificate of 19th August, made for the purpose of carrying out that which had been previously decided as to plaintiff's right to full costs.

4. If not, that an order for full costs should be made on the merits; that there was power to make such an order (*Elmore* v. *Coleman*, 4 U. C., O. S., 321); that its exercise was a matter of discretion; that the discretion is exercised almost as a matter of course when plaintiff's claim is reduced by set-off (*Moore* v. *Teetzel*, 1 U. C., Pra. R., 375; *Woodburn* v. *Newham*, 7 C. B., 64: *Beswick* v. *Copper*, 7 C. B., 669); that the fact of the power having been delegated to the arbitrators was no argument against the exercise of it by the court or a judge in a case where it is shown to have been intended to be exercised by the arbitrators but ineffectually done. *Sharp* v. *Everleigh*, 20 L. J., Ex. 282; *Caswell* v. *Groucutt*, 6 L. T., N. S., 290.

5. If no relief, as matter stands, then that award and subsequent proceedings should be set aside and reference back to the arbitrators, to enable them to certify in proper form (*Caswell* v. *Groucutt*, 6 L. T., N. S., 290) which reference may be made as well in vacation as in term, (Con. Stat., U. C., cap. 22, s. 164) and for that purpose the submission may be made a rule of court in vaca-

tion. *In re Taylor*, 5 B. & A. 217; Russell on Awards, 2 Edn. p. 560.

DRAPER, C. J.—I am of opinion the arbitrators have not exercised effectually the power given to them by the rule of reference to certify for costs as a judge at *nisi prius*.

The certificate itself appears to have been made after the award and after the arbitrators had finally separated, and they were not together when it was signed.

The award itself is in these words—"Award for plaintiff, and $93 damages, and costs of suit and also costs of reference $132, each party to pay their own witness fees."

By the terms of the submission it was ordered "that the costs of the said cause shall abide the event," and it is urged that the words "and costs of suit" in the award will have no effect unless treated as a certificate for the costs of the superior court. Admitting this consequence, I cannot hold that the words "and costs of suit" have reference to any particular scale of taxation.

I do not feel at liberty to gather the meaning of the arbitrators from any other source than the language used in the award.

Then as to the remaining part of the application. The plaintiff has entered judgment, and he seeks to set it aside, and asks for an order to tax full costs, or to refer back the award, and to enlarge the time for making it, in order that the arbitrators may make an award which shall give full costs in express terms. The case of *Caswell* v. *Groucutt*, 10 W. R. 91, Exch., is the nearest I have seen to the present, and it appears to me adverse to the application.

I would have followed any authority which established the principle contended for, but I have found none, and in the absence of any decision, I must say that I do not think the error and omission, assuming their existence, is of such a character as to justify setting aside a judgment virtually annulling an award by referring it back, and enlarging the time long since expired, in order to enable the arbitrators to make a new award. There must, I think, be something more than a question of the difference between the costs of the superior and inferior courts to justify such a procedure.

Summons discharged but without costs.

SAULTER V. CARRUTHERS.

Chattel Mortgage—Statement on renewal—Sufficiency of—Con. Stat. U. C. ch. 48, sec. 10.

Held, that the statement set out below, filed upon the renewal of a chattel mortgage, sufficiently complied with the requisites of the statute.

[CHAMBERS, May 9, 1863.]

Interpleader by sheriff of United Counties of York and Peel.

Tilt for execution creditor; *D. McMichael* for claimants, Cameron and Fraser; *Osler* for the sheriff.

HAGARTY, J.—The parties appear on an interpleader summons, and the execution plaintiff and the claimants Fraser and Cameron, agree to take the judgment of the presiding Judge in Chambers on the only point which they admit arises in this case, viz: the sufficiency of the statement and affidavit filed on renewing a chattel mortgage, and which reads as follows, "I, J. H., of &c., the duly authorized agent of F. & C., mortgagees named in the chattel mortgage, of which the hereunto annexed copy of chattel mortgage is, I verily believe, a true copy, do hereby state, that I am well acquainted with all the circumstances connected with the said original chattel mortgage, and that the said F. & C. claim interest in the property claimed and described in said chattel mortgage as mortgagees thereof, and that the whole principal sum of £—— named in said mortgage, is still due to said mortgagees, and unpaid, together with £50 for interest from, &c., to date, making in all £——, and said mortgagor has made no payment on account of either principal or interest. Dated, &c."

Annexed was an affidavit of J. H. that the above statements were true, and that said chattel mortgage had not been kept on foot for any fraudulent purpose.

The parties admit that the principles laid down in the recent case of *O'Halloran* v. *Sills*, 12 U. C. C. P. 465, must govern this controversy.

Tilt, for execution creditor, objects—

1st. That the interest of the mortgagees is not sufficiently shewn.

2nd. That the amount stated to be still due is not stated to be due on the mortgage.

The Chief Justice says, in the case referred to, "The statute requires a statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof, and a full statement of the amount still due for principal and interest thereon, and of all payments made on account thereof."

Apart from this case I should at once consider the statute reasonably complied with by the claimants in this matter.

I am only anxious that the judgment I now give shall not be any way contrary to the judgment of the court.

I think the statement here clearly shews that "the claimants claim interest in the property claimed and described in the chattel mortgage as mortgagees thereof;" and these words I think rebut any presumption that they have assigned their interest.

I also think the words "and that the whole principal sum of £—— named in said chattel mortgage, is still due to said mortgagees and unpaid, together with £——for interest from 7th July, 1858, to this date, making in all £——, and the said mortgagor therein named has made no payment on account of either principal or interest," sufficiently comply with the requirements of the statute as expounded by the Court of Common Pleas.

If this statement be sufficient, then the affidavit verifying it seems to me to be according to the statute.

I am not prepared to carry the law any further at present than *O'Halloran* v. *Sills*, and I think the statement before me is free from several defects in the statement in *O'Halloran* v. *Sills*.

I therefore decide on the best opinion I can form of the case, that the objections fail, that the usual order be made, the sheriff to withdraw from possession; no claim to be brought by either party against him, or against each other, in respect of seizure or entry by sheriff, or his officers; and that the execution creditor pay the sheriff's costs of interpleader and the claimant's costs on this application.

Order accordingly.

COUNTY COURT CHAMBERS.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

HALLEY V. STAUNTON ET AL.

Con. Stat. U. C., cap. 22, ss. 60, 85.

A declaration filed under and pursuant to s. 60 of Con. Stat., U. C., cap. 60, and not shewing at its commencement date of issue of writ as required by s. 85 of the same act, is irregular; but on application to set same aside for irregularity—the copy served having been produced by defendant—the judge ordered declaration filed and copy served, upon payment of $2 costs, to be amended.

(June 1st, 1863.)

Geoffrey Hawkins obtained a summons on the part of defendant Staunton, calling upon plaintiff to shew cause why the declaration filed in this cause, the copy thereof served, and all proceedings subsequent thereto, should not be set aside for irregularity with costs, upon the ground that the declaration filed and copy served omitted to give the date of issue of writ of summons.

The action was brought against the defendant Staunton as the maker, and defendant Smith as the endorser of a promissory note for $350 overdue.

Defendant Smith allowed judgment to go by default, but Mr. Hawkins appeared for defendant Staunton.

Plaintiff thereupon under and pursuant to Con. Stat. U. C., cap. 22, s. 60, signed judgment against defendant Smith, and declared against defendant Staunton, stating, by way of suggestion, the judgment against defendant Smith.

The declaration, which was in the form given in Chit. F., 7 Edn., p. 78, commenced as follows:—

(*Venue*) William Halley, by J. P., his attorney, sued out a writ of summons (not giving date of issue) against J. H. Lynch Staunton and Francis E. Smith, &c.

The objection relied upon was non-compliance with s. 85 of Con. Stat. U. C., cap. 22, which enacts that "Every declaration shall commence as follows or to the like effect:

(*Venue*) A B, by E F, his attorney, sues C D, who has been summoned by virtue of a writ *issued on the day of A.D., one thousand eight hundred and* or," &c.

The words in italics are not to be found in s. 59 of C. L. P. A., 1852, with which s. 85 of our C. L. P. A. is supposed to correspond, and hence the impropriety of relying upon the English form given in Chitty's Forms.

R. A. Harrison shewed cause, and filed an affidavit of Mr. Spencer, showing that the form of declaration used was not only that given on p. 78 of Chitty's Forms, but the form in general use in both the Superior Courts of Common Law for Upper Canada, at Toronto. He argued that notwithstanding the omission of the date of issue of writ, the declaration filed "in effect" complied with 85 of Con. Stat. U. C., cap. 22, and that the part omitted (date) was immaterial.

Hon. S. B. Harrison held that the declaration, by reason of the omission complained of was irregular; but as the copy of declaration served was before him, ordered that plaintiff, upon payment of $2 costs, should be at liberty forthwith to amend declaration filed and copy served.

Order accordingly.

LOWER CANADA REPORTS.

SUPERIOR COURT.

(*From the Lower Canada Jurist.*)

Sweetapple v. Gwilt.

Held:—That although there is no community of property, according to the Custom of Paris, between parties married in Upper Canada, their then domicil, without any ante-nuptial contract, yet an action *en séparation des biens* will be maintained in favour of the wife, by reason of the insolvency of the husband, since their removal to Lower Canada.

[Montreal, 24th December, 1862.]

The plaintiff, by her declaration, alleged that on the 8th March, 1856, at the city of Toronto, she was lawfully married to the defendant.

That they then resided and thereafter continued to reside at or near Toronto, and the defendant administered the estate of the plaintiff. That they removed to Lower Canada in the month of July, 1859, and moved to Lachine, where they continued to live and reside; and the plaintiff, after alleging the insolvency of the defendant, prayed for a *séparation des biens*, in the terms mentioned in the following judgment:

The court having heard the plaintiff by her counsel, the defendant having made default, examined the proceedings and proof of record and deliberated thereon. It is considered and adjudged that the said plaintiff shall and may, from the date of her *demande*, to-wit, from the sixth day of November, 1862, (Date of service of process in this cause,) hold, possess, use, administer and enjoy separately and apart from the said defendant, all and every her estates and property, real and personal, moveable and immoveable, as well as those which belonged to her before her marriage with the said defendant, as those which have accrued or shall hereafter accrue to her, and to which she is now and may hereafter become in any way entitled, without molestation, trouble or hindrance, by or on the part of the said defendant or any person whomsoever; and the court doth adjudge and condemn the said defendant to guarantee, acquit and idemnify the said plaintiff from and against all and every the debts, sum or sums of money for which he may have caused the said plaintiff to be jointly with him liable or responsible, and to pay to the plaintiff the costs of this action.

J. A. Perkins, jr., attorney for plaintiff.

Ex parte Moge, Petitioner for a Writ of Certiorari v. Roy, Prosecutor in the Court below.

(*Coram*—Badgley, J.)

Held:—That upon a writ of Certiorari to remove the proceedings had and conviction made in pursuance of Chap. 6 Cons. S. L. C., such conviction being for "keeping a house of public entertainment;" will be quashed, inasmuch as it is no offence unless qualified within the terms of the said Statute.

[Sorel, 19th February, 1863.]

Per curiam:—The petitioner was prosecuted under the provisions of the Act respecting Tavern Keepers and the sale of intoxicating liquors, for "having kept a house of public entertainment." This allegation constitutes no offence and the proceedings had were not therefore in pursuance of the said act.

It is necessary to qualify the keeping of such a house of public entertainment, by alleging that it is for the reception of travellers, and others. The simple allegation of keeping a house of public entertainment is not sufficient to bring this suit within the provisions of Chap. 6, Cons. S. L. C., as it may have been a Circus or a Theatre, which are also houses of public entertainment.

Conviction quashed.

Oliver & Armstrong, attorneys for petitioner.
Pitché, for respondent.

Ex parte Roy, Petitioner for a Writ of Certiorari.

(*Coram*—Badgley, J.)

Held:—1o. That the return of the notice of motion for a writ of *Certiorari* made by a bailiff is sufficient.
2o. That such a return need not be proved upon oath.

[Sorel, 19th February, 1863.]

In this case the prosecutor in the court below having appeared when the motion for a writ of *Certiorari* was made, objected to the granting of the motion upon the ground that the return of the notice of such motion was insufficient not being proved under oath, as required by the Imperial Statute 18, Geo. II, ch. 18, sec. 5, regulating proceedings upon *Certiorari*.

The respondent contended: That it was the proper time to take advantage of this defect, as it would be too late afterwards.

Paley, on Convictions, edition of 1856, p. 360.

That the Imperial Statute, which required that the six days' notice should be "duly proved on oath," had not been repealed by the Provincial Act, ch. 89, sec. 2, sub-sec. 2, Cons. Stat. L. C., which latter Statute applies only to the returns of the different proceedings had after the granting of the writ of Certiorari. That this reasoning had been applied in several instances by the Superior Court in Montreal, in 1850 and 1851, in the following cases;

No. 96, *Ex parte Pierre Chicoine*, 7th October, 1850.
No. 153, *Ex parte Hiram Waite*, 3rd December, 1850.
No. 146 " " " 7th January, 1851.

In those cases the proof of service of notice of motion having been made by the return of a bailiff, the Court decided that the English Statute and the rules which obtained in England, required proof of service by affidavit.

Per curiam.—The practice now followed in the District of Montreal is different and requires no proof of service by affidavit.

Motion granted.

Olivier & Armstrong, attorneys for petitioner.
Germain, attorney for respondent.
Lefrenaye, counsel.

Ex parte, Cousine for a Writ of Certiorari and Raphael Bellemare, Prosecutor in the Court below.

(*Coram*—Monk, J.)

Held:—That in a prosecution for selling liquors without a license, the information need not be under oath.

[Montreal, 31 March, 1863.]

In this case the information and conviction were for the offence of selling liquor without a license. On the 27th March 1863, the petitioner moved the Superior Court for a writ of *Certiorari* to issue upon several grounds contained in his affidavit of circumstances amongst others the following: Because no information under oath was ever exhibited to Charles J. Coursol, Esquire, judge of the Sessions of the Peace for the City of Montreal, previous to the issuing of the writ of Summons in the said prosecution; because in lieu of being under oath, the said information was merely signed by the said Raphaël Bellemare and not sworn to. Vide ch. 6 Con. Stat. Lower Canada, s. 43.

Per curiam—The provisions of the act respecting tavern-keepers, do not require that such an information be made or laid on oaths but on the contrary that act gives all the forms which are to be followed in such prosecutions; so that the Section 24 of Ch. 103 of the Consolidated Statutes of Canada do not apply to such cases.

Application refused.

Kerr and Nagle, attorneys for petitioner.
Lafrenaye, attorney for Bellemare.

ENGLISH REPORTS.

PRIVY COUNCIL.

[*Present Lord* CHELMSFORD, *Sir* J. L. KNIGHT BRUCE, *and Sir* J. T. COLERIDGE.]

(*From the Jurist.*)

THE GREAT WESTERN RAILWAY OF CANADA. Apps., JANE FAWCETT, Resp.

THE GREAT WESTERN RAILWAY OF CANADA, Apps., MARGARET M'KAY BRAID, Resp.—*Feb.* 21.

Railway Company—Negligence—Construction of the line—Onus probandi—Misdirection.

Where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *primâ facie* evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it.

A railway company, in the formation of their line, are bound to construct their works in such a manner as to be capable of resisting all violence of wheather which, in the climate through which the line runs, might be expected, though perhaps rarely, to occur.

In an action against a railway company to recover compensation for injuries resulting to a passenger from an accident caused by the giving way of a portion of the company's railway, it was proved, on behalf of the company, that they had always employed skilful engineers in the construction of their works, and that the giving way of the company's railway was caused by a storm of unusual violence. The judge in directing the jury, never explained to them the effect of such evidence upon the question of negligence: *Held*, that the jury ought to have had their minds distinctly and pointedly directed to this question.

These were two appeals from the judgment of the Court of Error and Appeal of Upper Canada. The causes of action in both cases arose out of an accident which happened on the appellants' railway on the 19th of March 1859. In each case the action was brought by a widow as the personal representative of the husband, to recover compensation for the benefit of herself and children. In the first case an action was brought by Jane Fawcett to recover compensation for the loss sustained by the death of Thomas Fawcett, which took place whilst travelling on the appellants' railway on the 19th March 1859, when a part of the embankment on which the railway was laid gave way during a violent storm which then occurred; the engine of the railway train was thrown into the breach thus created in the embankment, and Thomas Fawcett was killed. The deceased was travelling as a passenger for hire, and it was alleged by the respondent, that the accident was attributable to the appellants having their railway, and the switches, bridges, embankments, culverts, drains, and gutters thereof unskilfully and improperly placed, built, and constructed of insufficient materials and size, and to negligence, and want of skill and caution, in the carrying and conveying the deceased, and in conducting, managing and directing the carriage in which he was a passenger, and the train to which the carriage was attached, and the locomotive whereby the train was drawn. The defence was, that there was no such breach of duty, or want of skill and care, on the part of the appellants, as alleged. The cause was tried at Hamilton on the 31st October, 1859, before Sir J. B. Robinson, C. J., of Upper Canada. It was admitted that the deceased, Thomas Fawcett, was a passenger in the train from Paris (in Canada) to St. Catharines and was killed by the accident which happened on the 19th March, 1859, in that part of his journey which lay between Hamilton and Copetown. It appeared by the evidence, that the railway between Hamilton and Copetown at the place where the accident happened and for some distance in both directions, is carried along an embankment raised on and running along a mountain side, the mountain on the upper or north side of the embankment, rising to a height far above the top of the embankment, the level of which was about twenty-five feet above the ground on its north side, and about sixty feet above the ground on its south side. On the morning of the 19th March, 1859, at about two o'clock A. M., the train in question, travelling at about ten miles an hour from Copetown to Hamilton, reached the place of the accident. The embankment to within about twelve feet from the ground on the north side, had previously given way, and fallen over to the south side, leaving a gap of about forty-five yards, into which the engine fell and so Fawcett was killed. Loaded trains had passed safely over the place of the accident, one within a hour of the time when it took place, and two others within the two or three hours preceding. At those times all appeared safe, and there was nothing to attract attention. The weather had been wet for two or three days previously, the winter's frost was coming out of the ground, the night in question was very stormy, and from six o'clock in the evening of the 18th March there had been an excessively heavy rain. The witnesses on both sides agreed that the rain caused the embankment to give way, but in what manner it acted was left entirely to conjecture and uncertainty. No evidence was given of any negligence, or want of caution, care, or skill in carrying or conveying Fawcett, or in conducting, managing, or directing the carriage train or locomotive, or of defects in the materials used in the construction of the embankment or railway works; but the respondent called witnesses for the purpose of proving negligence or want of skill in the construction or maintenance of the works. At the close of the respondent's case it was objected, on behalf of the appellants, that as the evidence shewed that the appellants employed competent engineers, the negligence charged against them was negatived. But the learned judge ruled, that the question of negligence or no negligence must go to the jury, and that the question was, whether a ditch was necessary at a certain part, and whether such a ditch was either never made, or, if made, was not properly maintained, so as to protect the embankment from water; and that the engineers employed by the appellants were not exclusively the judges of the matter; that they, like other servants of the appellants, might fail in doing their duty; and if they did, the appellants must answer for injuries occasioned to others by such neglect. The judge having so ruled, the appellants called witnesses on their behalf, for the purpose of shewing that there was no want of care or skill in the construction of the railway and embankment; that the culverts and drainage were sufficient; that the appellants employed competent and skilful engineers, and spared no expense in the construction and maintenance of the railway; that the railway had been used for about four years, without any suspicion of insecurity, and was considered perfectly safe by first-rate engineers, and that it was inspected daily; that the embankment was repeatedly inspected by competent surveyors and engineers, and that all precautions had been taken to provide against such dangers as could reasonably foreseen, and that the storm which occurred about the time of the accident was of a most extraordinary and unprecedented character. The jury found a verdict for the respondent, with damages 5000 dollars. In the following term the counsel for the appellants obtained a rule *nisi*, in the Court of Common Pleas for Upper Canada, for a new trial, on the ground of misdirection, and on the ground that the verdict was against law and evidence. In Hilary Term cause was shewn against the rule, and it was discharged; but the Chief Justice of the Court of Common Pleas was of opinion that the verdict was against the weight of evidence; and in that respect he differed from the other two judges who heard the case. Judgment was on the 27th March, 1860, entered for the damages and costs, being 5419 dollers and 16 cents. Against that judgment, the then defendants appealed to the Court of Error and Appeal for Upper Canada. The appeal came on to be heard before the Court of Error and Appeal on the 27th December, 1860, and on the 23rd January, 1861, judgment was delivered to the effect, that the Court was of opinion that the directions were proper, that the verdict was supported by evidence, and that the majority of the Court were of the opinion that the judgment was not against the weight of evidence. The judgment appealed from was therefore affirmed. The appellants having obtained leave from the Court of Error and Appeal to appeal to her Majesty in her Privy Council, and, having complied with the terms on which the appeal was allowed, now appealed accordingly.

In the second case, an action was brought by Margaret M'Kay Braid, the widow and personal representative of Alexander Braid, for the loss sustained by the death of the said Alexander Braid, which occured while travelling on the appellants' railway, at the same time, and under the same circumstances alleged in the former case; but in this latter case a defence was also set up, that the deceased was travelling on the railway gratuitously, or else that he was wrongfully travelling on the terms of a free pass ticket, which though expired, he used for the purpose of avoiding payment of railway fare, and by the terms of which he took upon himself all risk of accidents. The cause was tried at Hamilton,

on the 31st October, 1859, before Sir J. B. Robinson, C. J., of Upper Canada. It was admitted that the deceased Alexander Braid was in the train from London (in Canada) to Hamilton, that he was in the sleeping car, and was killed by the accident which happened on the morning of the 19th March, 1859, about two o'clock A. M. It appeared by the evidence that the deceased had been a railway officer in the employ of the appellants, and had a free pass in each of the years 1856, 1857, and 1858, and had improperly retained in his possession the two passes for 1857 and 1858, and that in 1859, after he had left the service of the appellants, he had claimed of the conductors and servants on the line a right to travel free, presenting one of his old passes, and on some occasions had been allowed to do so, and on others (as many as two) he had paid; and on one occasion had told one of the conductors (not the conductor on the night of the accident) that he was the only conductor who made him pay. The two pass tickets for 1857 and 1858 were found on him after his death. The conductor on the journey in question supposed that he had a free pass and when examining the tickets of others sitting near Braid, was told in his presence that Braid had a free pass ticket, and Braid was not asked for his ticket. No evidence was given of any other ticket than the two free pass tickets being found on him, nor was any other evidence of his having paid his fare given. It was proved that persons travelling with free pass tickets take upon themselves all risk of accidents and damages. The judge summed up the case to the jury. The jury found a verdict for the respondent, with damages 4000 dollars; and being asked at the suggestion of the appellants' counsel stated that they concluded that the deceased had paid his fare on the 18th, as it had been proved he did on two other occasions recently before, and that he was not travelling under a free ticket. In the following term (Michaelmas 1859), the counsel for the appellants obtained a rule *nisi* in the Court of Common Pleas of Upper Canada for a new trial, on the ground of misdirection and want of direction, and on the ground that the verdict was against law and evidence. In the following term (Hilary, 1860), cause was shewn against the rule, and it was discharged; but the Chief Justice of the Court of Common Pleas was of opinion that the verdict was against the weight of evidence, and his Lordship differed from the other two judges in that respect. Judgment was, on the 20th March, 1860, entered for the damages and costs, being 4240 dollars 68 cents. Against that judgment the then defendants appealed to the Court of Error and Appeal for Upper Canada. The appeal came on to be heard before the Court of Error and Appeal on the 27th December, 1860, and on the 23rd January, 1861, judgment was delivered, to the effect that the Court was of opinion that the directions to the jury were proper; that the verdict was supported by evidence; and that the majority of the Court were of opinion that the judgment was not against the weight of evidence. The judgment appealed from was therefore affirmed. The appellants having obtained leave from the said Court of Error and Appeal to appeal to her Majesty in her Privy Council, and having complied with the terms on which the appeal was allowed, now appealed accordingly.

Manisty, Q. C., and *Rew*, for the appellants, in both cases, contended that there was no evidence of negligence, or want of care or skill in the construction of the railway, or in repairing or maintaining the same, which occasioned the accident; that the judge misdirected the jury in telling them there was evidence of culpable negligence in the construction or maintenance of the embankment which, it could be said without doubt, occasioned the accident; that it was at least as consistent with the evidence, that the giving way of the embankment arose from inevitable accident, or a cause which the appellants could not reasonably anticipate or guard against, as from any negligence or want of care or skill in the construction or maintenance of the embankment; that the judge ought to have given the jury some instruction or direction as to what constituted culpable negligence in the construction and maintenance of the embankment, and to have explained to them under what circumstances and in what manner the appellants would be liable for the consequences of the storm.

Matthews for the respondent in all cases.—There was no misdirection on the part of the judge. The question whether the verdict was against the weight of the evidence is not now in issue. The jury were justified, on the evidence, in finding a verdict for the respondents.

The following authorities were referred to:—*Withers* v. *The North Kent Railway Company* (27 L. J., Ex., 417); *Bligh* v. *The Birmingham Water Works Company* (11 Exch. 781); *Toomey* v. *The London, Brighton, and South-coast Railway Company* (3 C. B., N. S., 146); *Carpue* v. *The London, Brighton, and South-coast Railway Company* (5 Q. B. 747); *Skinner* v. *The London, Brighton, and South-coast Railway Company* (5 Exch. 787); *Ruck* v. *Williams* (27 L. J., Ex., 357); *Smith* v. *Sheppard* (Abb. Ship. 382); *Ford* v. *Lacey* (30 L. J., Ex., 451); *Bird* v. *The Great Northern Railway Company* (28 L. J., Ex., 3); and the Act of the Canadian Legislature, 22 Vict. c. 13, s. 57.

Lord CHELMSFORD delivered the judgment of their Lordships: These cases come before us by appeals from judgments of the Court of Error and Appeal of Upper Canada, affirming judgments of the Court of Common Pleas in two actions brought against the Great Western Railway Company of Canada. As the actions arose out of the same accident, and in each of them the same ground of negligence is alleged against the company, the principal questions to be determined are the same in both. There are two points, however, which are peculiar to *Braid's case*, to which it may be necessary shortly to advert. The first of these, which was properly abandoned on the argument, arose upon two pleas of the company, which alleged in substance, that Alexander Braid, the deceased, was travelling on the railway under circumstances which released the company from all liability to answer for his death; and it was admitted that if the onus of the proof of their pleas rested upon the company (of which there could be no doubt), it would be hopeless to attempt to disturb the verdict of the jury upon these issues. The other is an objection which has been urged against the right of appeal, on the ground of the damages being of insufficient amount. This objection depends upon an act of the Canadian Legislature (22 Vict. c. 13, s. 57), which enacts "that the judgment of the Court of Error and Appeal shall be final where the matter or controversy does not exceed the sum or value of 4000 dollars." The damages in *Braid's case* were exactly of this amount; but it was contended, on behalf of the appellants, that the costs which were the consequence of the verdict, ought to be added to the damages, and that thus the matter in controversy would exceed the limited sum or value. As the judgment of their Lordships will be in favour of the respondents upon the other grounds of appeal, they think it unnecessary to express any opinion upon this objection; but nothing which was thrown out by them in the course of the argument must be considered as any indication of their assent to the proposition, that in estimating the matter in controversy the costs incurred by the losing party may be taken into account. Having adverted to the questions which are applicable only to one of these appeals, we now proceed to those which are common to both. The actions were for damage alleged to have been sustained by the plaintiffs in consequence of the deaths respectively of Thomas Fawcett and Alexander Braid, occasioned by the want of care and skill of the company in constructing their railway, and in repairing and maintaining the same. The part of the railway where the accident occurred was carried over an embankment, made on the slope of a mountain, and had been in use for four or five years without any injury having happened. Early on the morning of the 19th March, 1859, after an unusually heavy fall of rain, the embankment gave way to the extent of forty-five yards in length on the line of the track. Trains had gone over the place where the accident occurred during the preceding night, and a train with thirteen cars had passed the same spot at ten minutes past one on the morning of the 19th March. The train in question arrived at the part of the embankment which had given way about two A. M., and was immediately precipitated into the breach, the deaths of the two persons in respect of which the actions were brought being the unhappy consequence of this accident. In support of the verdicts which in both the actions were against the company, it was insisted by the learned counsel for the respondents that the mere proof of the embankment having given way would have been quite sufficient to establish a case of negligence; and in support of this position he cited the cases of *Carpue* v. *The London and Brighton Railway Company* (5 Q. B. 747) and *Skinner* v. *The London, Brighton and South-coast*

Railway Company (5 Exch. 787). There can be no doubt that where an injury is alleged to have arisen from the improper construction of a railway, the fact of its having given way will amount to *primâ facie* evidence of its insufficiency; and this evidence may become conclusive from the absence of any proof on the part of the company to rebut it. However, the plaintiffs did not rest their case solely on the fact of the falling in of the embankment, but called witnesses to give their opinion as to the cause of the injury. It was objected by the learned counsel for the appellants that this evidence amounted only to theory and conjecture, and that the jury ought not to have been permitted to act upon it. To this it may be answered, that although the circumstances which occasioned the accident were facts to be proved, yet the causes which produced this state of circumstances were necessarily matters of opinion and judgment. But then it was said that the witnesses ascribed the accident to different causes, that their theories were conflicting and mutually destructive, and that consequently at the close of the plaintiff's case there was nothing to go to a jury. The difference of opinion in the witnesses, however, refers merely to the mode in which the water must have operated upon the embankment, but they speak, almost with one voice, as to the defective character of the drainage. It was assumed that at the close of the plaintiff's evidence in each case there was an application by the defendants for a nonsuit; but this seems to be a misapprehension. The notes of the learned judge who tried the cause appear to be merely the heads of the defence set up. The first ground of defence in both cases, that the company had always skilful engineers, and therefore could not be held to have been negligent, even if the work were not judiciously constructed, would have been prematurely urged as matter of nonsuit at that stage of the trial, as no proof had then been given of the employment of such engineers by the company. The language of the note in *Braid's case*, "it being proved," must be understood "upon its being proved," and must be taken as a short mode of stating the intended defence. The other defence mentioned to have been raised in *Braid's case* only, was clearly for the jury, even if the unusual state of the weather had been proved in the course of the plaintiff's case. Although no mention is made of this ground of defence in the notes of *Fawcett's case*, it is fair to assume that it was urged on behalf of the company in that case also, not only from the nature of the evidence, but also from the circumstance, that when, on the application for the new trial, misdirection was imputed to the learned judge in this particular, it was never objected that no question of the kind had been raised. The defence in both cases, therefore, was substantially the same, being founded upon proof of the proper construction of the railway, of the daily inspection of the line, and of the violence of the storm of rain, which carried away the embankment. As far as we can collect from the learned judge's note of his charge to the jury, he does not appear in *Fawcett's case* to have adverted to the company's defence arising upon the extraordinary and unforseen state of the weather immediately before the accident; nor, in *Braid's case*, to have mentioned it otherwise than in an incidental manner. In neither case does he appear to have explained to the jury the effect which would be produced upon the question of negligence, by satisfactory proof that the storm which destroyed the embankment was of such an extraordinary description that no experience could have anticipated its occurrence. Their Lordships think that the jury ought to have had their minds distinctly and pointedly directed to this question, and that without some definite instruction upon the subject, they were likely to have omitted it from their consideration. If, therefore, there had been any miscarriage on the part of the jury in consequence of this non-direction, and a verdict against the evidence had been produced by it, their Lordships would have felt themselves compelled to send the case to a new trial. But upon a careful examination of the evidence, they have come to the conclusion that the verdict ought to have been the same even if the question of negligence had been left to the jury, accompanied with a direction as to the circumstances under which the company would have been exonerated from liability. In the construction of works of a permanent character, such as a railway, the amount of precaution which ought to be taken to guard against any external violence to which it may be exposed cannot be the subject of any precise rule, but must necessarily vary according to the varying local circumstances of each case. The difficulty of extracting any principle from decided cases which may be applied with certainty to questions of this description, is strongly exemplified by two judgments of the Court of Exchequer, which were delivered within three weeks of each other. In *Withers* v. *The North Kent Railway Company* (27 L. J., 417), which was an action against the railway company for an injury occasioned by their keeping and maintaining their railway in an insecure state, it appeared that the railway had been constructed five years, and ran through a marshy country subject to floods; that it was constructed on a low embankment composed of a sandy sort of soil likely to be washed away by water; and that the culverts were insufficient to carry off the water. Evidence was given that on the day of the accident an extraordinary storm occurred, accompanied for sixteen hours with very violent rain, and that in consequence of this, a stream, near to the spot at which the accident had occurred, had been swollen to a torrent, and washed away a bridge, and poured down with great force upon the line; that the water had by midnight worn the earth away under the sleepers on some places, leaving the rails unsupported and exposed. A verdict was given for the plaintiff, but the Court set it aside, and granted a new trial; Pollock C. B., saying that the company was not bound to have a line constructed so as to meet such extraordinary floods; and Bramwell, B., observing that the very existence of the line for five years, notwithstanding that the district was subject to floods, tended to negative the only negligence which was set up." There is some difficulty in reconciling this remark with the language used by the same learned judge in the other case of *Ruck* v. *Williams* (27 L. J., Ex., 357). That was an action against commissioners of sewers for negligence in constructing a sewer in a defective and improper manner, and keeping it in that state, whereby it burst and damaged the plaintiff's premises. It appears that the sewer was constructed in April, 1853. In the year 1855 two severe storms occurred, one on the 13th July, which occasioned the bursting of the sewer, and another on the 26th July, before the repair of the sewer was completed, at which time the injury was done to the plaintiff. It was stated in the report of the commisioners' surveyor, that the storm of the 26th July was without its precedent for violence. The Court held that the plaintiff was entitled to recover. Bramwell, B., in answer to the argument for the defence of the commissioners arising out of the extraordinary violence of the storm, which occasioned the damage, said, "he called it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary, it would be extraordinary if it did not happen;" and he added "therefore, it seems to me that the commisioners, who ought to have put down a flap or penstock of a permanent character, in order to guard against a thing likely to occur, not only in a short time, but at all times, may well be said to be guilty of negligence relatively to the probable event of a storm happening in fifty years." Their Lordships, without attempting to lay down any general rule upon the subject, which would probably be found to be impracticable, think it sufficient for the purpose of their judgment in these cases, to say that the railway company ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps, rarely, to occur. Now, the evidence, fairly considered, shews nothing beyond this in the character and degree of the storm which destroyed the embankment. The night of the accident is described by various witnesses to have been "very severe;" one says it was a "bad night, very bad;" another, in the usual style of exaggeration, that "it was the worst night he ever saw;" it is stated by others that the rain "washed away bridges and portions of the road;" and two of the plaintiff's witnesses describe the storm, one as being "a very unusual one," the other "an extraordinary storm." In the whole of this evidence, there is nothing more proved than that the night was one of unusual severity, but there is no proof that nothing similar had been experienced before, nor is there anything to lead to a conclusion that it was at all improbable that such a storm might at any time occur. It must also be borne in mind, that although the embankment had stood firm for five years, and had possibly not been exposed to any storm of equal violence to that before which

it gave way, yet it was evidently not constructed, or at least not maintained, in a manner to enable it to resist any unusual pressure. It appears that there was a ditch made for the purpose of carrying off the water that came down from the hill, but it was either imperfectly constructed from the first, and of insufficient dimensions, or it was suffered to be obstructed and choked up, so that when an unusual quantity of water flowed into it, it was unequal to the occasion. The company's engineer says in his report, "It appears from the levels that there is a depression of two feet in one place. The ditch is an imperfect one. If that depression of two feet had been filled in, I question whether that accident would have occurred." And afterwards, "The cause of this accident can be overcome, and must be, to prevent the recurrence of such an accident again." It is true that he adds, "No engineer could possibly have foreseen such an accident as this." But whether he means that it was impossible to have anticipated such a storm as occurred, or from the manner in which the embankment was constructed, it could not have been expected to give way is not easy to determine. Whatever his meaning may be, it is evident that the embankment was insufficiently provided with means of resisting the storm, which, though of unusual violence, was not of such a character as might not reasonably have been anticipated, and which, therefore, ought to have been provided against by all reasonable and prudent precautions. Even supposing, then, that the learned judge omitted to explain to the jury what amount of *vis major* would exonerate the company from the charge of negligence, yet their Lordships are of opinion that had this direction been given, and had the jury been led by it to find for the company, their verdict would have been wrong; and they adopt the language of the Court of Exchequer in *Ford* v. *Lacy* (30 L. J., Ex., 351), that "non-direction is only a ground for granting a new trial where it produces a verdict against the evidence;" and they will, therefore, humbly recommend to her Majesty that the judgments in these cases be affirmed, with costs.

GENERAL CORRESPONDENCE.

Articled Clerks—Contract of Service, how satisfied—Con. Stat. U. C., cap. 35, s. 3, sub-s. 1.

To the Editors of The Upper Canada Law Journal.

Toronto, 15*th May*, 1863.

Gentlemen,—You will confer a favour, not only on the writer, but on many students-at-law, by giving your opinion on the following question.

An articled clerk serves in an attorney's office for three years, and, at the end of that time, leaves the office without cancelling his articles, and employs himself for two months in teaching school. At the expiration of the two months he returns to the law office and serves two years more under the same articles under which he originally served.

Is the above such a service of the period of five years, required by statute, as will entitle the clerk to admission as an attorney?

On page 412 of Con. Stat., U. C., the first sub-section of section three provides that the student seeking admission as an attorney must have, during *the term specified in his contract of service*, duly served thereunder, and during the *whole of such term* been actually employed in the proper practice or business of an attorney or solicitor by the attorney or solicitor to whom he has been bound, &c.

Now this would seem to mean that he must not merely serve for five years, but for *the particular five years mentioned in his contract of service*, and have been employed in the proper practice or business of an attorney or solicitor during the whole of *those particular five years*. The effect of this would be that, if he leaves the office and engages, even for a week, in some other business, he renders it impossible for him to serve during the whole of the five years mentioned in his articles, and consequently, though he may have served faithfully in an attorney's office for four years and six months, yet his absence of a week in some other employment, under a strict construction of the statute, reduces him to the same position as if he had not served a day.

It is very difficult to see the sense or justice of such an enactment, and in reality I think it is not strictly enforced, but would be much obliged if you would, in the next number of the *Law Journal*, give your opinion on the effect of that clause of the statute and the interpretation put upon it in practice.

Yours truly,

A Law Student.

[A strict interpretation of the enactment to which our correspondent refers would probably have some such effect as that to which our correspondent adverts; but we are glad to say that having submitted his letter to the Treasurer of the Law Society, we are authorised by that gentleman to state that such is not the interpretation given to the enactment by the Benchers of the Law Society.—Eds. L.J.]

Municipal Law—Assessment—Court of Revision—Court of Appeal.

To the Editors of the Law Journal.

On the 6th of April, the township of A. accepted the resignation of their clerk, and on the same day appointed another clerk, but he did not subscribe the declaration of office until the 4th of May following.

The assessor made the return of the roll to the old clerk, and subscribed the same before him, on the 24th of April.

Parties applied to the new clerk to see the roll, but it was not in his hands up to the day of meeting of Court of Revision, after which court, when the roll was finally passed, numerous errors appear.

Have the rate-payers any means of compelling the roll to be amended on account of a copy of the same not having been put up, in accordance with s. 50 of c. 55 of the Con. Stat. of U. C., by the clerk, if the new clerk appointed was the clerk at the time; or have the rate-payers power to appeal in general terms to the judge of the County Court against the validity of the roll; and has such judge the power to order the said roll to be put up for fourteen days, and re-open the Court of Revision; or in fact have they any and what remedy? Your valuable opinion on the above question would be esteemed a great favour.

Ignis Fatuus.

[It was the duty of the new clerk, before entering on the duties of his office, to take the oath to which our correspondent refers. Not having done so, the roll appears to have been delivered to the old clerk, who was acting until his successor should qualify. Though not so stated by our corres-

pondent, we presume the old clerk in good time caused a copy of the roll to be put up in good time as required by law. But whether this was so or not, we are at a loss to see in what manner the Court of Revision can now interfere. All the duties of the Court of Revision are required to be completed, and the rolls finally revised before 1st of June in each year. And we do not think the remedy by appeal to the county judge can now be successfully invoked—first, because the appeal clauses do not seem to us to apply to such a case as put by our correspondent; and secondly, because the time for serving the written notice of appeal has long since expired.—EDS. L. J.]

C. L. P. A.—Time for Pleading—Computation.

TO THE EDITORS OF THE LAW JOURNAL.

SARNIA, 5th June, 1863.

GENTLEMEN,—On what day can judgment as for want of a plea be signed under the following circumstances?

A writ of summons is served on the 13th May, and declaration and notice to plead on Saturday the 23rd May.

Now, as between counsel for plaintiff and defendant, comes a wide difference of opinion: one holding that Saturday, the 30th May, is the last day for pleading; the other that the day of service of declaration is not inclusive, and that consequently Sunday being a *dies non*, the defendant has the whole of Monday to file his plea, and that judgment cannot be signed until the office is legally open on Monday morning.

Defendant proceeds to file his plea at the opening of the office on Tuesday morning (10 o'clock) and finds that judgment has been signed an hour previously.

Authorities seem conflicting, hence the enquiry of

LAW STUDENT.

[Plaintiff is, we think, right in his contention. In computing the time for pleading to a declaration, the first and last days are inclusive. We refer to *Moore* v. *The Grand Trunk Railway Co.*, 4 U. C. L. J. 20.]—EDS. L. J.

MONTHLY REPERTORY.

COMMON LAW.

C.P. SPENCE v. SPENCE.

Will—Construction—Devise of freehold—Trustees, extent of estate of—Rule in Shelley's case.

The testator, by his will, after directing his debts and funeral and testamentary expenses to be paid, devised to trustees all that his freehold messuage, public house, and premises, situate in L. street S., now in the occupation of W. C.; also all those his freehold messuages, dwelling-houses, shops and premises situated in B. street and S. street; and also all and singular other his real and personal estate and effects, goods and chattels, whatsoever and wheresoever; in trust as to his said freehold public-house and premises situate in L. street aforesaid, to pay the rents and proceeds thereof as and when the same shall come to their hands, unto his son J. S., for and during the term of his natural life; and from and immediately after the death of the said son, in trust for the right heirs of him the said J. S. forever.

The trustees were also appointed executors.

Held, that J. S., jun., took the equitable fee simple.

C.P. STAGG v. ELLIOTT.

Bill of exchange—Acceptance per proc—Duty of indorsee.

The duty of an indorsee of a bill of exchange expressed to be accepted *per proc*, is to ascertain that the person so accepting had exceeded his authority; and if he omits to do so, he takes the bill at his peril.

Q.B. GALLAGHER v. HUMPHREY.

Permission to use way—Negligence.

Where the owner of the soil permits others to pass over it, he is liable for an accident caused by the negligence of himself or his servants to a person lawfully availing himself of such permission; though he would not be liable for an accident caused by the ordinary risks attaching to the nature of the place, or the business there carried on.

Semble, per Crompton, J., that the fact that the injured person was upon the premises unlawfully would not excuse negligence on the part of the owner, though it would be an element in determining what acts amounted to negligence.

EX. C. DURRELL v. EVANS AND OTHERS.

Contract of sale—Statute of Frauds (29 Car. 2, cap. 3, sec. 17)—Signature of buyer's name by seller's factor—Authority to make a binding contract—Evidence of agency.

In an action for not accepting hops, it was proved that the plaintiff sent some samples of the hops to N., his factor, with instructions for sale. The defendant called on N., and the samples were shown to him. On the same day he met the plaintiff, and after some conversation about the hops went with him to N.'s office, and there made an offer. The plaintiff, in the presence and hearing of the defendant, asked N. if he should accept the offer, and was advised to do so. N. then wrote out a sale note in duplicate. The notes were dated the 19th October, but at the defendant's request N. altered the date to the 20th October, in order to allow a longer time for payment, and gave one of the notes so altered to the defendant, who took it away with him. The note given to the defendant was torn from a book containing the counterfoil: it commenced "Messrs. Evans, bought of J. T. & W. Noakes," &c. (the words "Messrs. Evans" being written by N.), and was not otherwise signed by the defendant. The counterfoil was retained by N.

Held, that there was some evidence that it was the intention of the parties that N. should act as the agent of both to make a binding record of a contract of sale; and that as it was to be inferred that such was their intention, the writing by N. of the defendant's name at the commencement of the note was a sufficient signature to bind the defendant under the Statute of Frauds.

Judgment of Exchequer reversed.

EX. CARY v. CARY.

Outgoing and incoming tenant—Assessment—Tenant right or tillages—Administration.

An outgoing tenant, administratrix of the late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of a debt due to him, all her goods and effects, and all stock, corn, grain, &c., on the farm, and all her estate and interest thereon and therein.

Held, that this comprised tenant right or tillages on the farm.

EX. MAYALL v. HIGBY.

Detinue—Wrongful use of property—Injunction.

A person lending prints or photograps to another, who, with his consent, takes and sells copies, can not only sue in detinue for the originals, but also the copies, and can likewise sustain a count for an injunction, to prevent the sale of any copies remaining, and this quite apart from copy-right, and although there has been a publication.

EX. KIRKWOOD AND ANOTHER, *re* CHESTHAM AND ANOTHER.

Contract—Partners, holding out as Principal and Agent.

Where a trader arranged with his paid servant to set him up in the name and style of a supposed firm as a merchant, and there was evidence to show that the latter had an interest in the concern.

Held, that whether or not they were partners or not, they might be jointly liable as contractors, for goods ordered by the servant in the name of the supposed firm, in the way of its apparent business,—the employer as the real principal, the servant as holding himself out as partner.

EX. TURNER v. MUCKLOW.

Goods sold—Defence to action for price—Implied warranty—Specific article—Raw commodity.

On the sale of a specific article, the refuse of a raw commodity used in a manufacture, there is no implied warranty that it is fit for any purpose; and in an action for the price it is no defence that it is not so; and the only question is, whether the article on commodity really bargained for, was delivered?

EX. BOTTOMLEY v. FISHER.

Promissory note signed by secretary of a building society—Personal liability in.

Two trustees and the secretary of a building society having signed a promissory note, for money lent to the society by a third party, not a member,

Held, that the secretary, as well as the trustees, were personally liable thereon, and that the rules of the society did not effect the rights of the lender—a stranger.

C. P. *Re* THE ERA LIFE ASSURANCE SOCIETY.

Winding-up—Official Manager—Creditors' representative—Costs.

As a general rule, where the creditors and contributories have common and equal interests, the creditors' representative ought not to appear upon applications to the court, but should leave the case in the hands of the official manager.

Where, therefore, claims against the estate were being urged, the official manager was more interested in resisting them than the creditors' representative, and the costs of the latter, who attended the proceedings, were (in agreement with the decision of Wood, V.C.) disallowed by the Court of Appeal:

But *secus* where any question arises between creditors and contributories:

And, *semble* also, where the interest of the creditors is greater than that of the contributories.

CHANCERY.

M. R. ELWELL v. CROWTHER.

Easement—Right to water—mineral workings beneath watercourse—Subsidence of bed—Loss of supply water—Injunction—Acquiescence—Costs.

The plaintiff was entitled to a supply of water for the purpose of his mill, by means of a watercourse or aqueduct, passing through the adjoining lands, which belonged to the defendant. In consequence of the working by the latter of a mine under the watercourse, the level of the bed thereof was depressed to the extent of four feet for some distance. To prevent the water from overflowing the banks, the defendant had erected a stone wall and embankment. No actual diminution in the supply of water to the plaintiff's mill was proved in the cause.

Held, in an injunction suit, that the plaintiff was entitled in consequence of the subsidence which had already taken place in the level of the bed of watercourse, to obtain the influence of the court, in order to force the defendant so to work his mines for the future, that no loss of water should accrue to the plaintiff, but as the defendant had taken steps to prevent any such loss from happening, the court gave him the opportunity of entering into an undertaking, instead of making a hostile decree for an injunction against him—reserving liberty for the plaintiff to apply, if there should be occasion.

M. R. A——— v. B———
B——— v. A———

Practice—Exceptions for scandal—Passages inflicting moral stain on defendant—Materiality.

The defendant, to a foreclosure suit, a father and his two daughters filed a cross bill, praying to be relieved from the effect of the mortgage deed, upon the ground (amongst other reasons) that the mortgagee had voluntarily advanced the money, in order to place himself in the position of a creditor, and by continuing his visits to the family to effect his object, which, the bill alleged, was the seduction of one of the mortgagors.

Held, on exceptions for scandal to the passages in the bill containing these statements, that as the court could not say they would be immaterial at the hearing of the cause, they could not be struck out; and the exceptions were disallowed with costs.

L. J. FENWICK v. CLARKE.

Executor—Appropriation of legacy—Loss by failure of bank—Liability of Executor.

Where an executor, after payment of certain immediate legacies, deposits in a bank a sum sufficient to meet certain deferred legacies, with a view to an interest on mortgages, and a loss occurs by the failure of the bank, which renders the remaining assets insufficient to meet the unpaid legacies.

Held, that the unpaid legatees must bear the loss, and could not call on the executor or the paid legatees to contribute. *Held*, also, that the executor was entitled to file a bill for the purpose of taking the account.

M. R. SALTMARSH v. BARRETT.

Executor—Trustee—Replacing trust fund paid away by mistake—Interest.

Where an executor or trustee is ordered to restore a trust fund, paid away by him to a person not entitled thereto, if he has so paid it away under a *bona fide* mistake as to the legal rights of the parties, the court will not charge him with interest upon the amount ordered to be repaid.

M. R. FRITH v. FORBES.

Mercantile law—Consignment of cargo—Bills of lading—Bills of exchange drawn by consignor against cargo—Liability of consignee—General lien of consignee—Priority.

Where a merchant abroad consigns a cargo of goods to a merchant in England, sending him the bills of lading, and at the same time informs him that he has drawn upon him against such cargo a bill of exchange in favour of a third person, the receipt, and subsequent realisation of the cargo by the consignee, does not create an obligation on his part to pay the bill of exchange out of the proceeds in priority to the general lien to which, by the custom of trade, he is entitled on the cargo for the general balance due to him from the consignor. Such general lien attaches, by the law merchant upon the goods immediately on their arrival, and can only be postponed in favour of another claim but by some assent, express or implied, on the part of the consignee. The mere fact of his receiving and realising the cargo does not amount to an assent on the part of the consignee to the payment, out of the proceeds thereof of the bills of exchange, drawn by the consignor against it, in favour of third persons, although he may have notice of them before the cargo arrives.

L. C. JAMES v. HOLMES.

Trustee—Constructive trust—Money advanced by a woman to a man during co-habitation—Bill for an account—Interest—Maintenance.

A and B co-habited together. A having money of her own advanced the same to B upon trust, as she alleged, for her benefit. B invested the money in the purchase of leasehold property. After living together for ten years, B put an end to the connection. A filed her bill, seeking to charge B as a trustee with the moneys received by him on her account. B admitted the advance of the money and its application, but denied the trust.

Held, that the denial in this answer did not displace the allegations in the bill; that the fiduciary relation existed between them and that B was liable to account to A, for the moneys received by him, with interest at five per cent. and that he was not entitled to any allowance for the maintenance of the woman during co-habitation, nor for that of their illegitimate child.

L. C. NORTCLIFFE v. WARBURTON.

Lien in respect of costs—Sale of land after decree and before registry.

By a decree, W was ordered to pay defendants costs of a suit. After the decree, but before taxation or registry, W. sold his real estate, which was the whole of his property, to I, who had notice of the suit. The purchase money was received by A, who was W's solicitor, and who retained a considerable part of it to pay his costs in the suit.

On a bill filed by the defendant in the former suit against W, A. and H, seeking to set aside the sale and to charge the costs on the estate,

Held (reversing a decision of V. C. Stuart,) that the sale was not fraudulent within the statute of the 13 of Elizabeth, and that the decree not having been entered pursuant to the provisions of the 1 and 2 Vic. c. 110, s. 19, till after the sale, the court has no jurisdiction to make the costs of the former suit a lien on the estate.

V. C. K. PARSONS v. COKE.

Will—Construction—Accumulations—Maintenance.

Where there is a gift of a fund to a class for life, and a direction to accumulate, and after their decease equally between such of their respective issues as shall survive them, and attain twenty-one, that being a gift of capital, no part of it can be applied for their maintenance; although it might be so applied or the accumulations intercepted, in case there was no gift over.

V. C. S. JESSOP v. BLAKE.

Divorce—Post Nuptial Settlement.

The plaintiff by a post nuptial settlement, appointed and conveyed certain property to trustees upon trust for herself for life, for her separate use, and after the decease of herself or her husband upon trust, if she should survive him, for her heirs, executors, administrators, and assigns: and if he should survive her, then she should appoint, and in default of appointment to those who would have been entitled under the statute, had she died unmarried. She obtained a divorce. On a bill filed by her, during the husband's lifetime, the court ordered the trust moneys to be transferred to her.

V. C. W. HOOPER v. GUMM.

Production of documents—Agent—Plaintiff residing abroad.

Letters written by a party to a suit, resident abroad, to his agent in England, for the purpose of being communicated to his legal advisers in this country, will be protected from production, as also letters between the solicitors and the agent; it not being necessary that a party resident abroad should communicate directly with his solicitor in England. But *quære* as to letters from the agent to the principal, not stated to have been written in consequence of any communication with the solicitor.

L. C. TWYNAM v. HUDSON.

Agreement—Advance of part only of sum agreed to be advanced—Lien.

M having contracted to construct a railway, and being in want of money, applied to H to advance him £60,000, which he agreed to do, and by a memorandum, in consideration of H advancing that sum, M agreed to cede to him one-third of the profits to be derived from the contract, and proposed that the contract should be a security for the same, and agreed that he should sign an agreement on the terms therein referred to. In the transactions which followed, M failed to fulfil his engagement, but advanced certain sums, for less than the stipulated amount, for the payment of a part only of the bills which he had accepted for H, others of which he never paid. The plaintiff, who had taken an assignment from H, of his interest under the memorandum, filed a bill, praying an account of the money so received by M, from H, and that it might be a charge on the profits of M's contract.

Held, (reversing a decision of V. C. Stuart,) that as the agreement had not been fulfilled, neither H nor the plaintiff as his assignee, was entitled to any benefit from it in a court equity.

L. C. PARSONS v. HAYWARD.

Partnership—Articles—Continuation of business after expiration of term—Account of profits.

Where a partnership business for a term is carried on after the expiration of the term, although either party may put an end to the relation in the manner prescribed by articles, yet if nothing is done to mark a dissolution and to render it effectual, and the business is carried on without variation, the law infers an agreement that the relation shall continue on the footing of the antecedent contract.

A and B were partners for a term of seven years under articles which provided that the business should be carried on in the name of B, who should reside at the business and act as managing partner, and that at the expiration of the term the assets should be realised, sold, and divided. After the seven years had expired, the business was carried on by B, as before, the capital of A still remaining in it, B having claimed the whole profits since the expiration of the term, A filed his bill for a dissolution, and the usual accounts upon the footing of the partnership articles.

Held, that as B had continued the business after the expiration of the term, and as neither party had done any act which implied any disclaimer of the tacit agreement imputed by the law from the contract of the parties, that the partnership should continue, the plaintiff was entitled to an account and to his share of the profits upon the footing of the partnership articles, from the expiration of term to the time when the business was sold.

L. J. RE PANTREGUINEA FUEL COMPANY. (Limited)

Statute of frauds—Agreement not to be performed within a year.

C contracted with P to take a certain amount of coals daily, on certain terms, for three years. Before the expiration of two years C transferred his business to P. F. C; and P continued to supply coals to P. F. C. on the same terms as had been supplied to C, but no agreement in writing was entered into between P. and P. F. C.

Held, that a new contract must be implied between P. and P. F. C. and as it could not be performed within a year, it was within the statute of frauds.

M. R. RICHARD v. ROBSON.

Will — Construction — Charity—Gift to keep tombs in repair—Perpetuity.

A gift to the churchwardens of a parish of a sum of money to be invested in government or real securities, and the interest applied in keeping up the tomb of the testatrix herself, and also those of a number of her relations, was held void, as tending to a perpetuity.

Such a gift is not charitable within the meaning of the statute of Elizabeth.

M. R. STEVENSON v. ABINGTON.

Will—Construction—"Cousins"—"Issue"—State of family.

A gift was made by will to "my cousins (descendants from my father and mother's brothers and sisters) living at my death," sons at twenty-one, daughters at that age or marriage, "and such of the issue living at my death of any cousins of mine (descendants as aforesaid) who shall have died in my lifetime leaving issue living at my death;" males at twenty-one, and females at twenty-one, or marriage, "such cousins and issue if more than one to take equal shares *per stirpes*, so that the issue of any cousin dying in my lifetime shall take only the share the parent of such issue would have taken, if living, at my death, and attaining twenty-one, or being a daughter, attaining that age or marrying.

The testator made a codicil, by which he provided by name for all his first cousins who were alive at the date of the will, and excluded them from taking anything under the will.

Held, that the state of the family did not vary the construction to be put upon the will, and that the *primâ facie* meaning of "cousins"—namely "first cousins"—must be adopted, "issue" read "children."

L. J. STOTT v. MEANOCK.

Practice—Claim—Petition of appeal—Evidence—certificate—Executor—Infant—Liability to account.

Appeals from orders made on claims are governed by the order of 12th July, 1858, and must be prosecuted by petition of appeal, and not by motion.

Where the chief clerk, by his certificate, has reserved for the consideration of the court, the construction to be placed on certain facts proved before him, and found by his certificate, the court will look at the evidence adduced before the chief clerk. An executor is not liable to account for personal estate of the testator, received by him during his infancy.

M. R. BENTLEY v. MACHAY.

Deed—rectification—Mistake — Testimony of parties seeking to be relieved—Evidence—Communication of effect to volunteers—Consideration—Separate Solicitor.

Two ladies agreed with several of their brothers to execute a deed, whereby the sum of £200 a year, a-piece, was to be secured to be paid by them for the benefit of another brother, who had not been so well provided for under their father's will. By the deed which was executed, carrying out such intention, the annual payments were directed to be paid during the lives of the donors, for the benefit of the wife and children of the brother, as well as of the brother himself. The annual payments were made to the brother for upwards of 14 years, when he died. Upon his death the two ladies discovered, as they alleged in their bill for the first time, that, by the terms of the deed, the annual sums were to be continued during each of their lives, in favour of their brother's widow and children; and, thereupon, they instituted this suit, praying to be relieved from the further operation of the deed, upon the ground that each of them, when they executed it, intended to allow the annuities in question, merely, during the joint lives of herself and her brother, and not for any longer period. The view of the intention of the parties, when the deed was executed, was not borne out by the evidence of other parties to the transaction.

Held, that there being no fraud and undue influence, the court could not relieve the plaintiffs from the effect of the terms of the deed.

The court will not, especially after it has been acted upon for a number of years, set aside a voluntary deed, or restrain its future operation on the ground of mistake in the parties who executed it, upon no other testimony than that of the persons who are bound by it, and who will benefit by its being destroyed or altered. Where a voluntary deed is executed in favour of persons, to whom its contents and effect is communicated by the donors or their agents and by them it is acted upon, the court cannot afterwards set it aside upon the ground that the donors did not intend it to operate to the full extent of its terms.

Where a deed is executed to carry out a family arrangement it is not material, upon the question of mistake as to its full effect on the part of the persons executing it, that no separate solicitor was engaged for them in connection with the transaction.

A deed carrying out a contract between A and B, that they will each grant an annuity to C (a volunteer)—*Query*, whether a purely voluntary deed?

L. J. LUCAS v. WILLIAMS.

Administration—Bill given by executor—Liability de bonis propriis.

Where an executor gives bills or incurs liabilities in respect of his testator's estate, and a suit is instituted for the administration of the estate, the court will not by a motion in the suit, restrain an action against the executor, in respect of such bills or liabilities.

M. R. CLARK v. MALPAS.

Vendor and purchaser—Health of Vendor—Undervalue—Haste—Absence of professional adviser—Pleading—Plaintiff no interest—Cross-interrogatories.

A purchase of freehold property, for an inadequate consideration, by a person who did not hold a fiduciary relation to the vendor, was set aside on the ground of haste, and the absence of independant professional advice and protection on the part of the vendor, an illiterate old man, the deed being executed by him only thirty-six hours before his death, and the consideration expressed in the deed being a weekly sum and a house to live in during his life, and the payment of a sum of money after his death to any person to whom he should appoint the same. Where a defendant has reason to believe that the plaintiff had before the institution of the suit, parted with all his interest in the subject matter, he should file cross-interrogatories to ascertain the fact, and if he simply takes the objection by answer, and no evidence is brought forward upon it, the court will not take notice of the objection.

REVIEWS.

NOTANDA IN LAW, EQUITY, BANKRUPTCY, ADMIRALTY, DIVORCE AND PROBATE CASES. By Tenison Edwards, Esq., of the Inner Temple, Barrister-at-law. London: Printed and Published by T. F. A. Day, 13 Carey Street, Lincolns Inn, W. C., 1863.

This promises to be a useful publication. Its object is to assist the practical lawyer in "noting up cases," and so at all times save him the necessity of "hunting up cases" through the many annual Digests since Harrison's Digest.

In the present state of the law it is unsafe to advise without reference, not only to standard text works, but to decided cases. If the question in hand is one bearing upon any well understood branch of law, reference is at once made to the standard text book which discusses that branch of law, but as no text work is "put through" yearly editions it becomes necessary also to consult the annual digests subsequent to its date of publication. This is a task which year by year is becoming more laborious.

The real design of the publication before us is from time to time to furnish to the lawyer notes of late cases, so published that he can at once transfer them to his text book or copy of statutes according as the decision relates to a subject treated of in a standard text book, or has reference only to the construction of a statute perhaps of modern date. It is intended therefore that "Notanda" shall be "cut up" without compunction by every subscriber who desires to keep himself "posted up" in decided cases. The subscriber who regularly cuts up his copy and transfers the notes to the appropriate places indicated on the face of the notes, will save himself a

world of trouble when necessary to look for decided cases. Time is saved: first, in having a note not simply of the name of the case but of what it decides, so that reference to the report of it may or may not be necessary according to the bearing of the subject in hand. Secondly, in having the pith of the decision printed in small but legible type, so as to save the necessity of transcribing it in writing. By carefully carrying out the design of the compiler, old editions of text books will be nearly as valuable as new, and so a saving of expense besides the actual learning acquired by from time to time transferring such notes to the places intended for them.

The subscription price will be 12s. 6d. sterling per annum, —adhesive copies 2s. 6d. extra. Payment in advance is required. It is expected that there will be ten, possibly twelve, issues in the year, each of eight pages, containing in the year's issue from 3,000 to 4,000 notes. W. C. Chewett & Co., King Street East, Toronto, will receive Canadian subscriptions.

THE NORTH-BRITISH REVIEW for May is received. New York: Leonard, Scott & Co.

Disentegration of Empires, is the name of the first article in this number. It is really most instructive and interesting. The writer points to four notable instances where this process, either of political solution or of actual dismemberment is going on in our view, and each of these is noticed in regard to consequences affecting other nations far and near. The remaining articles are headed—Danish Literature, Past and Present; Kinglakes' Invasion of the Crimea; Vegetable Epidemics; Shell Tribes in India; Modern Preaching; M. Saisset and Spinoza; British Intervention in Foreing struggles.

THE WESTMINSTER for April. New York: Leonard, Scott & Co., is also received.

Contents: Austrian Constitutionalism; Reformation Arrested; The Resources of India; The Jews of Western Europe; Lady Morgan; Truth versus Edification; The Antiquity of Man. The last article is a bold one. It ridicules the idea that man was created in the year 4004 before the birth of Christ. The writer asserts that this statement is a baseless fiction. He argues that it is quite impossible to reconcile the Mosaic Cosmogony with the verities of science, and states that well informed men have long since ceased endeavouring to harmonize the successive days of creation (elongated into indefinite periods of time) with the Azoic, Palæozoic, Secondary, Tertiary, and Post-Tertiary epochs in Geological Science.

THE LONDON QUARTERLY. New York: Leonard, Scott & Co.

A writer in this number deals hard blows to sensation novels. He shows that works of this class manifest themselves as belonging, some more, some less, but all to some extent, to the morbid phenomena of literature, indications of a wide-spread corruption, of which they are in part both the effect and the cause, called into existence to supply the cravings of a deceased appetite, and contributing themselves to foster the disease and to stimulate the want which they supply. The remaining articles are headed: Industrial Resources of British India; The American War; History of Cyclopædias; The Salmon Question; Biblical Criticism; Poland; and Kinglake's Crimea.

THE EDINBURGH REVIEW for April. New York: Leonard, Scott & Co., is also received.

Contents: Kinglake's Crimea; Horsley's translation of the Odyssey; Tithe Impropriation; Simancas; Records of the Reign of Henry VII.; The Black Country; India under Lord Canning; The Bible and the Church; Alcock's Japan; Huxley on Man's Place in Nature; The Greek Revolution.

BLACKWOOD, for April. Same publishers, is also received.

It contains, besides the ordinary light reading, a very sensible article on the late Sir James Graham, showing that the deceased though not a foremast was a remarkable man. Many incidents of his life are given, and upon the whole justice is done to the memory of the deceased Baronet. Catonia is still continued. The concluding paper, which is headed "Marriage Bells," discourses on the recent marriage of the Prince of Wales, and refers in terms of affectionate loyalty to his widowed mother, our much beloved Queen.

GODEY'S LADY BOOK for June is received.

It contains four fashion plates, furnished by the house of A. T. Stewart & Co., the celebrated importers of fashionable goods in New York. The fashions are up to the latest dates, and will be invaluable to those ladies who are about to prepare for watering places and other fashionable resorts. These are in addition to the colored fashions, which contain six figures, three of them very recherche childrens' dresses. The number is a superb one, replete with much that is useful, and a great deal that is not merely useful but entertaining.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Honorable ADAM WILSON, Q. C., of Osgoode Hall, Barrister-at-Law, to be a Puisne Judge of her Majesty's Court of Queen's Bench for Upper Canada, in the room and stead of the Honorable Sheffington Connor, deceased.—(Gazetted May 16, 1863.)

SOLICITOR GENERAL.

The Honorable LEWIS WALLBRIDGE, of Osgoode Hall, Q. C., to be Solicitor General in and for that part of the Province of Canada called Upper Canada, in the room and stead of the Honorable Adam Wilson, Q. C., resigned.—(Gazetted May 23, 1863.)

CORONERS.

ALEXANDER A. McLAUGHLIN, Esq., THOMAS BRALL, Esq., WILLIAM A. BLACK, Esq., M.D., and GEORGE A. NORRIS, Esq., M.D., to be Coroners for the county of Victoria.—(Gazetted May 2, 1863.)

MOSES H. AIKIN, Esq., M.A., C.S.L., to be Associate Coroner for the United Counties of York and Peel. (Gazetted May 2, 1863.)

NELSON McGARVIN, Esquire, M.D., Associate Coroner, County of Halton. (Gazetted May 23, 1863.)

JAMES JUDGE, Esquire, Associate Coroner, County of Simcoe. (Gazetted May 23, 1863.)

NOTARIES PUBLIC.

ROBERT SWANTON APPELBE, of Oakville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 2, 1863.)

EWEN McEWEN, of Kingston, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 2, 1863.)

ARTHER LINDSAY, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

ABRAHAM DIAMOND, of Belleville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

WINTRINGHAM CLIFTON LOSCOMBE, of Bowmanville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

ANDREW WILSON BELL, of Douglass, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 16, 1863.)

ALEXANDER B. ROBERTSON, of Windsor, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 23, 1863.)

ADAM SAMPSON, of Streetsville, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 23, 1863.)

TO CORRESPONDENTS.

N. PEEL—Under "Division Courts."

A LAW STUDENT—IGNIS FATUUS—LAW STUDENT—Under "General Correspondence."

A LAW STUDENT.—Your letter on the subject of books for the Law School was duly received, and the information you require will be found published in the editorial columns of this number. The letter itself, though intended by us to be published, has been accidentally mislaid. We shall be glad to hear from you whenever disposed to write to us on topics of interest to the Profession. Many besides yourself approve of the Law Association proposed by a writer in the last number, but "that which is everybody's business is nobody's business," and so nothing is done.

DIARY FOR JULY.

1. Wednesday... Long Vacation commences. Last day for County Councils to equalize Rolls of Local Municipalities.
5. SUNDAY..... *5th Sunday after Trinity.*
6. Monday..... County Court and Surr. Court Term com. Heir and Devisee Sittings commence.
11. Saturday ..... County Court and Surrogate Court Term ends.
12. SUNDAY ..... *6th Sunday after Trinity.*
14. Tuesday ..... Last day for Judges of County Courts to make return of Appeals from Assessments.
19. SUNDAY ..... *7th Sunday after Trinity.*
21. Tuesday ..... Heir and Devisee Sittings end.
26. SUNDAY..... *8th Sunday after Trinity.*
31. Friday ..... Last day for County Clerk to certify Co. Rate to Municipalities in County.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

JULY, 1863.

THE LAW OF GUARANTEES.

The statute 26 Victoria, chapter 46, passed during last session of the Provincial Legislature, and entitled, "An Act to amend the laws of Upper Canada affecting Trade and Commerce," deserves some attention.

In considering a new law of a remedial character, it is well to examine the old law—discern the mischief to be remedied—and then the nature and effect of the remedy intended will be the more apparent.

In this manner we purpose to consider the nature and effect of the 26 Vic. cap. 46, sec. 1, which, in a legal point of view, is the most important statute passed during the last session of the Provincial Legislature.

It is provided by the fourth section of the Statute of Frauds (29 Car. II, cap. 3) that no action shall be brought whereby to charge the defendant upon *any special promise* to answer for the debt, default or miscarriage of another person, unless *the agreement* upon which such action shall be brought, or some memorandum or note *thereof*, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

What is required to be in writing? Not the promise, but the agreement or some memorandum or note thereof.

The word agreement as here used is not to be understood in any loose sense as synonymous with promise, but in its legal sense, as signifying a contract based on good consideration. There can be no binding agreement without consideration. A promise without consideration is not a binding agreement. Unless the binding agreement, *i. e.*, the consideration, as well as the promise, appear in writing, the party signing is not chargeable within the meaning of the act. The person to be charged for the debt of another, it is true, is to be charged upon his special promise; but, without a legal consideration to sustain it, that promise would be *nudum pactum*. The statute never meant to enforce any promise which, before the Statute, was invalid, merely because, under the statute, it was put in writing. The obligatory part is, indeed, the promise; but still, in order to charge the party making it, the consideration for the promise, as well as the promise itself, *i. e.*, the agreement, must be in writing.

Such was the construction put upon the statute in the well-known case of *Wain* v. *Walters*, 2 Smith's Leading Cases 146, and in many subsequent cases amply confirmed.

The statute, therefore, according to the legal interpretation of it, required at least two things: first, that there should be a good consideration for the promise; secondly, that the consideration, being an essential part of the agreement, should be in writing.

The law on the first point is unaltered. The law on the second is altered. Until recently it was not considered safe to allow the consideration to be supplied by oral testimony. The consequence was that in all cases it became a question of much nicety whether or not the consideration was sufficiently expressed; and in many cases right was defeated owing to the neglect to express the consideration with sufficient legal precision.

If Smith were to write to Jones—"I will engage to pay you this day fifty-six pounds, and expenses on bill for that amount, which Robinson owes you," this would not be sufficient, because of the omission to shew the consideration for Smith assuming the liability to pay Robinson's debt. But if Smith were to write to Jones—"If you will forbear to sue Robinson for one week on the over-due bill for £56, which you now hold, of his, I will see you paid," this would be held sufficient, because the consideration for Smith's promise is Jones undertaking not to sue Robinson for a week, and so the statute would be satisfied.

Such was the old law in all its strictness. In course of time it became most embarrassing to trade and commerce.

Even the courts appear to have been desirous to relax its strictness. It was soon held that it was sufficient either if the consideration appeared on the face of the writing in express terms, or by necessary implication. Next, evidence was received to explain the meaning of words in themselves really free from ambiguity, so as, in the explanation, to let in evidence of consideration.

Thus, plaintiff in his declaration alleged that one Andrew Little had requested plaintiff to sell and deliver him goods

and chattels, in the way of his (plaintiff's) business of a woollen draper, on credit; that plaintiff had, at the request of Andrew Little, consented to do so, provided defendant would guarantee the payment of the price of the goods so to be sold and delivered to Andrew Little, of which defendant, before and at the time of the making of the promise, had notice; that afterwards, and before Andrew Little became indebted to plaintiff for dry goods, defendant, by writing addressed to the plaintiff, promised in the words following: "I hereby guarantee the payment of any sum or sums of money *due* to you from Andrew Little—the amount not to exceed at any time the sum of £100;" that afterwards, plaintiff confiding, &c., supplied goods to Andrew Little for reasonable prices, amounting to £100, and thereby allowed Andrew Little to become indebted to him in £100; that Andrew Little had not paid, &c. Demurrer, on the ground that the state of circumstances contemporaneous with the making of the promise could not be shewn to supply consideration. *Held*, that the circumstances stated in the declaration might be looked at to explain the meaning of the writing. (*Bainbridge* v. *Wade*, 16 Q. B. 89. See also *Powers* v. *Fowler*, 4 El. & B. 511.)

The leaning of the judges in this case (*Bainbridge* v. *Wade*) was only a bending to the requirements of the age. It was a great departure from the rule established with so much strictness in the old cases. Lord Ellenborough, if alive, would have no hesitation in pronouncing it contrary to the law as understood in his time. But law is progressive; and even judges, with all their desire to adhere to old established rules, at times are somewhat influenced by the spirit of the age in which they live, and, as far as possible, constrained to administer the law as suited to the requirements of that age. Such, we think, was the influence which so sensibly affected the judges in *Bainbridge* v. *Wade*. Such is the influence which has since induced the Legislature both of Great Britain and of Canada to relax the rule of construction placed by Lord Ellenborough and others upon the fourth section of the Statute of Frauds.

On 29th July, 1856, was passed the Imperial statute (19 & 20 Vic. cap. 97) entitled, "An Act to amend the laws of England and Ireland affecting Trade and Commerce." Section 3 enacts that "No special promise to be made by any person after the passing of this act to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

In England this enactment was found to give much satisfaction, and the Legislature of Canada, last session, ventured to copy it.

It is a pity that the copy made was not exact in all its terms. The variance, as we shall presently see, is, however more in grammar, than in substance or sense.

Our enactment reads as follows: "No special promise to be made after the passing of this act to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized, shall be deemed invalid to support an action, suit or proceeding to charge the person by whom such promise *has* (Imperial act, "shall have") been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

We take it that the two enactments are, in law, identical. We take it, also, that the meaning of each is tolerably clear. The intention is simply to dispense with the necessity of stating consideration on the face of the writing. The special promise (and not the agreement involving the consideration) is all that is now required to be in writing. But still there must be, in fact, a good and valid consideration for the promise to make it binding. The statute is not intended in this respect to alter the law. It is only intended to alter the mode of proof. Before the statute the consideration could only be proved by the writing. Now it may be proved *dehors* the writing. But still it must, in order to make the promise binding, be proved either in the one way or the other. If not proved either way—if not, in truth, existing—then the promise, as before the Statute of Frauds, is simply a *nudum pactum*. The law of contracts is not altered. The law of evidence is altered.

This would be the interpretation which one disposed to apply the remedy to the mischief intended to be remedied would place upon the act of Parliament. Strange to say, however, in the only case which has been decided under the English statute, and to which we are about to refer, apparently a much less liberal interpretation was placed upon it.

Plaintiff had three counts in his declaration. In the first he stated that in consideration he would, at the request of defendant, lend £400 to one Hook Spooner and one William Cubitt, on mortgage of certain houses and land belonging to them, defendant promised plaintiff to take on himself any responsibility by the said Spooner and Cubitt incurred by reason of the loan, and to protect plaintiff from all loss by reason of the loan. Averment, that

plaintiff relying, &c., did loan £400 to Spooner and Cubitt on the security of the mortgage of said houses and land. Allegation, non-payment of money when due; and that houses and land of much less value than sum lent, &c. Breach, that defendant did not discharge the responsibility of Spooner and Cubitt to plaintiff in respect of the loan, &c. The second count was substantially the same as the first, but stated the consideration for the defendant's promise to be a transfer of £400 stock by the plaintiff to Spooner and Cubitt. The third count alleged the consideration to be the loan of money generally to Spooner and Cubitt. The cause was tried at the Bristol Summer Assizes for 1858, when the following facts appeared in evidence: The plaintiff having the sum of £400 in the funds, was advised by the defendant to lend it on mortgage to two persons named Hook Spooner and William Cubitt, who carried on business as builders, upon the security of certain leasehold premises belonging to them; the defendant assuring the plaintiff that he would incur no risk, as the security was good for £600, and telling him that if Spooner and Cubitt would not take less than £600 he himself would advance £200 to make up the required amount. The defendant also promised to see Mr. Lyne, his solicitor, upon the matter, and shortly afterwards addressed the following letter to plaintiff:

ENFIELD HIGHWAY, *October* 21, 1856.

DEAR CHARLES,—I saw Mr. Lyne this morning, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. *I will take any responsibility myself respecting it should there be any.*

W. MITCHELL.

Shortly after the receipt of this letter Mr. Lyne called on the plaintiff, and told him that Spooner and Cubitt would be content to take the £400, and the plaintiff consented to lend it. Accordingly plaintiff sold out the £400 stock, and advanced the proceeds to Spooner and Cubitt, upon the security before mentioned, at 6 per cent. interest —solely upon the faith of the defendant's letter of 21st October, 1856.

The interest was not paid when it became due, and the security turned out to be very inadequate, and the plaintiff sustained a considerable loss, and in order to recoup himself, sued the defendant.

It was objected, on the part of the defendant, that the evidence did not sustain the declaration, and the learned judge before whom the cause was tried being of that opinion, nonsuited the plaintiff, reserving him leave to move to enter a verdict (for such sum as should be assessed by an arbitrator to be chosen between the parties) if the court should be of opinion that there was evidence to support the contract alleged in any count of the declaration; the court to be at liberty to draw such inferences from the facts as a jury might have drawn.

A rule was accordingly obtained on the part of the plaintiff, to which cause was shewn. During the argument of the rule, on the part of the plaintiff's counsel, the expressions which fell from the judges of the Common Bench, on the construction of the new statute, deserve to be noted. Byles, J., said: "The statute does not make a promise good which was not good before. Can the verbal consideration be imported into the promise?" "You want to incorporate the parol consideration into the written promise. This you cannot do." "Formerly the consideration *in writing* might be looked at, not only to support but to explain the promise. But the *parol* consideration cannot be looked at to explain the promise." Cockburn, C. J., said: "The statute intended to exclude parol testimony as to the terms of the promise itself. The construction you contend for would raise a conflict of parol testimony as to the limit of the guarantee, which would be getting on the debatable ground from which the statute meant to exclude you. Is not the Statute of Frauds inexorable in that?"

Williams, J., who afterwards delivered the judgment of the court, said: "The question in this case is, whether in a letter written by the defendant to the plaintiff relating to a proposed mortgage, the following words are a sufficient guarantee within the fourth section of the Statute of Frauds:

"I will take any responsibility myself respecting it, should there be any."

"It will be observed that at the time the letter was written no mortgage existed. The letter is silent as to the sum to be advanced, as to the rate of interest, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning. It evidently refers to previous conversations in which these particulars were supplied. The whole promise, therefore, is not in writing, as the statute requires it should be. It cannot be made out without reference to previous conversations.

"The recent statute 19 & 20 Vic., cap. 97 sec. 2, it is true, abrogates the rule laid down in *Wain* v. *Walters*, 5 East. 17, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration formerly expressed in writing discharged two offices—it sus-

tained the promise, and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further and explain the promise.

"We therefore think that the ruling of the learned judge at the trial was correct, and the rule must be discharged." (*Holmes* v. *Mitchell*, 7 C. B., N. S., 361.)

Supposing this construction of the recent statute to be correct, it follows that, notwithstanding, the statute it will be safer to express the consideration in the writing, as hitherto. The want of the consideration may leave the promise incomplete, and without explanation. And, it is clear from the decision just referred to, that unless the promise be complete on the face of the writing by reference to the consideration, expressed or otherwise, that parol evidence will not be received to aid it, and so the promise will fail.

Thus it will be seen that the Legislature, according to the decision of the Court of Common Bench, while removing one difficulty in the way of the binding effect of guarantees, have raised up another which, in all probability, may neutralize the good effect which it was intended the statute should have. The statute says that the consideration need not be stated in the writing. In few cases will the promise be found complete without reference to the consideration. But the court says that unless the consideration appear on the face of the writing, no reference can be made to it as explanatory of the promise, because the promise entire and complete must appear on the face of the writing. Technically, perhaps, the court is right. But if right, it is plain that more legislation is required to make guarantees—what they are designed to be—binding engagements to pay the debts of others. In general they are contained in letters written by and accepted by men fully cognizant of the requirements of common sense, but entirely ignorant of the refinements of the courts in the construction of the Statute of Frauds, and the recent explanatory act to which we have at so much length referred. The necessity for stating consideration was a refinement which had the effect of defeating numberless guarantees: and so the Legislature has interfered and destroyed it. In its place, however, another refinement has sprung up, which promises to rival the defunct refinement in destructiveness. The difficulty of making common, or, more correctly, statute law harmonize with common sense is, it will be seen, by no means trifling. Those interested in simplifying the laws regulating trade and commerce, must again try their hands at the work of legislation on the important subject of guarantees. The law of England still is too subtle for ordinary comprehension.

In several of the United States of America, the fourth section of the Statute of Frauds has been much more liberally construed. The question for the necessity of the consideration appearing on the face of the writing, came up in 1821, in *Pickard* v. *Richardson*, 17 Mass. 122. In that case Chief Justice Parker entered into an elaborate discussion of the question, and arrived at a conclusion the reverse of that of Lord Ellenborough, in *Wain* v. *Walters*. He pointed out that for more than a century after the passing of the Statute of Frauds, it had in England been held sufficient to prove the consideration by parol evidence, and decided that to be the true construction of the act. His decision is now a part of the revised statutes of Massachusetts, viz.:—"The consideration of promise, contract or agreement need not be set forth or expressed in the writing signed by the party to be charged thereunto, but may be proved by any other legal evidence." (Revised Stat. Mass. p. 527.) The doctrine propounded by Chief Justice Parker, in Massachusetts, has been followed in Maine, Vermont, Connecticut, North Carolina, Ohio, Missouri, Texas and New Jersey.

It is a subject for regret that any different doctrine ever prevailed in England. The impolicy of it is now very generally admitted; but the difficulty of getting rid of it is greater than might be expected. The courts must either construe the recent amending act with more liberality than the Judges were disposed to do in *Holmes* v. *Mitchell*, or else the legislature must again interfere and strike a blow of a more decided character than they appear to have done.

LAW SCHOOL.

We are informed that in our recent announcement of books to be read for scholarships there is a mistake. In the first year Williams on *personal* property, and not Williams on real property, is the book intended. Students will please make the necessary correction.

JUDGMENTS.

ERROR AND APPEAL.

Hamilton v. *Holcomb*.—Appeal from Common Pleas. Case reported 12 U. C. C. P. 38. Appeal dismissed with costs (McLean and Draper, C.J.J., dissenting.)

Rutherford v. *Hill*.—Appeal from Chancery. Case reported 9 Grant 207. Appeal dismissed with costs (Spragge, V. C., dissenting.)

Sexton v. *Paxton*.—Appeal from court Queen's Bench. Case reported 21 U.C.Q.B. 389. Appeal dismissed with costs (Draper, C. J., and Morrison, J., dissenting.)

QUEEN'S BENCH.

Present: McLEAN, C. J.; WILSON, J.

June 15, 1863.

Kelly v. *Moulds*.—Judgment for plaintiff, on demurrer.

Robison v. *Flanigan*.—Judgment for defendant demurrer to fifth plea, and for plaintiff on the other pleas. Leave to apply to amend on affidavit.

Gore Bank v. *Gore Mutual Insurance Company.*—Rule *nisi* to rescind order of Connor, J.

In re West Middlesex Agricultural Society and East Middlesex Agricultural Society.—Rule absolute for mandamus.

Adshead v. *Upton.*—*Held*, 1, that a rule for costs may be issued either in term or vacation; 2, that it may be issued in the vacation of the assize next preceding term (Hagarty, J., *dubitante*); 3, that it is premature to issue it during the sitting of the court of assize for which notice of trial was given. Rule absolute to rescind rule for costs of the day with costs.

Best v. *Boics.*—Rule for new trial; costs to abide the event.

Ham et ux v. *Lasher.*—Rule absolute for new trial; costs to abide the event.

The Queen v. *McLean.*—New trial ordered.

Wells v. *McGarth.*—Rule absolute for new trial without costs.

Dickson v. *Haskin.*—Rule discharged.

June 20, 1863.

Wismer v. *Wismer.*—Judgment for defendant on demurrer.

Sykes et al. v. *The Ottawa and Prescott Railway Company.*—Held, that until payment made a garnishee is not in a position to plead a plea in bar to an action at the instance of his creditors. Judgment for plaintiffs on demurrer.

Bank of Upper Canada v. *Rutten.*—Held, that no stranger to a bill or owner can at law sustain an action on it. Rule absolute to disallow amendment and for new trial without costs.

Garner v. *Garner.*—Rule absolute to enter nonsuit.

Grey v. *McMillan et al.*—Judgment for defendants.

COMMON PLEAS.

Present: Draper, C. J.; Richards, J.; Morrison, J.

June 15, 1863.

Shaw v. *Moreton.*—Rule absolute to enter nonsuit.

Baskerville v. *Doane.*—Rule discharged.

In the matter of Smith and Henderson, two, &c.—Rule discharged, without costs.

Thompson v. *Kaye.*—Judgment for defendant, on demurrer.

Steuart v. *Clark.*—Rule for new trial, without costs.

Quackenbush v. *Snider.*—Judgment for plaintiff, on demurrer. Rule absolute for new trial; costs to abide the event.

Turley v. *Evans.*—Judgment for plaintiff on demurrer, and rule discharged, except as to so much of it as asks for reduction of verdict, which part is made absolute.

Williams v. *Taylor.*—Rule discharged.

Meredith v. *McCutcheon.*—Judgment for plaintiff, on demurrer.

Powell v. *Baker.*—Judgment for plaintiff, on demurrer.

Fraser v. *Robertson.*—Judgment for plaintiff on special case.

Smith v. *Dodd.*—Rule discharged.

Roe et al v. *O'Neill et al.*—Rule absolute to enter nonsuit, unless plaintiff pay costs in a month, in which case new trial ordered.

Cotton v. *Beaty.*—Rule discharged.

Neilson v. *Jarvis.*—*Held*, that a writ of *fieri facias* cannot be wice renewed, and that the second writ is a nullity. Rule absolute for new trial, without costs.

Watson v. *Perrins et al.*—Rule discharged.

Lawson v. *Ingram.*—Rule absolute for new trial, on payment of costs.

Kennedy v. *Mulligan.*—Rule *nisi*.

Murray v. *Dickenson.*—No rule.

June 20, 1863.

Bank of Upper Canada v. *The Grand Trunk Railway Co.*—Judgment for plaintiffs. (Draper, C. J., dissentiente.)

Campbell v. *Corporation of Elma.*—Judgment for plaintiff on demurrer, with leave to amend on payment of costs.

Carrall v. *McInnes.*—Appeal dismissed without costs.

Benedict v. *McInnes.*—Appeal allowed. New trial without costs.

The Queen v. *The Port Whitby Railway Co.*—Rule discharged with costs.

The Queen v. *Lunn.*—Conviction affirmed.

In re Cahill and Clark.—Rule absolute to set aside so much of order of Conner, J., as gives costs of reference to plaintiff.

White v. *Lord et al.*—Application in the part of unattaching creditor to set aside judgment and execution obtained by plaintiff against defendants as being collusive. Rule absolute to set aside execution with costs to be paid by plaintiff.

In the matter of Goodwin and the Ottawa and Prescott Railway Company.—Rule absolute but not with costs, as no power to give costs except in cases under the Municipal Institutions Act.

Thompson v. *Kaye.*—Rule refused.

PRACTICE COURT.

Present: Richards, J.

June 20, 1863.

Johnston v. *Jamieson.*—*Held*, that the court has no jurisdiction to set aside an award for a mistake in law, unless the mistake appear on the face of the award or in some writing given contemporaneously with it. Rule discharged with costs.

Moodie v. *Dougall.*—*Held*, that a matter once discussed and decided, cannot be again discussed upon the suggestion that the judge who decided took an erroneous view of the law. Rule discharged without costs.

Glass v. *Whitney.*—*Held*, that plaintiff cannot, after demurrer to a plea in bar decided against him, be allowed to discontinue. *Semble*, his proper course is, at the time of the delivery of judgment against him on the demurrer to apply for leave to amend. Rule discharged with costs.

SELECTIONS.

THE ACTION FOR A NUISANCE.

What is an actionable nuisance? That has become a very difficult question to answer since the decisions of the courts in some recent cases, where the alleged nuisance has been the burning of bricks near the premises of the complainant. In these cases the judicial opinions appear to be most conflicting, and consequently the law on this subject, which is one of frequent occurrence, and therefore of some importance, is in a very doubtful and unsettled state. It is certainly rather remarkable to find it an undecided point at the present day whether, if a man carry on a lawful trade, or exercise acts of ownership on his land, such as burning and making bricks there, he is or is not legally liable to an action for a nuisance at suit of a neighbour whose property has been thereby injured. But so it is. The first case which gave rise to this question, and has since led to so much discussion on the subject, is that of *Hole* v. *Barlow*, 4 C. B. N. S. 334. There the action was for a nuisance alleged to have been caused by the defendant burning bricks on his own land near to plaintiff's house, and Byles, J., who tried the cause, directed the jury that the verdict ought to be for the defendant if he carried on the burning of bricks in a proper and convenient place for that purpose, although the plaintiff's enjoyment of his property might have been rendered uncomfortable by the nuisance. That direction was upheld by the Court of Common Pleas, consisting of Crowder, J., Willes, J., and Byles, J., the Court being of opinion that such direction was warranted by the following passage in Com. Dig. tit. "Action on the Case for a Nuisance:" "So an action does not lie for a reasonable use of any right, though it be to the annoyance of another, as if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour." In *Bamford* v. *Turnley*,

31 L. J., N. S., 286, Q. B.; s. c. 6 L. T. N. S. 721, the nuisance complained of arose from the use of a brick clamp erected by the defendant for the sole purpose of making bricks on his own land, the clamp being placed on that part of the land which was most distant from the plaintiff's house, and so as to create no further annoyance than would necessarily result from the burning of bricks. Upon this state of facts, Cockburn, C. J. directed the jury, upon the authority of *Hole* v. *Barlow*, that if they should be of opinion that the spot was a proper and convenient one, and the burning of the bricks, under the circumstances, was a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict, whether there was or not an interference with the plaintiff's comfort. The Court of Ex. Ch. held this direction to be wrong, and in fact, overruled the case of *Hole* v. *Barlow*; but it must not, however, be supposed that, because *Bamford* v. *Turnley* has determined *Hole* v. *Barlow* to be not well decided, that therefore the only question for a jury in such an action is, whether the nuisance complained of be such as to render the plaintiff's enjoyment of his life or property uncomfortable. The majority of the judges who composed the Court of Error in *Bamford* v. *Turnley* only concurred in this, that the place being proper and convenient for the purpose of burning bricks or carrying on the defendant's trade would not alone entitle him to succeed in such an action. That this is the correct view of those cases would seem from the observations of Erle, C.J. in the case of *Cavy* v. *Lidbetter*, decided by the Court of Common Pleas in Hilary Term last: (32 L. J., N. S. 104, C. P.) That was also an action for nuisance from burning bricks, and the facts of the case were very similar to those of *Hole* v. *Barlow* and *Bamford* v. *Turnley*. Wightman, J., who tried the cause at the spring assizes for Kent, 1862, left it to the jury to say whether the plaintiff's enjoyment of his life and property were rendered substantially uncomfortable by what the defendant had done, and being required by the counsel for the defendant to leave also to the jury the question whether the defendant had burned the bricks in a convenient place for the purpose, refused to do so. A rule *nisi* for a new trial was obtained on the ground that such refusal was a misdirection, and upon the argument of the rule the case of *Bamford* v. *Turnley* having been cited for the plaintiff, the Court of Common Pleas took time to consider their judgment, and afterwards discharged the rule on the ground only that *Bamford* v. *Turlney* had decided that it was a misdirection to put such a question as Wightman, J. had been asked to put in *Cavey* v. *Lidbetter*, but said Erle, C. J., "beyond deciding that such a form of question was wrong, the judgment in the Exchequer Chamber does not extend. In the present case, if the objection had been that the learned judge told the jury to consider solely the evidence adduced to show discomfort to the plaintiff, and not to take into their consideration, in whole or in part, any evidence showing that the act complained of was an act of ownership on the part of the defendant, which was clearly lawful if it did not cause actionable discomfort to a neighbour, and that it was done with full intention to prevent discomfort in respect of time and place and manner and degree, I think that a misdirection would be made out. It seems to me that life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort; and that in all actions for discomfort the law must regard the principle of mutual adjustment; and the notion that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances is as untenable as the notion that the act complained of, if done in a convenient time and place, must therefore be justified, whatever was the degree of annoyance that was occasioned thereby. And I would add, that the judgment of Willes, J., in *Hole* v. *Barlow*, appears to me sound, although the question left by Byles, J. has been decided to be wrong. In the present case the learned counsel, acting on the precedent of *Hole* v. *Barlow*, contended for a question wrong in form but did not contend for his right in substance, according to the principle I have above attempted to explain."

The judgment of Willes, J., so referred to with approbation by the Chief Justice, was to the effect, that the right of every one to pure air may be taken away for the sake of public convenience, on the same principle that private rights must generally yield to right *pro bono publico*. This ground for making lawful what would be otherwise an actionable nuisance is, however, disapproved of by Bramwell, B. in *Bamford* v. *Turnley*. "That law," says that learned judge, "to my mind is a bad one, which, for the public benefit, inflicts loss on an individual without compensation. But, further, with great respect, I think this consideration misapplied in this and many other cases." Indeed, it is scarcely possible to deduce any clear understood principle from the various opinions of the judges in these recent cases, nor would it seem to be easy to reconcile some of the doctrines which they propound with the older authorities.

In vol. 3 of Blackstone's Commentaries, book 3, cap. 13, p. 217 (by Chitty), it is said to be an actionable nuisance "if one's neighbour sets up and exercises any offensive trade, as a tanner's, a tallow chandler's, or the like; for though these are lawful and necesary trades, yet they should be exercised in remote places; for the rule is *sic utere tuo ut alienum non lædas.*" Again, he says: "If one erects a smelting-house for lead so near the land of another that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance:" (citing as an authority 1 Roll. Abr. 89) "And by consequence," says Mr. Justice Blackstone, "It follows that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act where it will be less offensive." And after pointing out that it is a nuisance to corrupt a watercourse, or "to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour," he characteristically concludes with the following laudatory remark on the English law: "So closely does the law of England enforce that excellent rule of gospel morality, of doing to others as we would they should do unto ourselves."

The general doctrine contained in the passages above cited from Blackstone's Commentaries is, we believe, still quite correct. It is difficult to understand how the common-law right which a person has to wholesome air can be lost, except by prescription, if the decisions in *Elliotson* v. *Fleetham*, 2 Bing. N. C. 134; and *Bliss* v. *Hall*, 4 Bing. N. C. 183, rest on sound law, which it has never been doubted they do. It may be safely said since *Bamford* v. *Turnley*, that the idea that the place being convenient will justify the act, although it be done to the annoyance of a neighbour, is now exploded, and that "the convenient place" referred to in the passage in Comyn's Digest, which has been already cited, must mean "a place where a nuisance will not be caused to another." Still it would seem to be the opinion of several of the judges that the place where the act complained of occurred is proper for the consideration of the jury in determining the question whether there has existed a nuisance or not. If the fitness of the locality is to be considered, it surely ought to be with reference to the situation of both the plaintiff and defendant, as pointed out by Stuart, V. C., in *Beardmore* v. *Tredwell*, 31 L. J. 892, Ch.; s. c. 7 L. T., N. S. 207. "Nobody will doubt," says that learned judge, "that to the brickburner the place may be convenient, and probably the most convenient to him that can be found, but yet I apprehend it is perfectly clear that the mere circumstance of the place being convenient to one party is not enough to justify the continuance of the acts if they make the enjoyment of life and property uncomfortable to the other, or if they may be done elsewhere without these injurious consequences following." Indeed, the

question of fitness of locality, or reasonableness of circumstances under which the trade has been carried on, must surely be subordinate to the question whether it has been so carried on as substantially to render uncomfortable the plaintiff's enjoyment of life and property, for, if in fact his life and property has been injured by what has occurred, there must exist an actionable nuisance, however much the defendant may have endeavoured to prevent the plaintiff from receiving any discomfort from the exercise of objectionable trade in question.—*Law Times.*

THE CHANCES OF THE BAR.

Somers flourished a little before the period when legal honours ceased to depend principally upon intrigue and faction. He made himself useful to his party by some well-written pamphlets, and the young Earl (afterwards Duke) of Shrewsbury was his fast friend; still, when he was proposed as junior counsel for the Seven Bishops, they objected to him as too young (he was then thirty-seven) and too little known. Sergeant Pollexfen insisted on their retaining him, and his speech for the defence laid the foundation of his fame.

Lord Hardwicke, the son of an attorney, and bred up in an attorney's office, was fortunate enough to obtain the patronage of Lord Macclesfield, and that noble and learned but most unscrupulous personage forced him at once into the front rank of the profession. He was only twenty-nine years of age and five years' standing at the bar, when he was called up from his *first* circuit to be made Solicitor-General. Having little or no leading business, it was confidently expected that he would break down; but his talents and knowledge proved equal to the extraordinary call made upon them.

Thurlow dashed into practise with the same suddenness, and was indebted for his first lift to patronage; though he certainly did not obtain it by the quality for which Lord Hardwicke was famous—bowing, smiling urbanity. His favourite haunt was Nando's coffee-house, near the Temple, where a large attendance of professional loungers were attracted by the fame of the punch and the charms of the landlady, which, the small wits said, were duly admired by and at the bar. One evening the *Douglass case* was the topic of discussion, and some gentlemen engaged in it were regretting the want of a competent person to digest a mass of documentary evidence. Thurlow being present, one of them, half in earnest, suggested him, and it was agreed to give him the job. A brief was delivered with the papers; but the cause did not come on for more than eight years afterward, and it was a purely collateral incident to which he was indebted to his rise. This employment brought him acquainted with the famous Duchess of Queensbury, the friend of Pope, Gay, and Swift, and an excellent judge of talent. She saw at once the value of a man like Thurlow, and recommended Lord Bute to secure him by a silk gown. He was made King's Counsel in 1751, rather less than seven years after his call to the bar. He ran greater risks than Lord Hardwicke, because his business had been hitherto next to nothing; but he had far more of the *vis vivida*, and the unhesitating self-confidence which enables an untried man to beat down obstacles.

Dunning got nothing for some years after his call to the bar which was about 1756. "He travelled the Western Circuit," (says the historian of Devonshire, Mr. Polwhele,) "but had not a single brief; and had Lavater been at Exeter, in the year 1764, he must have sent Counsellor Dunning to the hospital of idiots. Not a feature marked him for the son of wisdom." He was, notwithstanding, recommended by Mr. Hussey, a King's Counsel, to the chairman of the East India Company, who was looking out for some one to draw up an answer to a memorial delivered by the Dutch government. The manner in which Dunning performed this piece of service gained him some useful connections and an opportune fit of the gout, which disabled one of the leaders of the western circuit, did still more for him. The leader in question handed over his briefs to Dunning, who made the most of the opportunity. His crowning triumph was his argument against the legality of general warrants, delivered in 1766. He was indebted for his brief in this famous case to Wilkes, whose acquaintance he had formed at Nando's, the Grecian, and other coffee houses about the Temple, which seventy years ago, were still the resort of men of wit and pleasure.

Kenyon rose slowly and fairly through the general impression entertained at the bar of the extent of his legal knowledge; but this impression was nearly twelve years in reaching the brief bestowing branch of the profession. It has been said that he occasionally supplied Thurlow with law, and was brought forward by him out of gratitude.

Lord Camden (a judge's son, Etonian and Cantab), went the Western Circuit for ten or twelve years without success, and at length resolved on trying one circuit more, and then retiring upon his own fellowship. His friend Henley (Lord Northington) hearing of his determination, managed to get him retained as his own junior in a cause of some importance, and then absented himself on the plea of illness. Lord Camden won the cause and prospered.

Lord Mansfield came to the bar with a high reputation, but it was rather for literary taste, accomplishment, and eloquence, than law. He "drank champagne with the wits," as we learn from Prior; and Mr. Halliday relates, that one morning Mr. Murray, was surprised by a gentleman of Lincoln's Inn, who took the liberty of entering his room without the ceremonious introduction of a servant, in the singular act of practising the graces of a speech at a glass, while Pope sat by in the character of a friendly spectator. It is from a couplet of Pope's we learn how he first became known in the profession—

> "Graced as thou art with all the power of words,
> So known, so honour'd in the House of Lords."

A piece of bathos thus parodied by Cibber—

> "Persuasion tips his tongue whene'er he talks,
> And he has chambers in the King's Bench walks."

He is reported to have said, that he never knew the difference between no professional income and three thousand a-year; and the case of *Cibber* and *Sloper* is specified as his starting-point. The tradition goes, that Serjeant Eyre being seized with a fit (the god who cuts the knot always comes in this questionable shape), the conduct of the defence devolved on Murray who after a short adjournment, granted by the favour of Chief Justice Lee, made so excellent a speech that clients rushed to him in crowds. The case was admirably adapted to his abilities, being an action of *crim. con.* brought by a conniving husband against a weak young man of fortune. But the story is apocryphal at best. There is no mention of the Sergeant's illness in the printed accounts of the trial. On the contrary, a speech by him is duly reported; and it appears that Murray was the fourth counsel in the cause. He certainly made a speech, and probably spoke well; but we disbelieve the tradition which makes him the hero of the day. *Cibber* v. *Sloper* was tried in December 1737. How could a man, "so known, so honoured" for his eloquence be raised from obscurity by a speech? It was a stepping-stone not the key-stone.

When Lord Loughborough first came to London he was a constant attendant at the green room, and associated with Macklin, Foote, and Sheridan (the father of Richard Brinsley) who assisted him to soften down his Scotch accent. But the

* This interesting account of the first success of many distinguished judges and counsel is taken from an old number of the *Edinburgh Review*. CLXIII. January.

main chance was not neglected. It is stated in Boswell's Johnson, that he solicited Strahan the printer, a countryman to get him employed in city causes; and his brother-in-law Sir Henry Erskine, procured him the patronage of Lord Bute. When a man of decided talent and good connexion does not stand on trifles, there is no necessity for speculating on the precise causes of his success.

There is hardly a surviving friend of Lord Erskine's who has not heard the history of his first lucky hit from his own lips. The author of the "Clubs of London" has undertaken to report his very words;—

"I had scarcely a shilling in my pocket when I got my first retainer. It was sent to me by a Captain Baillie of the navy who held an office at the Board of Greenwich Hospital; and I was to show cause in the Michaelmas Term against a rule that had been obtained in the preceding Term calling on him to shew cause why a criminal information for a libel, reflecting on Lord Sanwich's conduct as governor of that charity, should not be filed against him. I had met during the long vacation, this Captain Baillie at a friend's table; and after dinner I expressed myself with some warmth, probably with some eloquence, on the corruption of Lord Sanwich as first Lord of the Admiralty, and then adverted to the scandalous practice imputed to him with regard to Greenwich Hospital. Baillie nugged the person who sat next to him, and asked who I was. Being told that I had just been called to the bar, and had been formerly in the navy, Baillie exclaimed with an oath, "Then I'll have him for my counsel!" I trudged down to Westminster Hall when I got the brief, and being the junior of five who should be heard before me, never dreamt that the Court would hear me at all. The argument came on. Dunning, Bearscroft, Wallace, Bower, Hargrave were all heard at considerable length, and I was to follow. Hargrave was long-winded, and tired the Court. It was a bad omen; but, as my good fortune would have it, he was afflicted with strangury, and was obliged to retire once or twice in the course of his argument. This protacted the cause so long, that, when he had finished, Lord Mansfield said that the remaining counsel should be heard the next morning. This was exactly what I wished. I had the whole night to arrange in my chambers what I had to say the next morning, and I took the Court with their faculties awake and freshened, succeeded quite to my own satisfaction (sometimes the surest proof that you have satisfied others); and as I marched along the hall after the rising of the judges, the attorneys flocked around me with their retainers. I have since flourished, but I have always blessed God for the providential strangury of poor Hargrave."

In a more particular, and apparently more accurate, note of the same story, taken by an eminent poet, it is stated that the other counsel proposed a compromise of consultation; that Erskine stood out, and that Baillie flung his arms round his neck in a transport of grateful confidence. According to this note the number of retaining fees which Erskine said he carried home were sixty-two. Now retaining fees are usually paid to the clerk at chambers; but taking the statement to mean nothing more than that business came in very rapidly in consequence of the speech, still we must be pardoned for suggesting that the reports of the period do not bear out the supposition; and that the speech, excellent as it was, was not of the sort to win the confidence of attorneys, particularly those parts which brought him into collision with the Court. The effect in our day would strongly resemble that produced by Alan Fairford in the case of Peebles and Plainstanes:—"The worst of the whole was, that six agents who had come to the separate resolution of thrusting a retaining fee into Alan's hand as he left the court, shook their heads as they returned the money into their leathern pouches, and said, 'That the lad was clever, but they would like to see more of him before they engaged him in that kind of business.'"

He was next engaged to draw up Admiral Keppel's defence, which was spoken by the Admiral. For this service he received a bank note for £1,000, which he ran off to flourish in the face of his friend Reynolds, exclaiming, "*Voilá* the nonsuit of cow beef!" He was employed in two or three other cases of public interest on account of his naval knowledge, and the extraordinary powers he displayed in them speedily led to a large general business. It is now acknowleged that Erskine's best quality was the one ordinary observers would give him credit for—sagacity in the conduct of a cause.

Sir William Jones made his forensic *debut* about the same time as Erskine, though according to the account given in Miss Hawkins's "Memoirs," on her brother's authority, without producing an equally favourable impression. He spoke for nearly an hour in a highly declamatory tone, and with studied action; impressing all present, who had ever heard of Cicero or Hortensus, with the belief that he had worked himself up into the notion of his being one or both of them for the occasion. Being little aquainted with the bar he spoke as a case having been argued by "one Mr. Baldwin," a gentleman in large practise sitting in the first row. This caused a titter; but the grand effect was yet to come. The case involved certain family disagreements, and he had occasion to mention a governess. Some wicked wag told him he had been too hard upon her: so, the day following, he rose as the judges had taken their seats, and began in the same high tone, and with both hands extended—"My Lords, I have been informed, to my inexpressible mortification and regret, that, in what I yesterday had the honour to state to your Lordships, I was understood to mean to say that Miss—— was a harlot." He got no further: *solvuntur risu tabulæ;* and, so soon as the judges could speak for laughing, they hastened to assure him that no impression unfavourable to Miss ——'s morals had been made upon the court. Nothwithstanding this inauspicious commencement, and his fondness for literature, Jones obtained a fair share of business. His "Essay on Bailments" is considered the best written English law-book on a practical subject. None can be placed alongside of it, for style and method, except Serjeant Stephen's "Treatise on the Principles of Pleading."

Lord Ellenborough pursued the most laborious path to distinction. He practised several years as a special pleader, and joined the Northern Circuit with a formed connection. He first rose into fame by his defence of Warren Hastings, who employed him at the instance of Sir Thomas Rumbolt, a connexion of the Law family.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Harris Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

STAYING EXECUTIONS *EX PARTE*.

We return, to the communication of our correspondent, which has already afforded us a text for commentary, in reference to practice in the Division Courts.

Our correspondent says:—"In one county, the practice is for the Judge to stay executions in the hands of the bailiffs, without notice to the plaintiff or his agent, upon the mere *exparte* verbal or written application of the defendant, which, I need not say, leads to great loss, inconvenience and uncertainty in the collection of debts,

for, when the plaintiff, supposing it collected, calls for his money, instead of getting it, he is comforted with a judge's order to stay proceedings."

We assume that this stay of execution must be ordered under the 108th sec. of the act, which provides that, except in cases where a new trial is granted, the issue of execution shall not be postponed more than 50 days from the service of summons, without the consent of the party entitled to the execution; and then enacts as follows:—"But in case it at any time appears, to the satisfaction of "the Judge, by affidavit or affirmation, or otherwise, that "any defendant is unable, from sickness or other sufficient "cause, to pay and discharge the debt or damages "recovered against him, or any instalment thereof ordered "to be paid as aforesaid, the Judge may suspend or stay "any judgment order or execution given, made or issued "in such action, for such time, and on such terms as he "thinks fit, and so, from time to time, until it appears, by "the like proof, that such temporary cause of disability "has ceased."

It is obviously improper, under this section, to make an *ex parte* order: both parties should be heard before the Judge acts. There may be cases where a sudden emergency may warrant a judge in staying proceedings till a certain day, or till the return of a summons to the plaintiff to show cause; but, as a general rule, no order should be made under the clause that would make it necessary for the plaintiff to apply to rescind it before he could act on his judgment.

This is one of these powers that should be most sparingly used. The power to step between a man and his rights calls for much delicacy in its exercise, and no judge should step between a judgment debtor and his creditor unless he sees the whole facts. How can a judge be satisfied as to facts, hearing only one side? How can he be sure that all the circumstances material to be considered are laid before him unless both parties have an opportunity to be heard? How can he be in a position to know whether he should "suspend or stay" the execution, or say what are proper terms to impose as a condition to doing so, if he does not hear what the plaintiff has to say?

How easy it would be, under the practice stated by our correspondent, for a defendant to make out a *prima-facie* case by suppressing some material or collateral fact, which, if brought under the judge's notice, would induce him to refuse the application.

The judge "*may* suspend or stay" execution—implying the exercise of judgment not arbitrary discretion, but judicial discretion—in view of all the facts. We have no hesitation in saying that the practice of granting *ex parte* suspensions is a monstrous perversion of the true meaning of the clause, and a gross violation of the vital principle of justice.

We have taken occasion to speak to two judges on the subject—one of over 20 years, and another of over 15 years experience in the Division Courts—who both hooted the idea of making an *ex parte* order; and, in all their experience, had never made half a dozen orders under the clause.

The proper practice we take to be this:—the defendant applies, on affidavit, to the judge, who grants a summons to hear the matter, with or without stay of proceedings, in the meantime, as may appear proper, or directing that the plaintiff shall be furnished with copies of the affidavits, upon which the application is founded. On the return of the summons, the parties are heard when the order is made, upon such terms as may seem just, or the summons is discharged.

Our correspondent has not, in any case, given us the names of the judge of whose administration he complains; nor do we desire to know them. It is sufficient for us that we have, in the character and position of our correspondent, an assurance that the facts he states are correct, and it becomes us to speak freely of a practice which we believe to be unjust, unexpedient, and dangerous.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page 99.*)

THE CLERK'S DUTIES.

Clerks are furnished by the County Attorney for their county with forms for making these returns.

The manner in which unclaimed suitor's monies remaining in the court are to be disposed of is given in the following sections.

45—"All sums of money which have been paid into court to the use of any suitor thereof, and which have remained unclaimed for the period of six years after the same were paid into court, or to the officers thereof, and all sums of money, when this Act takes effect or afterwards, in the hands of the clerk or bailiff paid into court or to the officers thereof to the use of any suitor, shall, if unclaimed for the period of six years after the same were so paid, be applicable as part of the General Fee Fund of the Division Courts, and be carried to the account of such Fund, and paid over by the clerk or officer holding the same to the County Attorney of his county; and no person shall be entitled to claim any sum which has remained unclaimed for six years."

46—"No time during which the person entitled to claim such sum was an infant, or *femme covert*, or of

unsound mind, or out of the Province, shall be taken into account in estimating the six years."

Rule No. 5, of the General Rules of Practice, provides that the *return of emoluments* shall be made without any special order from the judge, immediately after the 30th of June and 31st day of December, yearly, according to a prescribed form. And Rule No. 6 provides that a copy of the list of unclaimed suitors' monies shall be transmitted in the month of January in each year to the County Attorney, with the monies mentioned in such list.

Bailiffs are required to make returns on oath with regard to process in their hands and monies received by them in the execution of their duties, (Rule 12) as will be more particularly noted hereafter. Rule 7 provides that bailiff's returns shall be filed in the clerk's office, and be open without fee to the inspection of any person interested; and that the clerk shall examine such returns, and if found correct and complete within ten days after the receipt thereof, endorse thereon a memorandum in the following words:—

"I have carefully examined the within return, and find the same to be full, true, and correct in every particular to the best of my knowledge and belief.

"Dated the —— day of —— 18 ,

"—— —— Clerk."

If the clerk finds the returns incorrect or incomplete, he shall forthwith notify the judge of the same, and of the particulars thereof.

All fees are payable in the first instance by the party at whose instance the proceedings take place (sec. 50).

The 53rd section declares that bailiffs neglecting to return process or executions within the time required by law, shall forfeit their fees thereon, and these fees "shall be held to have been received by the clerk, who shall keep a special account thereof," and account for and pay the same over to the County Attorney to form part of the General Fee Fund. There is also a general provision that monies arising from any penalty, forfeiture, or fine imposed by the Act, not directed to be otherwise applied, shall be collected by the clerk of the court, and by him paid over to the County Attorney to form part of the Fee Fund (sec. 190).

The primary object of the bond to the Crown before referred to is to secure the due and regular performance of that branch of the officer's duties which relates to the fee fund monies. The quarterly returns, according to the instructions from the Government, are to be made on 31st March, 30th June, 30th September, and 31st December in each year; and any clerk failing to account to the County Attorney for the space of ten days after the examination of his quarterly account by the judge is, according to the instructions to the County Attorney, to be reported to the Attorney General of Upper Canada, with a view to the necessary proceedings being had at law for the recovery thereof.

Clerks of the Division Courts are in some sense public officers, and several of the provisions of the Consolidated Acts of Canada, chap. 12, will be found to relate to them.

In case of the resignation, removal, or death of a clerk, all accounts, moneys, books, papers, and other matters in his possession by virtue of, or appertaining to his office, become the property of the County Attorney of the county, who holds the same till the appointment of another clerk, to whom they are to be delivered when his security covenant is completed (sec. 47). And any person wrongfully holding or getting possession of accounts, books, papers, or matters belonging to the court, is guilty of a misdemeanor, and is liable to be committed to gaol, there to remain without bail til he has fully accounted for, or delivered up to the County Attorney the matter withheld (sec. 48).

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., *Barrister-at-Law, Reporter to the Court.*)

HENRY MCCABE V. MARY MCCABE.

Will—Construction.

"I, Michael McCabe of the township of S., south half of lot 24, tenth concession, do make and ordain this my last will and testament in the manner and form following: all of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, whom I appoint sole executrix of this my last will and testament, hereby revoking all other and former wills by me at any time heretofore made."

Held, that the word *estate* passed the testator's land, notwithstanding its connexion with the personality. [E. T., 26 Vic., 1863.]

Ejectment for lot 10, in the eleventh range east of the Garafraxa road, in the town of Owen Sound, and the south half of lot 24 in the tenth concession of Sydenham.

"The plaintiff claimed as heir-law of one Michael McCabe, the defendant as devisee under his will, which was as follows:

"I, Michael McCabe, of the township of Sydenham, south half of lot number 24, tenth concession, county of Grey, Canada West, do make and ordain this my last will and testament, in manner and form following: all of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, Mary McCabe, whom I nominate, constitute and appoint sole executrix of this my last will and testament, hereby revoking all other and former wills by me at any time heretofore made."

At the trial at Owen Sound, before Richards, J., it was objected that this was insufficient to pass land, and the plaintiff also contended that the testator when he made it was of unsound mind.

A verdict having been found for defendant.

Robert A. Harrison moved for a new trial, citing *Cliffe* v. *Gibbons* 2 Lord Rayd. 1325; *Buchanan* v. *Harrison*, 8 Jur. N S. 965.

HAGARTY, J.—I have read the voluminous evidence at the trial, and am clearly of opinion that the verdict is right on the merits.

It was objected that the will does not pass real estate.

It would in my judgment be a reproach to the law if on such a will a man should be held to have died intestate as to his real estate, including the very lot which he names as his place of abode or residence.

Notwithstanding the older cases cited, I think the real estate would be held to pass at the present day on words like those before us. The tendency of all the modern cases seems to me to be to look at the plain obvious meaning of words, unembarrassed by technicalities which could never have occurred to the mind of the testator. We are asked to say because the word "estate," which by itself is admitted to be quite sufficient to pass realty, is joined

to words of mere personality, that its well known individual significance is to be destroyed.

I have no doubt whatever but that there are cases in which on the whole context of a will the word "estate" may be restricted to personality. But this will before us shews to my mind a clear intention to dispose of every thing he possessed, land as well as chattels, and I see nothing to restrict the meaning of the word.

I refer to *Streatfield* v. *Cooper*, 27 Beav. 338; *Patterson* v. *Huddart*, 17 Beav. 210; *Coard* v. *Holderness*, 20 Beav. 147; *Fullerton* v. *Martin*, 17 Jur. 778; *Mayor of Hamilton* v. *Hodson*, 6 Moo. P. C. C. 76; *O'Neil* v. *Carey*, 8 U. C. C. P. 342; and *Doe Evans* v. *Evans*, 9 A. & E. 726, from which this case is not distinguishable.

I think there should be no rule.

Per Cur.—Rule refused.

MARY HELEN PHILAN v. THOMAS GRAHAM.

Will—Construction—Estate in fee or in tail.

The Testator, who died in 1829, devised as follows:—

"To my son John Philan I give and devise all that my real estate situate, lying and being lot number five in the fourth concession of Yarmouth, in the London District, containing 200 acres, be the same more or less," (the land in question.) "and also I give and bequeath to my said son John all that my real estate situate, lying and being lot number six in the fourth concession of Yarmouth, in the London District, containing 200 acres, be the same more or less, to hold unto him, the said John Philan, his heirs and assigns for ever."

"In case of the next surviving male heir arriving at the age of twenty-one years," then he gave to such male heir lot six, "to hold unto the said male heir, his heirs and assigns for ever." To his daughter E. he gave another lot, "to hold unto her, the said E., her heirs and assigns for ever; and in case that the said E. shall die without children, then the said lot of land shall be equally divided between my surviving heirs." To another daughter, C., he gave other land, "to hold to the said C., her heirs and assigns for ever." In case a daughter should be born of his wife, he gave to such daughter other lands, "to hold to the said daughter, her heirs and assigns for ever." In case his son John Philan should die before coming of age, he gave lot five to his daughter C., "her heirs and assigns for ever," and lot six to the daughter that should be born of his wife, "her heirs for ever;" and if such daughter should die previous to her having an heir," then he gave lot six to his daughter E., her heirs and assigns for ever." In the event of the decease of C. before she shall have an heir," then he gave lot five to E., "her heirs and assigns for ever." In the event of the death of C. and of the daughter that should be born of his wife, he gave most of the lands devised to them to E., "and her heirs and assigns for ever."

After all these devises he added, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an incumbrance on the said lots of land, whatever may be considered a fair allowance, according to the interest of the said estate, to be for the support and benefit of the younger heirs."

Afterwards the testator directed that these lots five and six, which he called "the home lots," should be leased "until the heir or heirs arrive at age," and made provision for the event of his wife having a son.

Held, 1. That John Philan, by the first part of the will, took a fee in lot five, the habendum applying to that lot as well as lot six; and

2. That the subsequent general clause was not sufficiently definite or intelligible to cut down such estate to an estate tail.

[E. T., 26 Vic., 1863.]

Ejectment for an undivided moiety of 141 acres of land, being part of lot number five, in the fourth concession of the township of Yarmouth.

Both parties claimed title under one William Windham Philan—the plaintiff by descent, the defendant as grantee of John Philan, devisee of the said William Windham Philan.

The case was brought to trial at St. Thomas, before the late Sir J. B. Robinson, Chief Justice of this court, in October, 1861, when the seisin of the said William Windham Philan was admitted; and it was also admitted or proved that he died in September, 1829: that he was twice married: that on the death of his first wife he married Eliza Moore, about the year 1826: that by his first wife he had two children, John and Eliza, (afterwards Mrs. Doyle,) and by the second wife two daughters, one of whom died when only a few weeks old, and the other was the plaintiff: that his second wife died in 1830 or 1832; and that John Philan, the only son, died unmarried in 1847 or 1848, in the twenty-second or twenty-third year of his age.

The deed from John Philan to defendant was dated October 3rd, 1846, and registered on the 7th of October, 1847.

By consent a copy of the will of the said William Windham Philan was put in, bearing date the 9th day of September, 1829, by which the testator gave and devised to his wife, Elizabeth Philan, all that his real estate situate and being the south-easterly half of lot number seventeen, in the ninth concession or tenth range north of the Long Woods Road, containing one hundred acres, more or less, "to hold unto her, the said Elizabeth, her heirs and assigns for ever." The will then proceeded:—

"To my son John Philan I give and devise all that my real estate situate, lying, and being lot number five in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, and also I give and bequeath to my said son John all that my real estate situate, lying, and being lot number six in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to hold unto him, the said John Philan, his heirs and assigns for ever; but in case of the next surviving male heir arriving at the age of twenty-one years, I give and bequeath to such male heir the aforesaid lot number six in the fourth concession of the township of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to hold unto the said male heir, his heirs and assigns for ever: and if at my death my title to the said last mentioned lot should be questionable, I in that case desire my executors hereinafter named to take such steps as may be necessary to procure a patent for the same from the directors of the College Company at York, or whoever may be legally authorised to do so."

To his daughter Elizabeth Doyle he gave and devised all that his estate being lot number eleven south of the Lake Road, in the township of Southwold, in the London District, containing one hundred acres, more or less, "to hold unto her, the said Elizabeth Doyle, her heirs and assigns for ever; and in case that the said Elizabeth Doyle shall die without children, then the said lot of land shall be equally divided between my surviving heirs."

To his daughter Catherine Philan he gave and devised all that his real estate being the north-westerly halves of lots numbers six seven, and eight, in the seventh concession or eighth range north of the Long Woods Road, in the township of Carradoc, in the District of London, containing three hundred acres, more or less, "to hold to the said Catherine Philan, her heirs and assigns for ever."

The testator then devised certain lands to a child expected to be born of his wife, Elizabeth Philan, in the following manner:—"And in case a daughter shall be begotten by me of the body of my said beloved wife, Elizabeth Philan, I give and devise to such daughter all that my real estate situate, lying, and being the south-easterly halves of lots numbers seven and eight, in the seventh concession or eighth range north-westerly of the Long Woods Road, in the township of Carradoc, and in the District of London aforesaid, containing two hundred acres, be the same more or less, and also all that my real estate situate, lying, and being the south-easterly half of lot number eighteen, in the ninth concession or tenth range north of the Long Woods Road, containing one hundred acres, be the same more or less, to hold to the said daughter, her heirs and assigns for ever."

Then followed these provisions, relating to the land in question;—"In the event of the decease of my beloved son John Philan before he arrives at age, I give and devise all that my real estate situate, lying, and being lot number five in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to my beloved daughter Catharine Philan, her heirs and assigns for ever. Likewise, in the event of the decease of my beloved son John Philan before he arrives at age, I give and devise all that my real estate situate, lying, and being lot number six in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to my daughter that shall be begotten by me of the body of my said beloved wife, Elizabeth Philan, her heirs for ever; and in case my said daughter that may be born should die previous to her having an heir, then and in that case I give and devise the said two hundred acres, being lot number six in the fourth concession of Yarmouth, to my beloved daughter Elizabeth Doyle, her heirs and assigns for ever. Likewise, in the event of the decease of my beloved daughter Catharine Philan before she shall have an heir, then and in that case I give and devise the said two hundred acres, being lot number five in the fourth concession of Yarmouth, to my beloved daughter Elizabeth Doyle, her heirs and assigns for ever."

He also devised over to his daughter Elizabeth Doyle, and her heirs and assigns for ever, in the event of the death of the said

Catharine Philan and of the daughter to be born of his said wife, the north-westerly halves of lots six, seven, and eight, and the south-easterly halves of lots seven, and eight, in the seventh concession or eighth range, also the south-easterly half of lot seventeen in the ninth concession or tenth range, north of the Long Woods Road, containing in the whole six hundred acres, in the township of Carradoc.

Immediately after the several devises already mentioned came the following clause, on which this action chiefly turned :—"*It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir at law; at the same time there shall be an incumbrance on the said lots of land, whatever may be considered a fair allowance according to the interest of the said estate, to be for the support and benefit of the younger heirs.*"

He then directed that his farming stock, &c., should be valued by his executors immediately after his decease, and that his son-in-law Lawrence Doyle and the rest of his family should occupy "the home farm" until such time as his debts were liquidated and affairs all arranged, with sufficient security for the said Lawrence Doyle to return the stock, &c., when his son John Philan should arrive at age; and if the said Lawrence Doyle would not agree to these terms, then the stock should be sold.

He also directed that "the home lots numbers five and six in the fourth concession of Yarmouth," should be leased "until the heir or heirs arrive at age:" that lot eight in third concession of Yarmouth, and the easterly half of lot thirty-eight south on the Talbot Road east, in the township of Southwold, should be leased until sold, giving certain directions as to the mode of cultivation, preservation of trees, &c., on the lots so leased.

Then came several devises of personal property, not material to notice.

In case a son should be begotten by him of his said wife Elizabeth, then he devised to his daughter Catharine Philan the south-easterly halves of lots seven and eight, in the seventh concession or eighth range north-westerly of the Long Woods Road, and the south-easterly half of lot eighteen in the ninth concession or tenth range, north of the Long Woods Road, and the north-westerly halves of lots six, seven, and eight, in the seventh concession or eighth range, north of the Long Woods Road, in the township of Carradoc, containing in all six hundred acres, "to hold to the said Catherine Philan, her heirs and assigns for ever." He added after this devise, "It is my request that if my son-in-law, Lawrence Doyle, shall wish to live in the home farm on the terms hereinbefore mentioned, that my beloved wife Elizabeth Philan shall reside on the said home farm as usual as long as she remains my widow;" and after some intervening bequests of personality, "It is my request that my son-in-law, Lawrence Doyle, shall occupy both the home farms at such rent as the executors shall consider to be fair." Lawrence Doyle and two others were appointed executors.

The plaintiff relied upon the clause above mentioned relating to all the testator's estate, as cutting down the estate of John Philan in this lot to an estate tail; and contended that in that case the conveyance by the said John Philan to defendant, not having been registered within six months from the execution, could have no operation under the statute to bar the entail—Consol. Stats. U. C., ch. 83, secs. 4, 31. He contended also, the testator having died before 1834, that the devise to John Philan gave a life estate only in lot number five, for that the *habendum* in fee applied to lot six alone.

The defendant, on the other hand, argued that the *habendum* clearly applied to both lots, five and six: that at all events the word *estate* would carry the fee; and that the general clause relied upon was not sufficiently intelligible to have any definite effect in opposition to this and the several other clear previous devises in fee, or could at most amount only to a trust.

At the trial a verdict was taken for the defendant, and leave reserved to move to enter a verdict for the plaintiff.

Owing to the various changes in the Bench, which will be found stated at 21 U. C. Q. B. 583, and 22 U. C. Q B. 282, this case was three times argued:—in Hilary Term, 1862, before Robinson, C. J., and Burns, J.; in Trinity Term, 1862, before McLean, C. J., Burns, J., and Hagarty, J.; and in Hilary Term, 1863, before McLean, C. J., and Connor, J.

Adam Crooks obtained a rule *nisi* to enter a verdict for the plaintiff pursuant to leave reserved. He cited *Doe Ford et al.* v. *Bellet al.*, 6 U. C. Q. B. 527; *White* v. *Coram*, 3 Kay & Johns. 653; *Burton* v. *White*, 7 Ex. 720; *Doe dem. McIntyre* v. *McIntyre*, 7 U. C. Q. B. 156; *Towns* v. *Wentworth*, 11 Moo. P. C. C. 526; *Jenkins* v. *Lord Clinton*, 4 Jur. N. S. 887, S. C. 26 Beav. 108; *Jenkins* v. *Hughes*, 8 H. L. Cas. 571, S. C. 6 Jur. N. S. 1043; *Marshall* v. *Grime*, 28 Beav. 375; *Earl of Tyrone* v. *Marquis of Waterford*, 6 Jur. N. S. 567, S. C. 1 DeG. F. & J. 613; *Lucas* v. *Goldsmid*, 7 Jur. N. S. 719; *Jordan* v. *Adams*, 7 Jur. N. S. 978; *Greenwood* v. *Verdon*, 1 Kay & Johns. 74; *Woodhouse* v. *Herrick*, Ib. 352.

Christopher Robinson shewed cause, and cited Jarm. on Wills, 2nd Ed., Vol. II., p. 225, 227; 3rd Ed., Vol. II., p. 255, 467; *Biddulph* v. *Lees*, 28 L. J. Q. B. 215; *Towns* v. *Wentworth*, 31 L. T. Rep. 274; *Jervoise* v. *The Duke of Northumberland*, 1 Jac. & W. 559, 574, 575; Powell on Devises, 3rd Ed., Vol. II., p. 451.

McLEAN, C. J.—There is no doubt in my mind that the testator intended by the will to devise to his son John what he calls the home farm, consisting of lots five and six in the fourth concession of Yarmouth, and that the words of inheritance which follow the devise of number six, apply to both lots. It cannot be supposed that the testator intended to give an estate in fee in the latter lot and only an estate tail in the other lot, especially as all the other devises to his several children are to them and their heirs and assigns for ever.

The words, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever," do not of themselves create an estate tail or change the nature of the estate previously devised in fee. They seem rather to convey a wish on the part of the testator that the several devisees should entail the properties devised to them respectively, so that the individual who would have been heir-at-law if the law of inheritance had not been changed would have the whole property. The subsequent part of that clause of the will shews a desire on the part of the testator to impose a charge on the several lots for the support and benefit of younger children, so that, while the heir-at-law was to be the sole owner of the lands, the younger children should also derive some measure of support from them; but the clause is in all respects so ambiguous that it must be inoperative, and the plain words of the several devises cannot be affected by it.

The devise to John Philan, to hold to him and his heirs and assigns for ever, created an estate in fee simple with the usual power of alienation in the devisee, and I am unable to see anything in the will which must be taken to qualify that devise and reduce the estate to an estate tail. Some of the property is devised in fee to a child not born at the time the will was made, and lot number six, one of the lots devised to John Philan, is devised over to that child in the event of John Philan dying before he became of age. It seems impossible to suppose that the testator could have intended, in the event of that lot becoming the property of that child, to create an incumbrance on the lot "for the support and benefit of the younger heirs," as expressed in the clause of the will referred to.

Under the circumstances I am unable to come to any other conclusion than that John Philan took under the will an estate in fee in the lot in dispute, and that his conveyance to the defendant must be held valid, and the plaintiff's rule must be discharged.

HAGARTY, J.—The first devise of lot five (with the other lot, number six) to John Philan, is in my judgment a devise of the fee simple. I think the *habendum* to him, his heirs and assigns applies to both lots.

The next mention of this lot is in a subsequent part of the will, which declares that in the event of John's death before he arrives at age, then lot five is devised to the testator's daughter Catherine, her heirs and assigns for ever.

In a subsequent clause, if Catharine die before she shall have an heir, then he devises lot five to his daughter Elizabeth, her heirs and assigns for ever.

He afterwards directs that lots five and six be leased until the heir or heirs arrive at age.

On these devises we would have, lot five to John in fee, defeasible on his death under age, then over in fee to his sister Catherine, and if she die before she shall have an heir, which I suppose we are to read heir of her body or direct heir, then over to her sister Elizabeth in fee.

This is clear enough, and as John did not die under age, his estate in fee became indefeasible.

Then comes the very singular clause, worded as follows:—"It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an encumbrance on the said lots of land, whatever may be considered a fair allowance according to the interest of the said estate, to be for the support and benefit of the younger heirs."

It is not easy to discern with reasonable certainty what was the testator's meaning in this clause. If the testator meant to cut down (for instance) John's estate in fee in lot five to either an estate tail or a mere life estate, so as to ensure it passing to his son or children generally, I am surprised at not finding a direction that the lots should not be *sold*, as well as not divided. In such an inartificially drawn clause I would naturally expect this, a most common direction from testators drawing their own wills and endeavouring to keep land in the family. Its absence is not without significance. I do not think the testator clearly understood the meaning of the words, "entailed to their heirs and successors for ever," followed, as they are, by the directions as to the heir-at-law and the proposed encumbrance.

If John be made tenant in tail, and died under age, but leaving issue, such issue should in ordinary cases take in tail. But the will expressly gives the estate over in such case to Catherine in fee; so with her, if she die before having issue, then it is given over to Elizabeth in fee.

Nothing can be more explicit than the devise absolutely in the earlier parts of the will to the devisee's heirs and assigns for ever.

Who are the "younger heirs," in whose favour he creates the proposed encumbrance? Is it not to be read as a perpetual charge for the heir apparent in tail, to attach on all existing tenacies in tail? Who is to determine the amount and apportion the encumbrance? Or does the testator contemplate a future settlement of his estate, arranging all these matters?

If Lord Eldon felt the difficulty so great in the far simpler and more intelligible devise in *Jervoise* v. *The Duke of Northumberland*, (1 Jac. & W. 559,) that he would not force the estate on an objecting purchaser, he would, I think, have felt the difficulty increased ten-fold if this case were before him. There the words were, "To my son, R., I leave all my estates at, &c., to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother, allowing £2500 to be raised upon the estates for female children each."

Mr. Jarman says, 2nd ed., vol. ii., 292, that Sir T. Plumer, in a suit to ascertain rights of parties, held that R. took an estate tail; that on R.'s marriage the estate was afterwards settled, and under a power of sale in the settlement the Duke purchased; and that it was on his objecting to the title that Lord Eldon's decision was given.

In Sugden's V. & P., 14th ed., 390, note, after noticing *Jervoise* v. *The Duke of Northumberland*, it is said that in a family suit R. was held to take an estate tail.

Here we have to deal with a clause hardly possible of being carried into affect without an equity suit, and following express devises in fee of the lands.

I think it highly probable that the testator in this confused expression of desire, did not wish to alter his previous express devises: that the heirs and successors that he mentions so loosely may be the named "heirs" and objects of his bounty specially provided. For instance, Catharine, as an heir, if John died under age; Elizabeth, as an heir, if Catharine died before she should have "an heir;" and in the many cases in which somewhat similar words are used respecting his other lands.—"None of the lots to be divided, but to be the sole property of the heir-at-law;" in this he possibly means "the heir I have designated;" his object is to prevent division, but, as I have already remarked, not apparently to prevent a sale.

When his will was made a tenant in tail could not alien in fee, and fines and recoveries were practically unknown in Canada. It may naturally be remarked that he may be assumed to know that a tenant in tail could not cut off the entail by sale, but his frequent previous use of the words "heirs and assigns for ever," rather induces me to think that he contemplated, as in John's case, an absolute estate in fee, if he survived the age of twenty-one years.

If the clause as to entailing had been devising the land "to my son John, to be entailed to his heirs and successors for ever," &c., &c., to the end of the clause, then we might venture perhaps, considering the comments on *Jervoise* v. *The Duke of Northumberland*, to hold that John was seised in fee tail, though Lord Eldon's doubts would press very hard. But we have here to deal with the whole will, and on the whole I feel very great difficulty in ascertaining the testator's meaning.

Feeling, however, the impossibility of giving an intelligible effect to this extraordinary clause, I prefer on the whole to let the previous clear words of devise prevail, and not to cut down the estate thereby given by the loose and confused expressions adopted by the testator.

I repeat that with much hesitation I arrive at the conclusion, that John Philan having attained full age the estate in fee devised to him became indefeasible, and that he had the right to alien in fee.

I may add that the late Mr. Justice Burns, before whom the case was argued, had formed a strong opinion concurring in the decision now given. The late Sir John Robinson, who also heard the first argument, had considered the case, but had not arrived at a conclusion, and we have therefore not the advantage of his opinion.

Rule discharged.

Cameron v. Todd.

Action for rent by assignee of reversion—Mortgage—Estoppel—Liability of mortgagee of the term

S. having mortgaged certain land in fee afterwards leased it for 21 years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage P., the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery the land was sold, expressly subject to the lease, to J., who received a conveyance from S and P. and the plaintiff, each using apt words ("bargain, sell, and release") to convey a legal estate in fee. On the same day J. mortgaged to the plaintiff, to secure a balance of the purchase money This mortgage had been discharged before action, by certificate duly registered; and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage.

Held, 1. That defendant, as assignee of the term by way of mortgage, was liable on the covenant for rent, though he had never entered. 2. That though S. when he leased had only an equity of redemption, yet as this fact did not appear in the lease he had a legal reversion by estoppel as against the tenant; and that such reversion passed to the plaintiff by the first conveyance from S., (which contained apt words to pass the legal estate), though in it the mortgage was recited. 3. That the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P. and J.; and that the plaintiff being still bound by the lease, defendant was so as well. 4. That the plaintiff's discharge of the mortgage did not destroy his right of action for rent previously accrued: And that he was therefore entitled to recover.

This was an action brought by the plaintiff as assignee of the reversion against defendant as assignee of the term, to recover the same arrears of rent sued for in the case of *Jones* v. *Todd*, reported, 22 U. C. Q. B., 37.

It will be seen that the court there, in granting a new trial, expressed doubts whether this plaintiff was not the proper party to sue, not the then plaintiff, Jones, and this action was in consequence brought in his name.

The declaration in this case was the same as in that, except that after averring the grant of the reversion by Robert Stanton, the lessor to Jones, it was alleged that Jones during the term granted to the plaintiff.

The pleas were, 1. Denying the execution of the lease by Stanton and March. 2. Traverse of the grant of the reversion by Stanton to Jones, and by Jones to the plaintiff. 3. That before making the lease Stanton on the first of June, 1830, mortgaged the fee simple to one Carfrae for £600, and such legal estate at the time of executing the demise was outstanding in Carfrae's devisees; and Stanton, when he leased had only an equity of redemption, and was not seised of fee, as alleged; that the devisees, by indenture of the 4th of May, 1849, granted and assigned

the fee simple and the mortgage money to one Patterson, by whom the equity of redemption was duly foreclosed in Chancery; by means whereof it was alleged that Stanton ceased to have any interest in the lands, and the reversion alleged to be reserved to him upon the term granted to March became merged and extinguished in the legal estate and inheritance of Patterson, so that such alleged reverson did not vest in the plaintiff as alleged.

Pleas 4, 5, 6, 7 and 8, the same in effect as pleas 2, 3, 4 and 5 in the former suit.

It is unnecessary to repeat the facts here, as they were the same as in that case, and are there fully stated.

At the trial, at Toronto, before *Richards*, J., a verdict was taken for the plaintiff for £721 12s., subject to the opinion of the court.

In addition to the authorities referred to in the previous case, *Cameron, Q. C.*, and *Anderson*, for the plaintiff, cited *Bickford* v. *Parson*, 5 C. B. 920; Platt on Covenants, 538; Cru. Dig. vol. vi., p. 492.

Galt, Q. C., and *Adam Crooks*, contra, cited Doe dem Viscount Downe v. Thomson, 9 Q. B., 1037; *Pargeter* v. *Harris*, 7 Q. B. 708; *Harrold* v. *Whitaker*, 11 Q. B., 147, 163; *Whitton* v. *Peacock*, 2 Bing. N. C. 411; *Wootton* v. *Steffenoni*, 12 M & W. 129; In re Williams' Estate, 5 DeG. & Sm. 515; Burton, R. P. 428; Coote on Mortgages, 336; Spencer's case, Sm. Lea. Cas., Ed. of 1862, 43, 76; *Moss* v. *Gallimore*, Ib. 553.

McLEAN, C. J.—This action was brought by the plaintiff, as assignee of the reversion, against the defendant as assignee of a term created by a lease from Robert Stanton, as owner in fee of the demised premises, to Charles March, which lease has been assigned to the defendant.

The lease bears date the 29th of February, 1844, and is made by Robert Stanton, in consideration of the yearly rent therein reserved, and of the covenants therein contained on the part of the said Charles March, his executors, administrators and assigns, to be respectively paid, observed and performed, to have and to hold the said piece or parcel of ground and premises thereby demised, with the appurtenances, unto the said Charles March, his executors, administrators and assigns, for and during the term of twenty-one years, to be computed from the 1st day of March, 1844, and then fully to be complete and ended; yelding and paying during the said term unto the said Robert Stanton, his heirs and assigns, the clear yearly rent of £100, by four quarterly payments on the first day of March, the first day of June, the first day of September, and the first day of December, in each and every year. The lessee covenants to pay or cause to be paid the said yearly rent by four equal quarterly payments on the days before mentioned for the payment thereof, and the lessor covenants that the lessee, Charles March, his executors, administrators and assigns, paying the said yearly rent, and performing the covenants therein contained, shall and may quietly and peaceably have, hold occupy and enjoy the said piece or parcel of ground, without the lawful let, suit, interruption or disturbance of the said Robert Stanton, his heirs or assigns, for and during the said term.

Under that lease the tenant, March, and all persons claiming under him or through him, are estopped from denying the title of the lessor, and under the statute 32 Hen. VIII., ch. 34, are liable to pay the rent and to perform the covenants contained in the lease so long as they hold the demised premises under that lease. The lessor has assigned his reversion to Edward C. Jones, and all persons claiming any interest or estate therein have joined in the conveyance, using apt words to pass a reversion in fee. After Stanton's conveyance to the plaintiff, March the tenant, would be estopped from denying the title of his lessor or his assignee, and so a legal reversion in fee by estoppel would entitle the plaintiff as assignee to enforce the terms and enjoy all the benefits of the lease. By the decree in Chancery all parties interested joined in conveying the premises in fee to Edward C. Jones, and it appears to me that the reversion by estoppel must necessarily have passed to him under that deed.

On the same day that that deed was made to Edward C. Jones, 27th July, 1853, he executed a mortgage in fee to the plaintiff to secure payment of the sum of £637 2s., to be paid on or before the first of March, 1865, with interest thereon half yearly, on the first days of January and July in each year, until the principal money and interest should be fully paid and satisfied. The plaintiff had the legal estate under this mortgage from its date till the payment of the mortgage money and interest, during which period the rent sued for accrued on March's lease, and was payable to the plaintiff as the holder of the reversion.

When the mortgage money was paid the plaintiff executed the usual certificate of payment required by the Registry Act, Consol. Stats. U. C., ch. 89, the 59th section of which provides that such certificate shall, when registered, be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs and assigns, of his original estate; and if given *after* the expiration of the period within which the mortgagor had a right in law to perform the condition, shall have the effect of defeating any title remaining vested in the mortgagee or his heirs, executors, administrators or assigns, but shall not have the effect of defeating any other title whatsoever.

It is contended that since the registry of the certificate of payment of mortgage money the plaintiff's reversionary interest has wholly ceased, and that the premises have become vested in the mortgagor as if the mortgage had never been made. It may be admitted that since the registry of the certificate the estate has become vested in the mortgagor precisely as it was before the mortgage was given, but while he held the reversion a right of action had vested in him for rents accruing due while seised of such reversion, and that right is not affected by any assignment made after the period when it became due.

In Platt on Covenants, page 538, cited by Mr. Cameron in the argument, it is said, "A right of action once vested and attached in the grantor for a breach in his own time will not be defeated by his assignment over, * * for the contract, which was transferred by the statute, still remains as to that breach, though the privity of estate is gone." Then in Comyn's Landlord and Tenant, p. 268, it is even more clearly laid down, that "if a breach happen in the time of the grantee, and then he assign the reversion over, he may bring covenant against the lessee for the breach so happening in his time, notwithstanding he has parted with his estate."

I do not think that the mortgagee in this case by the assignment or surrender of his reversionary interest divested himself of a right of action which was vested in him before such surrender. If that were the case, then the holders of the term would be entitled, notwithstanding the breach of covenant, to set the reversioner at defiance, and might claim exemption from the payment of any rent for the period during which the plaintiff held the reversion.

The facts of this case are the same in all respects as in the case of *Jones* v. *Todd*, and are so fully stated in the report of that case that I have not thought it necessary to state them more fully here. After full consideration of the circumstances I have arrived at the conclusion that the verdict for the plaintiff cannot be disturbed, and that the rule *nisi* must be discharged.

HAGARTY, J.—The facts of this case appear so fully in the report of *Jones* v. *Todd*, that I do not deem it necessary to make any detailed statement of the various conveyances in evidence.

In *Jones* v. *Todd* the court in granting a new trial suggested the the existence of grave difficulties in the way of the then plaintiff, Jones, recovering for arrears of rent accrued while the reversion was in Cameron as mortgagee. The present suit is brought in the name of the latter.

I would first notice the question of defendant's liability as a mortgagee of the term to convenants running with the land, assuming that he never actually entered.

Williams v. *Bosanquet*, (1 B. & B. 238,) decided in error, by ten judges, who were unanimous in their view, seems to settle the law unless it has been since over-ruled. It is an elaborate review of conflicting authorities, and seems fairly to meet all the difficulties suggested, and decides that a mortgagee of the entire interest in the term is liable without entry.

In Coote on Mortgages, edition of 1850, page 121, it is said: "It is therefore now clear, both on principle and sound authority, that if a mortgagee accept an assignment of all the remaining interest in the term, he will be liable to the payment of the rent and performance of the covenants in the original lease, so long as

he shall be the legal owner of the lease, although he shall not take actual possession of the premises."

Since 1850 I have not found this view of the law questioned

I now turn to another branch of the case. Stanton, the original lessor, when he demised to March had only an equity of redemption, and no legal reversion. As the true state of his title does not appear in the lease, I consider it clear that there is a reversion by estoppel, and that this reversion would for the purposes of this suit vest in his assignee, Cameron.

I at first apprehended a serious difficulty from the fact that in this transfer of the reversion it is recited that a mortgage in fee had been made to Carfrae. But the very carefully considered judgment of the Court of Exchequer in *Cuthbertson* v. *Irving*, subsequently confirmed in error, (4 H. & N. 742, 6 H. & N. 135,) has removed that difficulty from my mind. There the lease did not shew any want of title, assignment did shew it.

Martin, B., who delivered the judgment of the court, says, (4 H. & N. 754,) "Upon consideration, we think the authorities shew that the defendant is estopped from disputing that the lessor was seised of an estate in reversion, and, as there are apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continues in his favour, notwithstanding the assignment to him shews the want of title. The estate in reversion by estoppel was created before the assignment was executed, and in our opinion was not destroyed by it. It would have been otherwise if the want of title had appeared on the face of the lease itself; in that case, the true facts being their disclosed, there would be no estoppel at all."

Again, "Where a lessor by deed grants a lease without title and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel; and an action will lie by the assignee of the reversion against the tenant on the covenants in the lease." This latter sentence may be referred to on another branch of the case.

In the assignment by Stanton to Cameron, there are certainly "apt words to convey a legal estate in fee in reversion," although the outstanding mortgage in fee to Carfrae is mentioned. The conveyance is by lease and release, and recites that Stanton is seised in fee simple, and the usual words to convey a reversion in fee are used, with *habendum* to the assignee and his heirs.

But the point chiefly laboured by the defendant arises on the following facts:—Patterson, assignee under Carfrae of the legal estate, filed his bill to foreclose the mortgage, and a sale was ordered. The conditions of sale under the decree provided that the sale was to be subject to the lease granted by Stanton to March for twenty-one years, at £100 per year.

At the sale Magrath was the purchaser for £1420. Magrath then transferred all his right to Jones, and by agreement between all the parties a deed was made on the 27th of July, 1853, between Patterson, Cameron, Stanton, (and his children), Magrath and Jones. The Carfrae mortgage is recited, its assignment to Patterson, and that Stanton has conveyed all his estate and interest in the premises, subject to the mortgage, to Cameron and his heirs, on certain trusts.

It recites the decree in Chancery, in the suit in which Stanton, Cameron, and the younger Stantons were defendants, the reference to the master, the decree, the report, the conditions above noticed, and the sale to Magrath and transfer by the latter to Jones; that Jones, instead of paying the money, paid to Patterson the mortgage money and costs, and the balance, £637, was to be secured by mortgage to Cameron as trustee, on the same trusts as in Stanton's deed to him. Then, in pursuance and performance of the decree, &c., Patterson, according to his estate and interest as mortgagee, and at the request of Magrath, bargains, sells, and releases to Jones and his heirs and assigns; Cameron, Stanton, and the *cestuis que trust*, the younger Stantons, all convey to Jones in fee, with reversions, remainders, estates, and equities of redemption of the granting parties, *habendum* to Jones, his heirs and assigns, "subject to the said indenture of lease granted by the said Robert Stanton to the said Charles March."

On the same day the mortgage is executed from Jones to Cameron, reciting the former conveyance in trust by Stanton, the Chancery suit of Patterson, the decree and sale, and then containing a conveyance in fee, with a defeazance on payment of £637 and interest at specified times. There is endorsed a registrar's certificate of discharge of this mortgage as of the 2nd of September, 1861, prior to the commencement of this suit.

The defendant argues that on this state of facts whatever reversion the plaintiff may have acquired from Stanton is merged, as it were, or lost by its union with the legal estate derived through Patterson and Carfrae; and that the deed executed by all the parties after the Chancery sale sets forth the whole facts, and leaves the whole matter at large, and puts an end to the estoppel.

This is a very serious proposition, amounting as it does simply to this:—that after a lease has been granted by one who has only an equitable estate, and on which as between him and the lessee there is clearly a legal reversion by estoppel, and afterwards such proceedings are had that a deed is executed by all parties interested both in the legal and equitable estates, by which a clear title in the premises is conveyed to a third person, expressly saving the term created by the lease, and declaring that the estate conveyed was to be expressly subject to the lease, describing its nature and effect, it still lies in the power of the tenant and those claiming through him to insist that the term is gone, and his covenants at an end.

I think we should require the most unmistakeable authority binding upon us before we should be asked to accede to such a result, so unjust in its nature, and so completely opposed to the express declaration of all the parties interested as owners in the property.

The authority relied on is Doe ex dem. *Lord Downe* v. *Thompson*, (9 Q. B. 1087,) decided by Lord Denman in 1847. The facts were these:—

Burton seized in fee mortgaged to Bromet to secure £1000. After this he leased to defendant Thompson for 81 years. In the same year £900 was paid on the mortgage. In 1828 Burton became bankrupt. In 1834 Messrs. Swann paid Bromet £100, and took from him a deed in fee. Three months after Burton's assignees sold the premises to Lord Downe for £245, £100 of which was paid to the Swanns, and they, by the assignees' directions, conveyed to Lord Downe in fee, the assignees being parties and joining in the conveyance. The deed recited the conveyances to Bromet and the Swanns, the bankruptcy and assignment, describing the premises as formerly in the tenure and occupation of Burton, but now of Thompson, his under-tenants or assigns, but did not refer to the lease. Messrs. Swann bargained, sold, and released; the assignees released, ratified, and confirmed.

Lord Downe, after receiving rent for two years, gave notice to quit and brought ejectment, insisting that the term was at an end.

Lord Denman, in a very short judgment of a few lines, says, "The lease was good against Burton by estoppel only. He had not the legal estate when he granted it, nor did he acquire it afterwards; nothing passed to his assignees but the equity of redemption, and they could pass nothing else to Lord Downe. The legal interest had passed to Lord Downe wholly and entirely from Messrs Swann, who were not privies to, nor in any way estopped by the lease; neither can Lord Downe be estopped in respect of the interest which he took from them. Doubtless, if Lord Downe had taken the legal interest from Burton, he would have been estopped in the same manner that Burton would. * * But, as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them; and as those from whom he did take were not estopped, neither is he. We think that the fact of the assignees joining in the conveyance cannot place him in a different situation from that in which he would have stood had the Messrs. Swann alone conveyed."

It was much pressed upon the court that on the face of the deed to Lord Downe the assignees appeared to have no legal interest, and the lease to defendant was not mentioned; also that the deed would show that Burton (or his assignees rather) had conveyed no legal title, and that there is no estoppel by a deed shewing the true facts.

I must say, with great submission, that this very brief judgment of Lord Denman is anything but satisfactory to my mind, and reading it by the light of the subsequent explanation of the law of estoppel between landlord and tenant in *Cuthbertson* v.

Irving, I cannot regard it as supporting the defendant's view to the extent claimed.

The facts, moreover, are very different from those before us. The assignees of Burton there apparently did not use (in Martin, B.'s language) "apt words to convey a legal estate in fee in reversion"; they merely "release, ratify and confirm," while the Messrs. Swann, who have the legal estate, "bargain and sell," &c. Lord Denman says,—"Doubtless if Lord Downe had taken the legal interest from Burton he would have been estopped in the same manner that Burton would, as was held in *Trevivan* v. *Lawrance*, 1 Salk. 276." I presume his lordship means had he taken a deed professing to assign to him Burton's legal estate in fee in reversion, with apt words, &c., he would be estopped. He cannot have meant if Burton really had conveyed the fee, because the whole case is based upon the fact that Burton had not the fee to convey. If read in this way the judgment may be reconciled with the other cases, and it is probable he so meant it, as the case in Salkeld to which he refers, says, "If a man makes a lease by indenture of D., in which he hath nothing, and after purchase D. in fee, and after bargains and sells it to A. and his heirs, A. shall be bound by this estoppel; and where an estoppel works on the interest of the land, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel."

Again, Lord Denman says, "as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them." This, I think, must have the same meaning as the sentence quoted above.

In this case, as already noticed, Stanton certainly conveyed to Cameron, with apt words, to pass a reversion in fee.

In the deed executed after the Chancery sale, Patterson, "according to his estate, right, title and interest as such mortgagee as aforesaid," bargains, sells, and releases; and Cameron, "according to his estate, right, title and interest as such trustee as aforesaid," bargains, sells, and releases; and Stanton, (with no words as to his estate,) grants, bargains, sells, aliens, releases, ratifies and confirms to Jones, his heirs and assigns, the land, and the reversions, remainders, rents and profits, and all the estate, right, title, inheritance, use, trust, property, possession, benefit and equity of redemption, claim and demand at law and in equity, of the parties thereto. *Habendum* to Jones and his heirs in fee, subject to March's lease, as already noticed.

It may be that as this deed is worded it may be argued that Cameron, then the assignee of Stanton, does not profess to give any greater estate than he had by Stanton's deed to him; that he only conveys "according to his estate as trustee."

But, according to Baron Martin's exposition of this kind of estoppel, it may be well suggested whether the estate in reversion by estoppel was not created by the lease, and passed certainly to Cameron by Stanton's first deed to him; and having so vested in Cameron, was there any thing in the deed after the Chancery sale to destroy such reversion?

In this deed we find Cameron only conveying according to his estate as trustee, joining with Patterson, the legal owner, who also conveys according to his estate as mortgagee, and all uniting, as it were, in the one grant and one *habendum*. This would seem to amount to "apt words," or, at all events, does nothing to negative the idea that he is conveying the full estate already vested in him (and which was a legal reversion in fee by estoppel) to Jones. In the deed in *Cuthbertson* v. *Irving*, by which the lessor sold to the plaintiff, the mortgage is recited, and the lessor (owner only of the equity of redemption) declares that he sells "in exercise of all powers enabling him." He uses general words sufficient to pass the fee, though the recitals shew the fee was not in him, and he conveys subject to the mortgage already given, and subject to the outstanding lease.

Can it be said, as in Lord Downe's case, that the purchaser took nothing, that is, professed by the deed to take nothing, from the party representing the equity of redemption? So far from taking nothing from Cameron, the purchaser, Jones, by the deed, declares that it is part of the bargain by which he acquires the estate that as a large surplus of purchase money remains after paying off Patterson's mortgage, he is to mortgage the premises to Cameron for the express purpose of applying such surplus to the trusts already created, and he obtains the several parties interested to join in the deed, by which he obtains a complete title to effectuate this purpose.

My impression is that the deed, as far as Cameron is concerned, is sufficient, under the rule laid down in *Cuthbertson* v. *Irving*, to pass a reversion in fee by estoppel to the purchaser.

All this argument is urged by defendant to shew that Jones could act as Lord Downe was permitted to do, and wholly repudiate the lease to March; and that as the estoppel is gone as to the assignee of the landlord, so it is equally at an end if the assignee of the tenant desires so to consider it.

We must now look at the express reservation of March's lease as an existing term recognised both by the owner of the fee simple and the party holding the whole of the landlord's interest. Jones purchased from Magrath, who bought at the Chancery sale, on the express condition of sale that it was to be subject to March's term. Then in the deed the owner of the fee simple, who was not of course bound by the lease as executed long after his mortgage in fee, expressly assents to the term, and conveys to Jones, to hold to him subject to the interest thereby created.

It is here proper to notice the doctrine already alluded to as laid down by Martin, B.: "Where a lessor by deed grants a lease without title, and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest, and not by estoppel."

If we assume a good legal reversion by estoppel in Stanton, conveyed by him to Cameron, and by the latter to Jones, then if Jones, having, before this, no legal title, acquires the legal estate from Patterson, the above doctrine may apply. In this case the same instrument by which Jones comes in under Cameron, vests in him the legal estate. This may suggest doubts, but I am not prepared to say they must necessarily prevent the application of the rule.

The case of *Sturgeon* v. *Wingfield*, (15 M. & W. 226,) may be noticed. The tenant sued the assignee of the reversion on a covenant running with the land. In May, 1835, one Hogarth leased to the plaintiff for twenty-one years. The farm was leased by the Broderers' Company to one Foster for one hundred years, from Michaelmas, 1741, with covenant for renewal. In 1827, the term vested in one Bray, who assigned to Fleming and others in mortgage. After this Hogarth made the lease, having then nothing at law.

In January, 1836, (after the lease,) Fleming, Hogarth, et al., surrendered the term to the Broderers' Company, and on the same day the company made a new lease to Hogarth for one hundred years, and soon after the residue of this term vested in defendant.

Parke, B., said, "Here the reversion by estoppel, being a reversion in fee, never was surrendered: it remained, therefore, (so far as regarded the plaintiff,) in Hogarth, until he assigned it to the defendant. The lease to the plaintiff was at first good by way of estoppel only, but when Hogarth took from the Broderers' Company for one hundred years the lease to the plaintiff became a lease in interest, and the reversion upon it was afterwards assigned to defendant. * * The estoppel was fed by the demise for one hundred years from the Broderers' Company to Hogarth, the lessor, and thereby the lease from him to the plaintiff became good in point of interest."

My opinion on this point is, that either the plaintiff, Cameron, on the chain of title shewn to us, is in under Stanton, and holds his reversion by estoppel, and is clothed with all his rights as against the lessee and all in privity of estate with him; or that the effect of the deed executed after the Chancery sale, in which the owner of the legal estate assents to the lease, and conveys the whole estate subject thereto, and with that term carved out of it, and thereby the lease from Stanton to March is set up and becomes "good in point of interest."

It remains to consider the objection as to the present plaintiff, Cameron, having before this action was brought executed a certificate of discharge.

It is urged that as the plaintiff executed the statutable certificate of payment, the registration thereof destroyed all his right as completely as if the mortgage had never existed.

The 59th section of the Registry Act, (Consol. Stats. U. C., ch. 89,) provides that the certificate of payment shall, when registered,

be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, &c., of his original estate, and if given after the time for performing the condition, "shall have the effect of defeating any title remaining vested in the mortgagee, or his heirs, executors, administrators, or assigns, but shall not have the effect of defeating any other title whatsoever."

I read this clause as simply providing for an easier method of discharging the mortgage and clearing the registered title than the ordinary course of a re-conveyance, which would require registration as any other deed, and I do not think it introduced any new or destroyed any old right as between mortgagor and mortgagee, or those holding under them, or in any way altered the rules of law affecting a case like the present.

I therefore treat it as if on a day previous to this suit the mortgagee had re-conveyed the estate to Jones, the mortgagor. In a court of law I think I must treat it precisely as if the plaintiff, Cameron, owning the entire reversionary interest, had conveyed it to Jones or any stranger, and notwithstanding such sale brings an action against a tenant for rent accruing due before he so parted with his estate.

It appears to me he can bring such an action. In Platt on Covenants, 588, it is said, "A right of action once vested and attached in the grantor for a breach in his own time, will not be defeated by his assignment over, * * for the contract, which was transferred by the statute, still remains as to that breach, though the privity of estate is gone." He cites *Midgley* v. *Lovelace*, (Carthew 289; S. C. 12 Mod. 45, Holt 74,) Anon Skin 847. The same view seems taken in Platt on Leases, vol. ii., p. 386. In Comyn's Landlord and Tenant, 268, the same principle is adopted: "If a breach happen in the time of the grantee, and then he assign the reversion over, he may bring covenant against the lessee for the breach so happening in his time, notwithstanding he has parted with the estate."

I do not feel pressed by any of the difficulties suggested in applying this rule to the case of a mortgagee. In this court I treat him as the owner of the reversion, and as such entitled to the rents accrued due whilst seized of the reversion. The application of such rent when recovered can only be a question between him and the mortgagor. In an ordinary case, and most probably in this, the suit would be brought by an understanding between the parties in the case of a paid up mortgage in fee, it would be, doubtless, prosecuted beneficially by the mortgagor, though necessarily in the name of the then reversioner.

I have arrived at the conclusion that the three questions on which the suit seems to depend must be answered in favour of the plaintiff:

That defendant as mortgagee of the whole term is liable for the rent without entry;

That the facts shew no destruction of the term by the alleged union o the equitable with the legal estate; and,

That the position of the plaintiff as mortgagee, bringing this action after registration of the statutable certificate of payment and cofnsequent discharge of the mortgage, does not prevent him from suing for arrears of rent accruing due to him whilst seized of the reversion. Judgment for plaintiff.

CHAMBERS.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-Law.*)

In re Babcock, landlord, and Brooks, tenant.

Con. Stat. U. C., cap. 27, s. 63—Overholding tenant—Jury discharged—Second Jury—Who entitled to apply.

Held, 1. That the fact of a jury being unable to agree, and so discharged in an overholding tenancy case, does not determine the authority of the commissioner to summon a second jury.

2. That the fact of the jury having been discharged by consent of parties does not prevent the writ being still proceeded upon.

3. That if a receiver has been appointed by the Court of Chancery to whom the tenant has attorned, or if the interest of the original landlord has been sold to another, in either case the original landlord is not the proper person to take proceedings to turn the overholding tenant out of possession.

[Chambers, June 18, 1863.]

This was a summons taken out by the landlord calling on the tenant to shew cause why a new precept should not be issued by the commissioner—formerly appointed to execute the writ between the parties, for the sheriff to summon a jury to try the question between the landlord and tenant, or why a new writ should not issue because the jury formerly empanelled being unable to agree were discharged.

The commissioner certified the evidence taken, and that he told the jury there was no evidence of any subsequent tenancy after the expiration of the lease put in.

Ten of the jury signed the memorandum—stating their opinion to be for the landlord—but as the whole jury could not agree the commissioner discharged them.

The commissioner reported the jury should, in his opinion, have found for the landlord.

W. H. Burns showed cause. He filed an affidavit that the counsel for both parties consented to the jury being discharged. He also contended that the writ of inquisition and all proceedings under it had been exhausted, and that nothing further could be done under it. He urged that no new writ should be issued, because Mr. Babcock, the lessor, had been enjoined by decree in Chancery from collecting the rents of the property, and had been ordered to deliver over all deeds, &c., to the receiver to be appointed by the Court. And that a receiver had been appointed who has for a considerable time past collected the rents of the property; and also that the property had been sold, and one James Moore became the purchaser of it, and is now the real owner of it as landlord. Also, the mere fact of the jury disagreeing is strong evidence "that the tenant does not hold over without any right or color of right." (Con. Stat. U. C., cap. 27, s. 63.)

Wilson, J.—The case of *Woodbury and wife* v. *Marshall*, in 19 U. C. Q. B., 597, determines that in just such a case as the present, when the jury did not agree, the authority of the commissioner was not determined, and that another jury might be summoned and an effectual inquisition be held.

I think the consent of the counsel that the jury should be discharged does not prevent the writ being still proceeded upon.

In case a receiver has been appointed to receive the rents—and to whom the tenant Brooke has been ordered to attorn, so as to give the receiver a right to distrain, I should hold that he is the proper person to apply (whether in his own name or in the name of the former landlord is of no consequence for me now to decide) against the tenant as overholding. But if he is not, and if a sale has been made to Moore, it would appear to me the title is out of Babcock rather than in him.

I therefore discharge the summous but without costs.

Summons discharged without costs.

Rigney, et al v. Durie.

Con. Stat. U. C., Cap. 22, sec. 237—Amendment of Endorsement on fi. fa.—Proper parties to Application.

Plaintiffs, without having previously issued process on 3rd of October, 1857, took a confession of judgment, neglected to file it or a copy of it, within a month, as prescribed by the statute. On 11th February, 1858, entered judgment. On 24th October, 1858, issued a *fi. fa.* goods; had same returned *nulla bona*. On 10th August, 1861, issued a writ of *fi. fa.* lands. Had same renewed 10th August, 1862. On 2nd February, 1863, amended their endorsement of levy on writ, and afterwards obtained a summons, calling on defendant to shew cause why they should not have leave to amend their endorsement on writs of *fi. fa.* lands, in the hands of the sheriff, by increasing the amount endorsed to be levied: or why a new writ of *fi. fa.* lands should not issue. *Held*, that so long as the confession was open to the objection of not having been filed within the month, and so not valid to support the judgment that the amendment could not be allowed *semble*; if relief could have been afforded to plff., it could only have been by making the other execution creditors of defendant, and the Sheriff parties to the summons.

(Chambers, June 27, 1863.)

Plaintiffs obtained a summons, calling upon the defendant to shew cause why they should not have leave to amend the endorsement on their *fi. fa.* lands, in the Sheriff's hands, by increasing the amount endorsed to be levied; or why a new *fi. fa.*, against lands, should not issue.

This summons was founded upon the following affidavits and Exhibits:

1. An affidavit by Mr. Brown, one of the plaintiffs, stating that judgment was entered on a confession about the eleventh of February, 1858, for £800 damages, and £4 10 2 costs. That the confession is identical with the confession referred to in Exhibits A. & B.; and that balances of account struck in these exhibits

were made at the times they bear date, and signed and acknowledged by the defendant as correct. That the defendant has not complied with the conditions in Exhibit A.; nor has he paid the two notes there referred to, nor any part thereof; nor the mortgage to the Building Society; nor procured the mortgage to be discharged; but the deponent has been obliged to pay off the balance due thereon, to protect the property. In consequence of the defendant's default, there was due on his judgment, at the time of issuing the *fi. fa.* against lands, the full amount settled to be due by Exhibit B., namely, $1320 01—excepting thereout certain solicitors' fees, and the proportion of interest which accrued due between the time of issuing the *fi. fa.* and the date of Exhibit B. By indenture of 14th June, 1862, the judgment debt and interest were assigned by plaintiffs to one Arthur McDonald, who is now the beneficial owner thereof. On or about the 10th August, 1861, *fi. fa.* against lands was delivered to sheriff, endorsed to levy £166 8 9 for damages, together with certain costs and fees. In endorsing the damages, plaintiff's solicitor committed an error: the amount endorsed being very much less than the amount really due, which should have been the amount stated in Exhibit B., with the rebate of solicitors' fees, and interest, as before stated. The error arose, as it is believed, from the plaintiffs solicitor being ignorant of the true state of accounts between the plaintiffs and defendant at the time of issuing the *fi. fa.*, and from his supposing that the balance struck in Exhibit A. was the only sum then due. That the deponent did not discover the error until the beginning of 1863, when the exact sum due upon the judgment, or secured thereby was established between the defendant and the deponent, acting for McDonald, by Exhibit B., which represents the exact sum due upon the judgment, with interest and costs up to the date of that Exhibit. That the *fi. fa.* is still in the Sheriff's hands.

2. Exhibit A. is dated 23rd Dec., 1857. It states the principal damages, interests and costs upon a draft, making the total, to the 12th of Dec., 1857, (costs being $61 10.)..... $3245 76
Credit given to the amount of 2580 00

Leaving a balance then due of $665 76
for which two notes, payable in six and nine months, from 1st Dec., have been taken.

"Defendant to indemnify plaintiffs against the mortgage to Commercial Building Society, on lot, in Innisfil, and to discharge the same within 3 months.

"Confession to stand as collateral security for the performance of this, and the payment of the notes, and that the lot in Flos to stand as collateral security for this also."

Confession of Judgment, (Signed) W. S. DURIE.
Entered Feb. 11, 1858, for £800. " ADAM CROOKS,
Costs, £4 10 2. For Rigney & Co.

3. Exhibit B. is dated the 26th of Jan., 1863, and is a debtor and creditor account between Mr. Durie and Mr. Brown.

1858.		
June 4.	To your note, due this day, with protest,.....	$343 88
Sept. 4.	" " " "	350 93
1862.		
June 30.	To Cooper's costs, paid for *fi. fa.*, ...	10 60
Oct. 13.	" Money advanced to pay mortgage to Building Society, ...	125 00
1863.		
Jan. 26.	To interest on above, to date, at 6 per cent. ..	189 60
		$1020 01
Jan. 26.	To paid Building Society, in full, on assignment of mortgage.....	300 00
		$1320 01

"I hereby acknowledge the foregoing sum to be truly and justly due by me, this day, unto James Brown, the younger, on a certain judgment recovered against me, and referred to in a settlement of accounts, on the 23rd of Dec., 1857, between myself and Adam Crooks, on behalf of Rigney & Co.

"Toronto, 26 January, 1863. (Signed)
" W. S. DURIE."

Confession of Judgment,
Entered Feb. 11, 1858, for £800.
Costs £4 10 2.

In answer to this summons, the defendant made affidavit to the effect, that, at the time the settlement, referred to in Exhibit A., was made, he entered into it with the understanding and belief that the sum of $665.76 was the amount of his indebtedness to the plaintiffs at that date. That his object in investigating and settling the further state of accounts on the 26th of January, 1863, was at the request of Mr. Brown, for the purpose only of ascertaining his indebtedness to the plaintiffs at that date, and for no other purpose.

John Hoskin, on the part of the defendant, also made affidavit to the effect, that he has searched the proceedings; that the confession was first filed in court on the 11th of February, 1858; and that it bears date the 3rd of Oct., 1857; that it was given without any process; and that it is subject to a certain defeasance, contained in a memorandum at the foot of it, as follows:—

"This confession is given to secure the said debt above-mentioned; but the amount thereof is subject to be reduced by a reference to such one person as the said parties may agree upon: and if such one person cannot be agreed upon, then, by the usual reference to two arbitrators, chosen by one party, and with liberty to appoint a final arbitrator, either as a third abitrator or an umpire.

" (Signed) ADAM CROOKS,
" For Plaintiffs."

That neither the confession, nor a copy, has been filed in the Cognovit book, as required by s. 237 of the C. L. P. Act, within one month from the execution of the confession; nor was the confession ever filed in court till judgment was entered thereon, as aforesaid. That *fi. fa.* against goods issued the 29th of Oct., 1858, to Sheriff of Simcoe, endorsed to levy £166 8 9, being the balance due on damages and costs in this cause, with interest from 23rd Dec., 1857; also, £2 for writ and certificate of judgment, together with sheriffs' fees, &c. That the *fi. fa.* against goods was returned *nulla bona*, and filed on the 10th of August, 1861, and thereupon two several writs of execution against lands were issued—one to Sheriff of Simcoe—the other to the Sheriff of York and Peel. That the one to the Sheriff of York and Peel is endorsed to levy £166 8 9, being the balance of damages due; also, £4 10 2, for costs taxed, with interest on both sums from 11th February, 1858, and also £5 for this and former and concurrent writs, together with Sheriffs' fees, &c. This writ has marked upon it, "Renewed for one year, from 1st August, 1862. Chas. C. Small." That in addition to the above endorsement there is another dated the 2nd of February, 1863, upon the writ, in these words:—

"In addition to the above levy for damages, £163 11 3, making in all, for damages, the sum of £330, or $1320, as acknowledged by defendant to be due on the 26th of January, 1863, with interest on £330 from that date; interest on costs as above; £2 7 4 for this renewed writ and concurrent.

" (Signed) ADAM CROOKS,
" Plaintiff's Attorney.'

That there is a suit in Chancery, now pending, by a Mrs. Coleraine, against the defendant, to which suit the now plaintiff and others, who are specialty creditors of the defendant, have been made parties in the Master's office, and a contest as to priority has arisen between the now plaintiffs and divers of such creditors; and the plaintiffs claim priority over them by reason of the *fi. fa.* against lands to the Sheriff of York and Peel, and by reason of the endorsement thereon, of the 2nd of Feb., 1863; some of such creditors being execution creditors, and some being creditors by mortgage. That he believes this application is made by the now plaintiffs with the view of prejudicing the just rights of the other specialty creditors of the defendant, who are contesting the plaintiffs priority as aforesaid, in Chancery.

WILSON, J.—It appears a confession was given by the defendant on the 3rd of Oct., 1857, with the memorandum or defeasance upon it that it was so given to secure the debt of £800, but that it was to be subject to be reduced upon a reference.

On the 23rd of December, 1857, a statement of accounts was agreed to between the parties, by which the balance was struck after certain credits were given at $665.76, and for which two notes at six and nine months, were given, the defendant engaging to indemnify the plaintiffs against the Commercial Building Society, on the land in Innisfil, and to discharge the same in three months, and agreeing that the confession should stand as collateral security

for the performance of this agreement about the mortgage, and for the payment of the notes.

This statement of accounts seems to have been in lieu of the reference stipulated for in the defeasance to the confession, and, no doubt, rendered that reference quite unnecessary.

Judgment was entered on this confession on the 11th of Feb., 1858—no copy of the confession. nor the confession itself, having been filed or entered in the cognovit book, as required by the 237 sec. of the C. L. P. Act.

Execution against goods issued on the 24th Oct., 1858, to the Sheriff of Simcoe, endorsed to levy £166 8 9, being the balance due for damages and costs, with interest, &c., from 23rd December, 1857.

This execution was returned *nulla bona*, and was filed in the Crown office, on the 10th of August, 1861, and thereupon two executions against lands issued to Simcoe and to York and Peel.

The execution against lands was delivered to the Sheriff of York and Peel on the 13th of Aug., 1861, and was endorsed to levy as above, £166 8 9, balance of damages (not as before, being balance of damages and costs,) and £4 10 2 for costs, and interest on both sums from 11th Feb., 1858, (instead of as before, from the 23rd Dec., 1857,).

This execution against lands was then renewed from 1st Aug., 1862.

On the 26th Jan., 1863, the plaintiffs and the defendant have a further accounting, in which the two notes, given upon the first settlement are restated, with interest; and a further sum of $10.60 for costs of *fi. fa.'s*, and two additional sums of $125 and $300, for money paid on account of the Building Society's mortgage, making the total claim, at that date, $1320 01.

Then, in order to make the endorsation on the *fi. fa.* against lands correspond with their new statement of accounts, the plaintiffs, on the 2nd of Feb., 1863, make this further endorsation, that the Sheriff shall levy the further sum of £163 11 3, for damages. with interest on the whole damages from the 26th of Jan., 1863—the interest on costs as above.

Then, on the 16th of June, 1863, the plaintiffs apply, by summons, to a Judge in Chambers, as before stated, for leave to amend the endorsation on the *fi. fa.*, by increasing the amount endorsed, by shewing, among other facts, these statements of accounts, and that they, the plaintiffs, have paid these moneys to the Building Society, &c., &c., as above stated.

The 1st objection which is made to this application is, that the cognovit, or a copy of it, was not filed according to the 237 sec. of the C. L. P. Act, within one month after it was given; and, as the statute declares that "No confession of judgment shall be valid or effectual to support any judgment or writ of execution, unless this is done:"—that so soon as this defect is brought to the notice of the Judge, he should not make any order upon it, or with respect to it, which may have the effect of maintaining or confirming it.

The 2nd objection is, that the plaintiffs have already made the very endorsement themselves, which they now desire the sanction of the Judge to have made.

The 3rd objection is, that the plaintiffs do not state, correctly, that the sum of $1320 was due as by Exhibit B., when the *fi. fa.* against lands issued: for that *fi. fa.* was issued on the 10th of Aug., 1861, while Exhibit B. shews the payments to the Building Society were not made till Oct., 1862, and Jan., 1863.

The 4th objection is, that the plaintiff's affidavit does not state truly when it represents that the endorsations made on the *fi. fa.* against goods on the 28th of Oct., 1858; and the endorsations made on the *fi. fa.'s*, against lands, on or about the 10th of Aug., 1861, and again made, in effect, on the 1st of Aug., 1862, when they were re-renewed, were made as sworn to in *error* by the plaintiff's solicitor, for the Exhibits A. & B. shew clearly there was no error in the endorsations, as it was the only sum which could properly have been endorsed for.

The 5th objection is, that the additional sums in the new endorsement of the 2nd of Feb., 1863. cannot be claimed upon this cognovit; that they formed no part of the original debt for which the confession was given.

And the 6th objection is, that this application is made for the mere purpose of procuring for the plaintiffs a priority over the other creditors of the defendant, which is now the very subject of a contest in the Court of Chancery, between the plaintiffs and the other creditors of the defendant.

As to the 1st objection, our section, which is general in its application, appears to be taken from the Imperial Act, 12 & 13 Vic., ch. 106, sec. 136, which applies to confessions, &c., &c., given by traders.

Under the Act 3, Geo. 4, ch. 39, sec. 1, and the 1 & 2 Vic., ch. 110, which avoids confessions, as against assignees in bankruptcy, &c., unless the confession, or a copy thereof, has been filed within twenty-one days from its execution, it has been held that, although the execution has been executed, and the money paid to the execution creditor before the bankruptcy, that the assignees may, nevertheless, recover it from the creditors. *Bettleston* v. *Cooper*, 14, M. & W. 699.

Acraman v. *Herminan*, 16, Q. B. 998, decides that under the 12 & 13 Vic., ch. 106, sec. 136, the warrant to confess judgment and judgment are void as against assignees, if the warrant be not filed within 21 days, even although the judgment be entered, and the warrant entered with the judgment, within the 21 days; the warrant must be filed with the proper affidavit, which the act requires, which is the only filing which will be sufficient.

I think it is impossible to do otherwise than to say, that while such a confession and judgment would seem to be open to the objections suggested, it would not be expedient to make the amendment prayed for.

It is not necessary, therefore, to pursue these objections further; but if it had been, and if relief could have been afforded to the plaintiffs at all, it could only have been by making the other execution creditors of this defendant, and the sheriff, also, parties to this summons, as I intimated on the argument, they ought to be, and which I find to be expressly so decided in *Hammond* v. *Navin*, 1 Dowl, N. S. 351.

After a careful perusal of all these affidavits and papers, I must say that this case has not been submitted to me in a very ingenuous manner. These plaintiffs make an application in June to justify an act which they have themselves completely performed in the month of February before, without bringing this fact expressly before the Judge; and I must say, also, that it is a complete misstatement of their case to call the first endorsation an error of the plaintiff's solicitor, when it is the only endorsation which the plaintiffs themselves could have made in Aug., 1861, when they sued out their execution against lands, as they had not at that time, nor for more than a year afterwards, paid any portion of the money which they claim the right to add to the original endorsement. The plaintiffs case is not one of error at all: it is as a right to add moneys to the original endorsation, which, although they had not accrued as a claim to the plaintiffs when the endorsations were made, were, nevertheless, as the plaintiffs contend, moneys within the provision and protection of the confession. by the express terms of the settlement of accounts of Dec., 1857, and which was in lieu of the defeasance underwritten upon the confession itself. This is their case, and not one of mistake or error in any form. But I do not feel at liberty, or called upon, to express any opinion upon this branch of it, for the reasons already given. I wish to say nothing either upon the amendment already made by the plaintiffs of the endorsation upon the writ.

I discharge the application with costs.

Summons discharged,

With costs.

NOTE.—If an application is made by one of several execution creditors to amend the endorsement on a writ by increasing the amount of the sum to be levied, the other creditors, and the officer to whom it is directed, should be made parties to the rule. *Hammond* v. *Neven*. 1 Dowl. N. S., 351 S. C.; 9 M. & W. 221.

If the writ has been endorsed for too small a sum, the plaintiffs may, in the case of a *fi. fa.*, be allowed to issue a fresh writ for the residue. *Street* v. *Passmore*, 2 Dowl. P. C. 404. *Smith* v. *Dickenson*, 13 Law J., Q. B. 151, 1 D. & L. 155 S. C.

CHANCERY.

(*Reported by* ARMI. GRANT, Esq., *Barrister-at-Law. Reporter to the Court.*)

BANK OF UPPER CANADA v. BEATTY.

THE SAME v. THOMAS.

Judgment creditor—Fraudulent conveyance.

In order to retain the lien created by the registration of a judgment recovered at law, it is necessary that th bill to enforce such lien should have been filed on or before the 18th day of May, 1861.

When a judgment creditor files a bill to enforce his judgment against the lands of his debtor, it must be shewn that the creditor has sued out execution on such judgment.

The agent of a bank having become indebted to his principals in a large sum of money, proceedings were taken to enforce payment thereof; and when execution therefor was on the eve of being sued out, the agent absconded from the country; and, with the avowed object of defeating the claim of the bank, but, as the agent alleged, for the purpose of paying his other creditors, conveyed away to a person to whom he was only then introduced, a large quantity of valuable lands to be paid for in goods at long dates, returning at night for the purpose of executing the conveyances, and which were executed without any investigation of the title to the property; and the agent subsequently signed the agreement for the delivery of the goods to his son, taking in payment, his notes payable over a period of several years. The court, under the circumstances, set aside the sale as fraudulent against the bank.

The bill, in the first mentioned cause, was filed by the Bank of Upper Canada against James Beatty, George Thomas, and John Stephens, for the purpose of having enforced the payment of a judgment recovered by the bank against Thomas, under the circumstances set forth in the judgment. That cause, together with a suit instituted by Beatty against Stephens and the Bank of Upper Canada, came on to be heard at the same time.

Strong and *Crickmore* for the Bank.

Blake and *Blain*, for the defendants.

In the suit instituted by Beatty, the usual decree was pronounced. In the other, after taking time to look into the authorities cited, the following judgment was delivered by

VANKOUGHNET, C.—This is a bill to set aside a certain conveyance of lands by one of the defendants, Thomas, to one other of the defendants, Stephens, on the ground that it was made with the fraudulent intent of putting the property out of reach of the plaintiffs, and during the pendency of an action by them against the defendant Thomas, which resulted in a judgment at law for an amount of which the plaintiffs, by means of this bill, seek to obtain payment out of the property in question. The bill alleges that the conveyance to Stephens was voluntary and without consideration. This latter allegation is disproved. The bill prays in reference to the lands so conveyed, that the same, upon which the plaintiffs' judgment is a lien or incumbrance, or a competent part thereof, may be sold, and the proceeds applied to the payment of the judgment. The bill also impeaches a judgment recovered by the defendant Beatty against Thomas; but this portion of it is not material to the questions under consideration here, as Beatty, prior to the 18th of May, 1861, filed a bill on that judgment as a judgment creditor, making the plaintiffs parties defendants to it as judgment creditors of Thomas, and has obtained, since this cause was heard, the ordinary judgment creditor's decree. The plaintiffs, in their bill, which was filed in June, 1861, do not allege that upon their judgment they have issued any *fi. fa.* against lands, but they set up, as giving them a right to obtain the aid of this court to execution on and of their judgment, the bill filed by Beatty as a judgment creditor on the 14th of May, 1861, and to which, as stated, they were made parties defendants, and they set forth that they had put in their answer in which they claimed to be paid the judgment in question, as well as a prior judgment recovered by the Savings Bank, and assigned to them, but about which there is no dispute, as Beatty offers to redeem and pay it off. The plaintiffs rely upon this allegation, true in fact, as bringing them within the 11th sec. of the act 24 Vic., ch. 41, and therefore keeping alive their judgments as liens upon the lands of Thomas available for the payment of his debts, and they also contend that that act did not take effect till the 1st of September, 1861, whereas the bill in this case was filed in June previously, and that so their lien is preserved.

I think the plaintiffs fail to maintain either of these positions, and that they filed their bill too soon to give them the benefit of any rights which they might have acquired as judgment creditors by virtue of Beatty's suit. The bill simply sets up the bill filed by Beatty, and the answer of the defendants filed long subsequently to the 18th of May, 1861. Beatty might, at any time, have dismissed that bill. The plaintiffs' right at the time this suit was commenced to preserve their lien as judgment creditors by means of Beatty's suit was inchoate, and until decree they could claim no benefit of the suit. This they anticipated, and, therefore, have in respect of it filed their bill too soon, just as when a judgment is no lien on any specific lands the plaintiff seeks equitable execution in this court without first having issued execution on his judgment at law. *Neate* v. *Marlborough*, (3 M. & Craig, 407.) *Angell* v. *Draper*, (1 Vernon, 399.) Had the plaintiffs' right to retain their lien matured before filing their bill by a decree at Beatty's suit I should, in accordance with the *Bank of Montreal* v. *Woodcock*, (9 Grant, 141,) have held that they had made out a title, so far, to ask the aid of this court. But, as I have already said, they have been premature, neither having a decree establishing their position in this court in Beatty's suit, nor execution at law when they filed their bill. As to the last clause of the 24 Vic., ch. 41, providing "This act shall take effect on the 1st day of September next," no doubt some uncertainty as to the time the act is to operate is created by it. It was probably hurriedly inserted in the bill after it had been introduced, but I think its effect must be limited to keeping registered judgments in their places or order of priority (but not as liens *per se*) until the 1st of September, in order that they may as to such priorities sustain writs of execution which shall have been issued on them in the meantime, and that in all other respects the act came into operation immediately on its passing. This view is confirmed by the act 25 Vic., ch. 21, passed to cure an omission in the other act relative to the registry of certificates of discharge of mortgage. It recites that it is expedient "to remove all doubts as to the sufficiency of such registration since the *passing* of the said act"—that is, the 24th Vic., ch. 41, and provides, in its 3rd section, that every certificate of mortgage registered since the 18th of May, 1861, which, before that date, would have been a sufficient discharge of a mortgage, "shall have the same effect and validity as if the second section of this act had passed and been the 8th sub-section of section number seven of the said act 24 Vic.," from which by an oversight in repealing the clause of the old act for the registration of such certificates provision therefor in the future had been omitted. The legislature here plainly shew that they treat the act of 24 Vic., as having come into force on the 18th of May, 1861, the date of its being passed.

The objection to the plaintiffs being in a position to ask the aid of this court having been taken by the answer, I must give the defendants their costs and dismiss the bill, but without prejudice; if that leave be necessary to the plaintiffs' filing another in respect of the same matters.

After this judgment had been delivered the Bank instituted proceedings in another suit against the same parties and one F. A. Thomas, a son of the defendant Thomas, to whom his father had transferred his claim upon Stephens.

Evidence was taken in the suit, and the case argued before his Lordship the Chancellor at the sittings of the court at London in March and April, 1863.

Becher, Q. C., and *Fitzgerald*, for the plaintiffs.

Blake and *Blain*, for defendants.

Corlett v. *Ratcliffe*, (4 L. T. N. S. 1), *Sharf* v. *Soulby*, (1 M. & Gor. 364), *Buckland* v. *Rose*, (7 Grant, 440), *Wood* v. *Dixie*, (7 Q. B. 892), *Thompson* v. *Webster*, (5 Jur. N. S. 668, S. C. on app. 7 Jur. N. S. 531), *French* v. *French*, (D. M. & G. 95), *Hale* v. *The Saloon Omnibus Company*, (4 Drew, 492), *Turnley* v. *Hooper*, (2 Jur. N. S. 1081), were, amongst other cases, referred to and commented on by counsel.

VANKOUGHNET, C.—The bill in this case is filed by the plaintiffs to have declared void as against them, and all other creditors of George Thomas, one of the defendants, certain conveyances of real estate executed by him to John Stephens, another of the defendants, under the following circumstances: Thomas having for some years been agent of the plaintiffs in Chatham, became

indebted to them in about the sum of $78,000, in respect of various transactions, and to secure its payment, executed to the plaintiffs, on the first day of March, 1858, a mortgage of certain lands, estimated at the time by a gentleman employed by the plaintiffs to value them, as worth $98,000. On the 13th of November, 1858, the Toronto Savings Bank, represented by Messrs. Henderson, Proudfoot and Robinson, recovered a judgment against Thomas for £1798 9s. Other parties were also liable to the Savings Bank for this debt, but whether they were or are solvent or not does not appear. The Savings Bank also held as security for the debt a transfer of 7000 or 8000 acres of wild land, the title to which is still in the Crown, but one instalment; viz., one-tenth of the original purchase money having been paid; whether this security is of any value does not appear. On the 16th of November, 1858, this judgment was duly registered in the counties where the lands in question here lie, and writs of execution against the lands of the defendant Thomas were duly issued, and placed in the hands of the sheriffs of the said counties, and have been duly kept alive. This judgment remains unsatisfied. On the 4th of October, 1860, it was assigned to the plaintiffs, who then became, and still are, entitled to the benefit of it. Thomas having made default in payment of one instalment of the money payable to the plaintiffs under the mortgage to them, was, in the early part of the year 1860, sued by the plaintiffs therefor. In this suit he made defence, as he says, for time to enable him to secure his other creditors, and a verdict having been rendered in it against him at the Chatham assizes, which commenced on the 16th of April, 1860, judgment was entered up upon it for the sum of £2393 17s. 4d., on the 18th of the same month, and writs of *fieri facias* against his lands duly issued and delivered to the sheriffs of the said counties, in whose hands they remain unsatisfied. On the 18th and 19th days of the same month of April, the said judgment was duly registered in the same counties. On the 6th of June, 1862, the plaintiffs recovered judgment against Thomas for $64,036 65, the balance of the amount secured by the mortgage to them.

In April, 1860, the outside value of the property mortgaged by Thomas to the bank, appears to be $15,000. How such exaggerated value as that put upon it in March, 1858, (before which the revulsion in the value of the real estate in the country had taken place,) was arrived at by the gentleman who thus estimated it, I do not know.

On the morning of the 18th of April, 1860, Thomas left Chatham, and arrived on the same day in Detroit, where he has ever since remained, having returned to Canada only on the occasion of his attending as a witness in this case, under the protection of a subpœna. When Thomas thus absconded from Chatham he was indebted to divers parties in sums not secured by judgment or otherwise, to an amount of from £4000 to £5000. On the day of his arrival in Detroit, Thomas met with the defendant Beatty, with whom for many years he had been on terms of intimate friendship. They met in the street, and Thomas at once proposed to Beatty that he, Beatty, should buy Thomas's property, giving, as his reasons for desiring to sell, that the plaintiffs were pressing him hard; that he thought he had sufficiently secured them, and if they succeeded against him he would not be able to pay other creditors whom he owed. Beatty, as he swears on his examination, was personally aware that Thomas had got into trouble with the bank, and had had a settlement with them, and that he had lost his position as bank agent; and he next heard, as he states, of Thomas's troubles when the latter came to see him in Detroit, that is, on the occasion of the interview just mentioned. Beatty declined to make the proposed purchase, not being then, as he says, in a position to buy. Thomas then requested Beatty to propose to the defendant Stephens, his partner in business, to become the purchaser, and Beatty promised to do so; subsequently, on the same day, Thomas went down to the store of the defendants Stephens and Beatty, and was introduced to the former by the latter. What then passed between Thomas and Stephens is told by the former in the following words:

"I gave Stephens a list of the property I wanted to sell, and told him Beatty would explain the value to him; that I had put it in as low as possible, to induce a purchase; I had put the price at $50,000; I gave him a list of the incumbrances, which would be deducted from this price; my interview with him lasted five or ten minutes; I told him that the whole amount of the Proudfoot judgment (that is the Savings Bank) was not to be considered as due, as they had other securities: I put down Beatty's judgment among the incumbrances: Stephens said he would take time to consider: I left him, and returned in about an hour; I considered the incumbrances to be about one-third of the price named by me: when I returned, Stephens asked me my terms for payment: I said I wanted part cash, and the balance in groceries. He said there was no use of further discussion, as he would not pay any cash; I told him I wanted means to pay off creditors, and that next to cash I considered groceries the best thing: we then spoke of the price to be paid. Stephens said he must take off one-third of the $50,000 for the incumbrances, one-third for taxes, and to cover any defect in title, and for profit in the transaction: he then offered me $16,000: I tried to get more; Stephens refused it, saying I might take that or nothing: I agreed to his offer: this interview lasted about one-quarter of an hour: Stephens then told me he had determined to purchase: I met Mr. Prince and Mr. Bernard there, (the members of the firm of Prince & Bernard, solicitors,) the latter was to draw up the agreement: he did draw it while I was there; then Stephens read it over, but was not satisfied, as he said that provision ought to be made by it against Beatty's judgment, and he did not see why I should not give him this indemnity if I felt satisfied, as I said I was, that there was other property sufficient to pay it: Beatty's judgment was not estimated among the incumbrances deducted as one-third of the price of the lands: I then added to the paper so drawn by Bernard the provision in regard to Beatty's judgment, and with this Stephens was satisfied: he would not sign it till he had got the deeds: Bernard said he would set his clerks to work to prepare the deeds: Stephens said he would have to be quick about it, as he was going away in the cars that evening: Bernard proposed a power of attorney: Stephens said he would prefer signing the agreement himself: finally, it was determined to have a power of attorney, in case Stephens was gone when the deeds were ready: I did not see Stephens again that day: he had left before the deeds were ready: I went to Windsor at night to execute the deeds, because they were not ready before, and I feared if left till next day I might, if I then went over, be arrested."

Thomas also states that after the deeds were ready for execution by him, Mr. Bernard, whom he had consulted, advised him that if he returned to Canada after selling his lands, the bank, being annoyed thereby, would probably arrest him; that having sold his property he remained in Detroit to look after the proceeds, and to realise them; that he did not think it was safe to go back to Chatham, unless he could make some arrangement with the bank, as he feared they would capias him; that Mr. Bernard advised him to cross over to Windsor to execute the deeds, as the bank might procure his arrest, and that he crossed over to Windsor between 10 and 11 o'clock at night, to execute the deeds to Stephens. These deeds being those impeached in this suit were there and then executed. On the following morning was executed by Beatty for Stephens under power of attorney the agreement by the latter to purchase. The deeds covered a quantity of land in the Counties of Kent, Middlesex, Essex, and Lambton. The consideration, therefor, was the agreement of Stephens, which, after reciting that Thomas was about to commence business in Detroit, and had bargained with Stephens for groceries to the amount of $16,000 to be used in such business, he, Stephens, agreed to supply the same to Thomas in the following manner; to the amount of $3,000 at any time within one year thereafter, to the amount of $8,000 at any time within the year following, and to the amount of $2,000 within each one of the five following years. In relation to this transaction of sale and purchase, defendant Beatty, on his examination, says that he introduced Thomas to Stephens, and left them together, and heard nothing more of the matter till Stephens brought him a list of the lands offered by Thomas for sale, for his opinion thereon; that he valued the lands at $50,000, deducting one-third for incumbrances, and one-third to cover taxes and defects in title, and the probable profit in the transaction, leaving one-

third as the net price to be paid for the property; that the interview between him and Stephens on this occasion lasted a couple of hours; that he and Stephens discussed Thomas' reasons for selling, as already given. He says he advised Stephens to make the purchase, and did not consider that the matter had been carried on in a very hasty manner. He says he never visited any of the property except the Chatham property, and that in his estimate of value for Stephens, he did not take the amount of the rents of this Chatham property into account, as he did not know what they were. Since he took Stephens' purchase off his hands he says he enquired the value of the Chatham property, and he thinks of some of the other lands, but he is not positive. Mr. Prince swears that in this transaction of sale and purchase, he was acting for both parties, the consideration for the sale was, as he understood from all parties, the setting up Thomas in business as a grocer in Detroit; that he himself was at the time acquainted with Thomas's position with the bank and his creditors generally, but he thinks Stephens was ignorant of it. That Stephens was not ignorant of it, is shewn by the evidence of Beatty, who also swears that he must have found out about the time he signed the agreement for Stephens on the following morning that Thomas had been over late to Windsor on the previous night to execute the deeds, and he then suspected that Thomas had absconded from Canada. Mr. Prince says he investigated the title to the lands for Stephens. This must have been after the execution of the deeds, for it was impossible to have done it before. The deeds, when executed, were retained by Messrs. Prince & Bernard, as solicitors for Stephens, and Bernard procured the execution by Beatty for Stephens of the agreement of the latter. Thus, then, we have a party, five or six days before a judgment is or can be recovered against him in a pending suit, flying from Canada to the city of Detroit, in the United States, and on the very day of his arrival there introduced to a man, up to that time a stranger to him, and a resident of Detroit, and within the space of about two hours thereafter, conveying to him, without any knowledge by the latter of, or any enquiry by him, except of the defendant, Beatty, as to their value, and without any knowledge by him of the state of the title, a large quantity of lands, valued at the lowest rate at $50,000, and for the avowed object of defeating the Bank of Upper Canada in recovering payment of the amount for which they were then seeking judgment.

Now, as against this short statement, of what actually occurred could these conveyances, so executed, stand? But it is said there is something more; while on the one hand Thomas desired to defeat the claim of the Bank of Upper Canada, on the other hand he sought by so doing to produce the means for paying his other creditors. Let us see how far this pretence is real and *bona fide*. Thomas, besides this property, which he conveyed to Stephens, had little else left—a few lots in the town of Chatham, sufficient, he thinks, and as Beatty swore he thought, to satisfy the judgment which defendant Beatty held against him (and which had been registered) for about £1,500. Its value, so far as I could gather from the evidence, was not nearly equal to this, but if it was, it would be swept away under Beatty's judgment, and no available property was therefore left for those other creditors whose debts, to the amount of £4000 or £5000, were not in any way secured, and which Thomas, as he stated, was so anxious to pay. How do he and Stephens, to whom Thomas' double object was made known by Beatty as the latter swears, go about it to effect this object? Thomas transfers himself and all his property out of the country, conveying the latter to a foreigner, resident within a foreign jurisdiction, thus putting everything out of the reach not only of the Bank of Upper Canada, but of all his other creditors, and in consideration of this, Stephens, or Stephens and Beatty are to set him up in the grocery business, providing him with a supply of goods by instalments extending over a period of seven years, out of which I suppose they mean us to understand the creditors are to be paid. I am now speaking of the transaction in its inception and formal completion, without any regard to what took place subsequently, and so treating it, I cannot look upon it otherwise than as a gross fraud by Thomas to cheat his creditors, knowingly concurred in by both Stephens and Beatty. Knowing Thomas' design to hinder, delay, and defeat, if he could, the Bank of Upper Canada, did Stephens take any care to see that Thomas' other professed object of paying certain creditors was secured? Did he not at once put it in Thomas' power to cheat all his creditors indiscriminately, and thus aid him in doing so; and how can he now complain that their joint action to this end should be frustrated? Fraud is not very often apparent in the transaction which it affects—it is to be gathered from many circumstances, including the conduct and demeanour of the parties to it, and every contrivance is usually resorted to to hide it, and to baffle enquiry. Here there was not much time for contrivance, so hurried was every thing, least the expected judgment, at the suit of the bank, should reach the property. What need for Stephens to have entered into the transaction? What inducement to close it in so hurried a way without the very ordinary enquiries which any man, the most ignorant, would make before committing himself to a purchase, unless induced to do so by Beatty, the friend and connection of Thomas, to aid the latter in the accomplishment of his scheme? Was there not sufficient to have aroused the suspicion of any prudent man—to have caused him to hesitate—to make enquiry?

Let us now look at the conduct of the parties afterwards, and see whether in it there is anything which will remove the grounds of fraud presented in the transaction originally. We find that Thomas for some time afterwards does nothing towards establishing himself in the grocery business, or in receiving groceries, but in the month of September, in the same year, he proposes to his son, the defendant F. A. Thomas, a partnership in the business, in which they should share equally, and accordingly gives directions to Mr. Bernard to prepare the articles of partnership, when he is advised by that gentleman to sell out his interest in the agreement with Stephens, as it would be unsafe for him to go into business, the Bank of Upper Canada being determined to push him hard. Acting on this advice the elder Thomas sells out to his son, and assigns to him the agreement with Stephens, and takes his son's notes for $16,000, payable in instalments extending over a period of between 8 and 9 years. Thomas, the son, thereupon enters upon the grocery business in his own name, receiving groceries from time to time from Stephens and Beatty, and being credited up to the present time with $3000, and $2577 as payments due him under the agreement with his father. In October, or the beginning of November following, Stephens being dissatisfied with his bargain, because, as alleged, the lands were not paying him any thing, though how he expected them to do so, unless by sales which he does not appear to have attempted, one does not very well see, applies to Beatty to take it off his hands. On this, Beatty feeling, as he says, bound in honour to do so, as having advised Stephens to make the purchase, consents on the terms that he is not to be charged with the goods delivered under the agreement until he had realised the amount out of the property conveyed to Stephens, he, Beatty, paying, however, to the firm ten per cent. interest in the meantime for this delay. Accordingly on the 5th November Beatty, with the assent of both the Thomas's assumes Stephens' agreement, and the latter some months afterwards executes deeds of the property to Beatty. These transfers between the parties appear to have been kept secret for some time till they came out in evidence in 1862, in a former suit between these parties. The deeds from Stephens to Beatty were not registered, Beatty says because of Stephens' title being disputed, that is to say, by the bank.

In the arrangement, such as it was, between Stephens and Beatty either a great deal of indifference or a great deal of confidence was felt, as nothing was said or done about passed accrued rents, or of the lands or mortgages which had been released by Stephens at the instance of Thomas out of those conveyed to him. Altogether the other dealings between and among all parties subsequently to the original sale to Stephens were not of a character to strengthen it in any way. It is evident that the original sale can obtain no support from what followed after it, but, on the contrary, if it appeared in its circumstances free from taint, the subsequent acts of the parties would go far to cast discredit, at least grave suspicion, upon it. I quite admit that we are not to try men's rights upon mere suspicion, however strongly entertained, that all is not honest, but in this case, as I have already explained, in the view which I have taken of the facts there is much more than suspicion; indeed, as strong evidence as you can

ever expect in such a case of the fraud by which it has been attempted to deprive a plaintiff of the fruits of his judgment. I quite admit also that a mere transfer of property to one creditor with the intent to prefer him to another, and so hinder and defeat that other's execution, will not be invalid either by the common law, or the statute of Elizabeth, but I deny that a transfer can stand made not to a creditor to pay a debt, but as a sale to prevent the operation of an execution, although there be but one such, notwithstanding that language is to be found in *Wood* v. *Dixie*, and *Hale* v. *The Saloon Omnibus Co.*, which read literally would almost sustain that proposition. A man may commit just as great a fraud in his design of defeating one creditor as of defeating a dozen, and indeed it was not contended otherwise on the argument of this case. Beatty, if he ought not to stand in any worse, certainly stands in no better position than Stephens. He was privy to the original transaction, and any suspicion he entertained then must have been amply confirmed by what transpired afterwards, and before he purchased from Stephens.

I should remark that it was stated in evidence that the elder Thomas had paid some debts to creditors in Canada since he had lived in Detroit, but they do not appear to have amounted to $300 in all. Though after Beatty had sworn that Thomas had given to him as one of his reasons for selling the property his desire to save it from the bank as well for himself as his other creditors, he, on his evidence being read over to him asserted that he had not meant to say that Thomas proposed to save any of it for himself. Yet it seems from what has taken place that it is for himself Mr. Thomas has saved it, and not for his creditors, and I should be ashamed of our jurisprudence if in such a case as this the court could not step in and wrench from the parties holding it, property which should never have been withdrawn from the reach of the creditors.

The law applicable to such cases as the present is plain enough. The only difficulty was in adjudging upon the facts to ascertain whether the conveyance has been contrived of malice, fraud, covin, or collusion to delay, hinder, or defraud creditors, or others of their just and lawful debts; and whether notwithstanding such intent in the one party the lands, &c., have been conveyed on good consideration and *bona fide* to a person not having notice of such covin, fraud, &c. Of recent cases on this subject I may refer to *Corlett* v. *Ratcliffe*, (L. Times N. S. p. 1.) before the Privy Council; to *Thompson* v. *Webster*, (5 Jurist N. S. 668, and 921,) and in 7 Jurist. N. S., on appeal to the House of Lords. And to *Hale* v. *The Saloon Omnibus Co.*, already cited. It was contended that the whole conveyance here could not be declared void, inasmuch as it covered mortgages, and that there was no allegation that writs against goods of Thomas had issued so as to have entitled the plaintiffs to seize such mortgages had they remained the property of Thomas. The allegation in the bill is that the writs against lands were *duly* issued, and this was admitted on the hearing. Although as against a demurrer this form of allegation might not be sufficient, yet I think, coupled with the admission, it enables the court on the hearing to make a decree as to the mortgages. The writs against lands could not have *duly* issued had they not been preceded by writs against goods, and the mortgages were held out of the country at the time of bill filed.

The decree must be to declare these several conveyances from Thomas to Stephens void as against the plaintiffs, with costs as against the defendants George Thomas, Stephens and Beatty, and for the usual necessary consequential relief. I give no costs to or against the defendant F. A. Thomas. I think he was a proper party to the bill, but he very unnecessarily in his answer enters into a defence of his father in his affairs with the bank. If on being served with the bill he had disclaimed all interest in the suit, and the plaintiffs had nevertheless continued proceedings against him, he would then have had a claim to his costs.

At the opening of the case I ruled that the plaintiffs could not in this suit impeach the judgment of *Beatty* v. *Thomas*, as that question had been disposed of in a former suit between the same parties, but inasmuch as the conveyances from Thomas stand good as between him, Stephens, and Beatty, the result is that Beatty cannot enforce his judgment against the property covered by those conveyances.

U. S. LAW REPORTS.

Wells v. Cook.

(From the *Legal Journal*.)

Where there is a contract to sell or manufacture, and the vendor or manufacturer is guilty of a tort, either in fraudulently representing the quality of the article sold, or in negligently making or labeling it, the general rule is that he is only liable to his immediate vendee for the wrong, because damage to third persons is not the necessary and natural consequence of his act, and to them the vendor owes no duty.

To this general rule there are two exceptions in which the vendor is liable to third persons, not parties to the contract, who sustain a particular injury.

(1.) When the wrongful act or neglect is imminently dangerous to the lives of others, as if a dealer sell for re-sale a dangerous poison, labelled as a harmless medicine, which is re-sold, and injures the person to whom it is administered.

(2.) Where the vendor or manufacturer, from the nature of the contract or service rendered, owes a duty to the public, and does a wrong aimed at the whole public, or the necessary and natural consequence of which is to injure whomsoever may come in the way, as if a bridge builder negligently build a bridge *per quod* a traveller is injured.

Where there is no contract, and a party is guilty of some wrongful act or omission of duty in violation of the Common Law, and which is aimed at the whole public, and the natural and necessary effect of which is to injure some or many indiscriminately, the party so guilty is liable to any one injured. As if a team is left unguarded in the street, or a loaded gun is placed in the hands of a child, or a pit is left open in a public place, any one who thereby, without his fault as a proximate cause, is injured, can maintain an action against the wrong-doer.

Where such wrongful act or omission of duty violates no rule of the Common Law, but only a statute, or violates both, a party who sustains a particular injury, not common to the whole public, can only recover, when the wrong is imminently dangerous to human life, or its natural and necessary effect is to injure some or many indiscriminately, or where the wrong is to a party to a contract.

But these principles do not authorize a person to maintain an action against a vendor of sheep infected with foot-rot for fraudulently selling them as sound, in violation of a penal statute and of the Common Law duty to disclose the disease, when such person is not a party to the contract but a purchaser, in ignorance of the fraud, from the vendee of the fraudulent vendor before the vendee discovered the fraud. This is so, because, damage to the second purchaser is too remote a consequence of the wrong, and is not a natural and necessary consequence of it.

When a false representation is fraudulently made to the prejudice of another relying thereon, the party injured may recover in an action against the guilty party for the deceit, provided the false representation is made to him, directly or indirectly, or is made to and with the design to defraud the public indiscriminately. But a false representation made to one person not designed to influence the conduct of others, can not give the latter a right of action.

An agent to whom false representations are made to the prejudice of his principal, not designed to influence personally the agent, has no right to rely on such representations in subsequent dealings with his principal, and if he do so, he has no right of action, because no contract with him is violated, nor is any duty to him personally violated. There can be no misfeasance, malfeasance or nonfeasance, except where there is an obligation or duty.

The petition filed February 26, 1863, is as follows:—

Orlando Wells, plaintiff, against Solomon Cook, defendant.

Court of Common Pleas, Union County, Ohio, Petition.

The defendant, on or about the 1st day of November, A.D., 1861, sold to the plaintiff, as the agent of his brother, Osmond Wells, and for the said Osmond Wells, twenty-three head of wethers, and three head of buck sheep, the defendant well knowing, at the time of said purchase, that the said sheep were to be turned in with a large flock of sheep owned at that time by the said Osmond Wells, of eleven hundred head, all of which said eleven hundred head of sheep, at the time of said purchase, and turning in of the said twenty head of wethers and three head of buck sheep, were sound and healthy, and free from any disease.

The defendant, at the time of said purchase, wrongfully and fraudulently represented to plaintiff, that said sheep purchased of him were sound and healthy, and free from any disease, whereas the said sheep, although apparently healthy, were not sound and healthy, as the defendant then well knew, and wrongfully and fraudulently concealed the same from the plaintiff.

The plaintiff, afterwards on or about the 1st day of December, purchased of his brother, Osmond Wells, all of the before-mentioned sheep, including those purchased of defendant, solely relying, as to the soundness of said sheep, upon his own knowledge of the said eleven hundred previous to the purchase of the twenty-three head of wethers, and three head of bucks, of the plaintiff, and relying solely upon the representations of the defendant to him, as to the soundness of those purchased of him. The plaintiff avers, that said sheep, purchased of the defendant were, at the time of said purchase, unsound, and had a disease known as the "foot-rot," which is contagious, and which was communicated to the rest of said flock by the turning in of said sheep with said eleven hundred head.

And the plaintiff further avers, that at the time of his said purchase from his brother, Osmond Wells, of said sheep, said disease had not made its appearance among said flock so as to be noticed by plaintiff or his brother, they being, at that time, unacquainted with the nature of said disease, but that it has since broken out among said flock, so as to render them almost entirely valueless. To the damage of the plaintiff four thousand dollars, for which he prays judgment.

Demurrer that petition does not state sufficient facts.

James W. Robinson, for demurrer.

There is no privity. 2 Hilliard on Torts 141 ch. 26. The tort or cause of action is not assignable *Zabriskie* v. *Smith*, 3 Kernan 322.

It is not even averred that it is assigned. The petition seeks damages for the impaired value of the sheep sold, and for injury to the other flock.

As to the first, there is no authority to sustain it.

As to the injury to the flock, no case has yet gone so far as to give damage therefor.

P. B. Cole and George Lincoln for plaintiff cited.

1 Smith's Leading cases 182 *n. Lobdell* v. *Baker*, 3 Metcalf R 472. 1 Greenleaf's Evidence, sec. 18. *Benton* v. *Pratt*, 2 Wendell 385. 19 Johns R. 381. 19 Wend. R. 345. 4 Denio R. 317. 4 Denio 454, 464. 6 Hill 292.

On the ground of contract, *Gearhart* v. *Bates* 20 Eng. L. & E 130 Chitty on Cont. 8 Am. Ed. 591 *n* 2 Parsons Cont 276. *Benton* v. *Pratt*, 2 Wend 385. *Weatherford* v. *Fishback* 3 Scane 170. *White* v. *Manot*, 3 Selden 356.

Hope v. *Alley*, 9 Texas 394.

If a surgeon unskillfully treat his patient, he is liable, though the contract was with the third person, 1 Hilliard on Torts 253. *Pippin* v. *Shepherd* 11 Price 40. *Gladwell* v. *Stegall*, 5 Bing. N. R. 733.

Plaintiff must recover, or there is a wrong without a remedy. Brooms Legal maxims 147, and see *Caveat Emptor* 622. 15 Ohio R. 730. No *privity* is necessary to sustain an action for tort. 1 Hilliard on Torts. 9 *n. Gerhard* v. *Bates*, 2 E. & B. 476. *Lanridge* v. *Tenney*, 2 M. & W. 519. *Wright* v. *Defrees*. 8 Indiana 298. *Caseaux* v. *Male*, 25 Barb. 578. 1 Hilliard on Torts 13. 14. *Pasley* v. *Freeman*, 3 D. & E 50.

On the authority of *Thomas* v. *Winchester*, 2 Selden R. 397, the Ohio Statute gives a right of action, the remedy to be pursued on common law principles. It is as follows:

An Act to prevent the spread of disease among Sheep.

(*Passed Feb.* 17, 1857.)

Section 1. *Be it enacted by the General Assembly of the State of Ohio*, That any person, being the owner of sheep, or having the same in charge, who shall turn out, or suffer any sheep, having any contagious disease, knowing the same to be so diseased, to run at large upon any common, highway, or uninclosed ground; or who shall sell any such sheep, knowing the same to be diseased, without fully disclosing the fact to the purchaser, shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than twenty dollars, and not more than five hundred dollars, to be recovered like other penalties of a like nature; Provided, That nothing herein shall change the right of any one sustaining damage from the running at large, or sale of such sheep, in bringing suit for the recovery thereof, or in defending against any suit brought upon a sale of such sheep.

Section 2. This act shall not be so construed as to prevent any person, owning such diseased sheep, from driving the same along any public highway.

BY THE COURT.

WM. LAWRENCE, JUDGE.—At Common Law there is a distinction recognised between a wrongful *act* or negligent omission of duty *imminently dangerous to the lives of others*, and one that is not so. In the former case the party guilty of the negligence is liable to the person injured, whether there be a *contract* between them or not; in the latter, the negligent party is liable only to the person with whom he contracted, and on the ground that negligence is a breach of the contract.

Longmeid v. *Holliday*, 6 Eng. Law & Eq. R. 562, *Kerr* v. *Clason* 4 West, Law Mo. 488.

Thus the owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negligence. *Lynch* v. *Nurdin*. 1 Ad. & Ellis, N. S. 29. *Illidge* v. *Goodwin*, 5 Car. & Payne 190. So the owner of a loaded gun, who put it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned thereby, 5 *Maule & Selwin*, 198.

So a dealer in drugs and medicines, who, by himself or agent, carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, is liable to all purchasers, however remote, who, without fault on their part, are injured by using it as such medicine, in consequence of the false label. *Thomas* v. *Winchester*, 2 Seldin R 397.

So a bridge builder, who, in violation of his contract, so negligently erects a bridge on a public highway that a traveller, not a party to the contract, is personally injured, is liable for the injury. *Longmeid* v. *Holliday* 6 Eng. Law & Eq. R. 562. *Griswold* v. *Gallop*, 22 Conn. R. 208. 1 Hilliard on Torts 116. *Ashby* v. *White*, 2 Ld. Raym 953, 6 Exch 752, 7 *Ib.* 460. *Fergusson* v. *Kinnout*, 9 Cl. & F. 289. *Johnson* v. *Barber*, 5 Gilman 425. *Beardley* v. *Same*, 4 McLean R. 333. Broom Legal maxims 619. *Caveat Emptor*. *Langiridge* v. *Levy*. 2 M. & W. 519. *Winterbottom* v. *Wright*, 10 M. & W. 109. *Priestly* v. *Fowler*, 3 M. & W. 1. *Pilmore* v. *Hood*, 5 Bing. N. C. 97, E. C. L. R. 85. *Vane* v. *Cobbold*, Exch 12 Jurist 61.

These are instances of wrongful acts or neglects *imminently dangerous to the lives of others*, and where the party liable, from the nature of his acts or omissions *owes a duty to the public* on common law principles, independently of statute, to protect them against injury.

Where a wrongful act or omission of duty *dangerous to the lives of others* is criminal or indictable by statute or common law, a person injured by such act or omission, though not in privity of contract or otherwise with the party guilty of the wrong, may, nevertheless, maintain an action against him, for "so highly does the law value human life, that it admits of no justification where ever life has been lost, and the carelessness or negligence of one person has contributed to the death of another." *Regina* v. *Swindall*, 2 Car. & Kir. 232, 368, 371. *Tessymond case*, 1 *Lewis's Crown Cases* 169. *Thomas* v. *Winchester*, 2 Selden R. 409, 411. *Kerr* v. *Clason*, 4 Western Law Monthly, 488.

The injury, to be actionable, must be some particular damage to the individual, not common to the whole public. 1 Smith's Leading cases (181) 265. *Ross* v. *Groves*, 5 M. & Gr. 613. *Butler* v. *Kent*, 19 Johns R. 228.

But these principles do not apply where an obligation or duty *grows exclusively out of a contract*, without necessarily involving a duty to the public, or the party injured.

Thus in *Winterbottom* v. *Wright*, 10 Mees & Welsby 109, a party contracted with the Post-Master General to provide a coach to convey the mail bags along a road, and another party agreed to run the coach. The coach, in consequence of a latent defect, broke down and injured the driver. But Baron Rolf decided that the driver could not maintain action against the man who furnished the coach, because his duty was to the Post-Master General, and not to the driver.

In all these cases where there is an obligation or duty *to the public*, a person *injured in his property* by the wrongful act or neglect of the person under such obligation, or owing such duty, might, perhaps, have his action, since it is the policy of the law to afford a remedy in favour of every person having a right to demand of another the performance of a duty, the failure to do which results in a wrongful injury. *Beardsley* v. *Swan*, 4 McLean 338. *Bartholomew* v. *Bently*, 15 Ohio R. 666. *Johnson* v. *Barber*, 5 Gilman 425. *Hess* v. *Lupton*, 7 Ohio R. 216.

Now, a *statutory prohibition* upon any act—that is, a statute making any act criminal, may impose duties, or prohibit acts in which, from the very nature of them, the *whole public* may have an interest, or they may be such that a wrongful act or omission may affect only the original person primarily affected by the criminal act.

Thus it is a crime to obstruct a road. The act, from its nature, is aimed at the whole public, or whomsoever may travel the road. The injury results directly to each person so travelling, but no

case could probably be found where a second person, not travelling the road, but who might sustain some loss in consequence of an injury to one who did, could because of that have a civil action against the one obstructing the road. The injury is too remote. 1 Smith's Leading cases (131) 266, 8 East 1, 5 B. & Ad. 645. 1 Tuant, 39.

An unlawful act or neglect in violation of some *express statute* is a tort and a party injured by it has an action. *Ashley* v. *White*, 2 Ld. Raym. 953, 6 Exch. 752, 7 Exch. 460. 1 Hilliard on Torts 116. *Griswold* v. *Gallop*, 22 Conn. 208. *Ferguson* v. *Kennout*, 9 Cl. & F. 289.

But a right of action thus created by statute, in the absence of qualifying provisions, must, on principle, be governed by the rules of law applicable to rights of action at common law. *Couch* v. *Steel*, 3 E. & B. 402.

But the statutory prohibition upon the fraudulent sale of diseased sheep gives no new or additional *civil* action, because the common law gives it, for similar reasons, independently of the statute. A statutory prohibition upon an act can have no greater effect than a common law prohibition, unless it be more comprehensive, which this statute is not. If the Common Law civil action did not exist then, a sale in violation of the statute would give a civil action to the party primarily injured. With the common law in force the statute merely adds a penal sanction to the unlawful sale. Besides the *proviso* to the statute expressly limits its operation so that actions for damage exist only as at common law.

But an unlawful sale is not in its wrong aimed at the whole public, but only at the individual to whom the sale is made. At Common Law, remote persons, who are only injured because the first purchaser is injured, could not maintain an action against the original vendor.

The unlawful *sale*, and the false *representations* complained of, are not *imminently dangerous to human life*; nor did defendant owe to the plaintiff or the public the duty of disclosing the truth. His duty arose from contract, and was to a person whose agent the plaintiff was. Hence, upon the authority of the cases referred to, the plaintiff shows no reason to enable him to recover. Damage to the plaintiff was not a natural, probable or necessary consequence of any act of defendant, 2 Greenl. Ev. 256.

It is not pretended that Osmond Wells' right of action against defendant for fraud, was assignable, or was, in fact, assigned to plaintiff, but the plaintiff claims an independent distinct right of action. If he can recover, there may be two distinct recoveries, for the same wrong, for Osmond Wells can certainly recover. The fact that he sold to plaintiff before the fraud was discovered, does not defeat his action.

On Common Law principles a right of action, arising from the fact of a fraudulent or unlawful sale, is limited to the same persons who could sue for *fraudulent representations* to induce the sale.

The same difficulty did not arise in *Thomas* v. *Winchester*, 2 Selden 397, as here. There the vendor was liable to a remote purchaser for injury done to his *health*. He was not liable at all to his immediate vendee, and, if guilty of fraud, the liability to him only would have been for the difference between the value of the medicine, as it was a fact, and as it was labelled to be. The two actions were for distinct things.

But here, if the vendor is liable in this case, he is liable for two actions for the *same wrong* and injury to *two different persons*, and so on *ad infinitum* as the same sheep may be sold again and again.

It is no answer to this to say that Osmond Wells, the first purchaser, having sold the sheep without loss, sustained no damage. His action is not defeated, nor his damages reduced by his sale. The price for which he sold can not be enquired into to defeat or reduce damages in such action, for if so, as said in *Medbury* v. *Watson*, 6 Metcalf 246, it might make the question of fraud depend upon the rise and fall of the property in the market, or upon the skill exercised in selling. The sale may have been for more or less than the sheep were worth. 1 Bouv. Institutes, 498. See Chit. Cont. 468, *Street* v. *Blay*, 2 B. & Ad. 459—7 Bing. 413, 5 M. & P. 284.

The plaintiff says he is without remedy unless he can recover here. That often happens. At common law, if a vendor sells defective goods, as sound, without fraud, the purchaser has no remedy—that is just what happened the plaintiff here.

If, therefore, the plaintiff can recover, it must be because the defendant has done a wrong to him. It is clear that if the plaintiff were about to buy sheep of a party, and another person should make fraudulent representations as to the sheep, inducing the purchase, the plaintiff could recover against him. The fraud is aimed at plaintiff, and perpetrated upon him. *Weatherford* v. *Fishback*, 3 Scamman, 170, *Paisley* v. *Freeman*, 3 *Term*, R. 51, 1 *Hilliard* on Torts 9, *Evans* v. *Edmonds*, 13 C. B. 786.

He is directly injured *in that transaction*.

But can the plaintiff maintain an action for *fraudulent representations* made to him as agent of another person, not designed to influence his conduct personally?

He does not sue for the *criminal act* of *selling*, and hence, derives no benefit from the statute. If he did thus sue, he is not within the principle of such cases, where a recovery has been had because of the *violation of a duty to the public*, or on grounds of public policy *in favorem vitae*, and so could not recover.

These are the only grounds upon which such actions have been maintained: 2 Selden, R. 400—*Mayor of Albany* v. *Canliff*; 2 Comst 180—*Broom on Parties to Actions*, 246; *Bush* v. *Steinman*, 1 Bos. & Pull. 409.

In *Thomas* v. *Winchester*; 2 Selden, R. 408, it is said:—

"If a horse be defectively shod by a smith, and a person hiring the horse from the owner, is thrown and injured, in consequence of the smith's negligence in shoeing, the smith is not liable for the injury."

And the reason assigned is because:—

"The smith's duty grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone, and to no one else. * * Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the smith's negligence."

The authorities show that damages can only be recovered, generally when they are the natural and necessary consequences of the act complained of. 2 Greenleaf on Evidence, sec. 250. Sedwick on damages *passim*; 1 Smith's Lead cases (132) 266; *Vicars* v. *Wilcox*; 8 East 1, "*legal* and *natural* consequences;" *Butler* v. *Kent*; 19 John's R. 228; 1 Smith's Lead. cases (132) 312.

It makes no difference that the wrong complained of is by statute a penal offence.

A person guilty of larceny may injure the creditors of the party whose property is stolen, but no creditor ever yet sued for such injury.

The plaintiff claims to recover because a false representation was knowingly made by defendant, which induced plaintiff to buy the sheep, and so plaintiff was injured by defendant's wrong; Broom's Legal Maxims, 621; *Caveat Emptor*; 1 Hilliard on Torts, 10 a; *Weatherford* v. *Fishback*; 3 Scammon, Ills., R. 170; *Paisley* v. *Freeman*; 3 Term, R. 51.

But the plaintiff can not recover upon this ground. His loss is *damnum absque injuria*—damages without a legal wrong.

In *McCracken* v. *West*, 17 Ohio, it was held that:

"If a person write a letter to another, desiring him to introduce the bearer to such merchants as he may desire, and describing him as a man of property, and the person having such letter do not deliver it to the person to whom it is directed, but use it to obtain credit elsewhere, the persons so giving the credit can not maintain an action for deceit, though the representations in the letter are untrue."

In that case, Reid, Judge, says:

"If a false statement should be made to one person to induce him to do a particular act, the balance of the world have no legal right to rely upon it; and if they do so, and suffer from it, they can not recover compensation against the person who made the false statement." And see *Edwards* v. *Owen*, 15 Ohio R. 502. *Allen* v. *Addington*, 11 Wend R. 375. *Snell* v. *Moses*, 1 Johns R. 96. *Perry* v. *Aaron*, 1 Johns R. 129. *Beach* v. *Catlin*, 4 Day R. 284. *Smith* v. *Blake*, 1 Conn. R. 262. 1 Hilliard on Torts,

106. *Young* v. *Hall*, 4 Geo. 95. *Boyd* v. *Brown* 6 Barr 310, 2 Selden, 253.

A fraudulent *act* and, perhaps, a fraudulent *representation*, may be aimed at the public generally; and in such case, any one suffering injury thereby, may maintain his action; *Bartholomew* v. *Bentley*, 15 Ohio, R. 659.

It can make no difference that the fraudulent representations in this case were made to the plaintiff as agent. His right to maintain an action, according to the principle of the decisions, depends on the question, whether there was an intention to deceive him, or whether he was induced so to believe, and whether defendant violated any duty to plaintiff. Fraud consists in intention; 5 Cranch, 351.

Demurrer sustained.

GENERAL CORRESPONDENCE.

Assessment of persons liable only to Poll-tax—Collection—Voters at Municipal Elections—Same at Parliamentary Elections—Aliens.

TO THE EDITORS OF THE LAW JOURNAL.

Picton, *June* 29, 1863.

GENTLEMEN,—May I trouble you, through the columns of your valuable journal, to enlighten me on some municipal points.

1st. Is it the duty of the assessor of a town to enter on his roll the names of persons from the age of 21 to 60 years liable to pay a poll-tax?

2nd. In what manner should poll-tax be collected? May a Council order a roll, containing the names and amounts, to be prepared and collected any time previous to the regular Collector's Roll being completed; or should the amounts and names be inserted on the regular roll?

3rd. If the names of such poll-tax payers are entered on the Assessor's Roll, are they included as *rate-payers*, in counting up the names of the *resident rate-payers* appearing on the roll? *Vide* Mun. Act, 22 V., ch. 54, sec. 152.

4th. Can non-residents vote at the municipal elections, held annually?

5th. In making out the list of voters for member of Parliament elections, what course is pursued in respect to joint-tenants, owners or occupants? The Statute says such persons must establish their right to be entered on the list, and vote, according to the Assessment Law. Now, the law of assessment provides only one mode of changing the names on the roll, that is by a notice given within fourteen days after the return day of the roll. If no notice is given to the Court of Revision, that there is an error in assessing as joint-tenants owners or occupants, is the absence of such notice *prima facie* evidence that such right to vote and be entered on the list of voters is established *silently;* or must every person jointly assessed, come before the court and shew his right to be so assessed? *Vide* Con. Stat., C., ch. 6 sec. 4, sub-sec. 3, and Con. Stat, U. C., ch. 55, sec. 60, sub-secs. 1-2.

6th. Can a Deputy Returning Officer administer the Oath of Allegiance to a person at the Polls, if such person does not produce a certificate of having taken the Oath of Residence (3 years)? There is, in the Alien Act, an Act referred to by which persons attain to political as well as civil rights by taking the Oath of Allegiance *alone*, but it seems impossible to procure it—(12 V., c. 197, *special*). *Vide* Con. Stats., C., chap. 6, sec. 56, and chap. 6, sec. 12.; *ib.*, cap. 8.

Having to apologise for such a lengthy epistle,

I am, Gentlemen,

Your obedient servant,

C.

We are at all times willing to comply with any reasonable request made to us by a subscriber, to answer questions of general interest to correspondents. But it is scarcely reasonable for one correspondent, in one communication, to put no less than six distinct questions—the answer to any one of which will be of much more value than the amount of his subscription to the *Law Journal.*

We intend no discourtesy to our correspondent "C.," so far as his present communication is concerned. We merely avail ourselves of the present opportunity of giving a hint to correspondents similarly disposed. In future, we shall deal more strictly in such matters.

The questions put by our correspondent are not free of difficulty.

First.—We cannot say that under the general law it is the duty of an assessor of a town to enter on his roll the names of persons from the age of 21 to 60 years liable to payment of a poll-tax only. The duties of an assessor in respect to the preparation of the assessment roll are declared in s. 19 of Con. Stat. U. C., cap. 55. These, all have relation to taxable persons having taxable property in the Municipality. Persons liable to the payment of poll-tax only have no taxable property. They are in the Act described as persons "who have not been assessed upon the assessment roll." (Ib., s. 79). It is usual, however, we believe, for assessors either to make out a separate roll for such persons, or otherwise to furnish the municipal clerk with a copy of it. (See *Regina* v. *Morris*, 21 U. C. Q. B., 392.)

Second.—The Act is by no means explicit as to the proceedings necessary to the rating of such persons and the collection of rates from them. We take it that their names must be made to appear on some roll. They need not appear on the assessment roll. They ought, we think, to appear on the collector's roll. We know of no one authorised to put their names on the collector's roll except the municipal clerk. If the collector be not able to collect the amount payable by such persons, and no sufficient distress to satisfy the same can be found, then the head of the municipality or a justice of the peace having jurisdiction in the locality, upon complaint shewing,

1. That the person appears upon the collector's roll to be rated for a certain sum;
2. That the same has been duly demanded;
3. That the party has neglected to pay the same;
4. And that no sufficient distress can be found;

May issue a warrant under his hand and seal, and commit the party to the common gaol of the county for any time not exceeding six days, unless the taxes and the costs of the warrant and of the execution thereof be sooner paid (Con. Stat. U. C., cap. 55, s. 86; *Regina* v. *Morris*, 21 U. C., Q. B., 392).

Third.—For the reasons already mentioned, we think the names of persons liable to the payment of poll-tax only need not appear on the assessment roll. Such persons, if named on the roll, may perhaps be said to be "resident ratepayers," within the meaning of s. 152 of the Municipal Institutions Act; but reading that section in connection with the following sections, we scarcely think it was intended by the Legislature that they should be included in the return made necessary by that section.

Fourth.—Non-resident freeholders who are natural born or naturalized subjects of Her Majesty, and of the full age of twenty-one years, and who are rated on the last revised assessment rolls for real property in the municipality of the value prescribed by law, held in their own right or that of their wives as proprieters, are qualified to vote at municipal elections; but householdors merely can only vote when resident in the municipality for one month next before the election (Con. Stat. U. C,, cap. 54, ss. 75-76).

Fifth.—We do not think, as at present advised, that Con. Stat. Can., cap. 6, sec. 4, sub-s. 3, makes it necessary for persons assessed jointly to go before the Court of Revision and establish before that court their right to be so assessed. It is, however, necessary that the assessment should be such as directed by the Statute, and that it should be true in fact.

Sixth.—The section of the Elections Act allowing returning officers to administer oaths of allegiance must be read in connection with the Con. Stat. Can., cap. 8. The latter is a consolidation and re-enactment of the 12 Vic., cap. 197, to which our correspondent refers. Aliens residing in the Province on 18 January, 1849, upon taking the oath of allegiance, without the oath of residence, may become naturalized. But aliens who have come into the Province since that date must not only take the oath of allegiance but the oath of residence for three years (Con. Stat. Can., cap. 8, s. 1).—[Ed. L. J.]

Parliamentary Elections—Voters' Lists.

To the Editors of the Upper Canada Law Journal.

Sirs,—Our late Elections have called forth some questions in regard to the voters' lists, respecting which I as well as others desire information, as Township Clerks will soon be required to make out new lists for voters. The question is this: If the assessor takes down the assessment thus—"A., occupant; B., owner"—have both A. and B. a vote on the same land? If not, which of them should the Township Clerk put down as entitled to vote?

An answer in your next issue will oblige Yours, &c.,

Rowley Kilborn, *Tp. Clerk.*

[To entitle a person to vote at a parliamentary election, two things are necessary: first, that he should possess the necessary property qualification; and, secondly, that his name should appear on the list of voters.

The following persons, and no others, being of the full age of twenty years, and subjects of Her Majesty by birth or naturalization, and not by law disqualified, have the right to the insertion of their names on the voters' lists:—

In any city or town, entitled to send a member or members to the Legislative Assembly, every male person entered on the last assessment roll revised, corrected and in force in such city or town, as the *owner* or as the *tenant or occupant* of real property therein, as bounded for municipal purposes, of the assessed value of $300 or upwards, or of the assessed yearly value of $30 or upwards.

In the limits of any city or town for the purposes of representation, but not for municipal purposes, every male person who is entered on the last revised and corrected assessment roll of any township, parish or place as the *owner, tenant* or *occupant* of real property within the limits of a city or town for purposes of representation, but not for municipal purposes, of the assessed value of $200 at least, or of the assessed yearly value of $20 or upwards.

In any township, town, village or place, not being within any city or town entitled to send a member or members to the Legislative Assembly, every male person entered on the last assessment roll revised and corrected, as the *owner, tenant* or *occupant*, of the assessed value of $200 or upwards, or of the yearly assessed value of $20 or upwards.

Whenever two or more persons, whether as being partners in business, joint tenants, or tenants in common, are entered on the assessment roll, revised and corrected, as the *owners, tenants* or *occupants* thereof, each of such persons is entitled to be entered on the list of voters in respect of the property, if the value of his share or part be sufficient to entitle him to vote if such property were assessed in his individual name.

It is the duty of the clerk of each municipality, after the final revision and correction of the assessment rolls, forthwith to make a correct alphabetical list of *all persons entitled to vote* at the election of members of the Legislative Council and Assembly within such municipality, according to the provisions already noticed, together with the number of lot, or part of lot, or other description of the real property in respect of which each of them is entitled to vote.

Where the real property is of the value already indicated, in the city, town, village, township or place already indicated, and not occupied by the owner, though assessed in the name of owner and tenant or occupant, both the owner and tenant or occupant are entitled to have their names placed on the voters' list, and to vote in respect of one and the same property.

This is the answer desired by our correspondent. (Con. Stat. Can., cap. 6, sec. 4, sub-sec. 1, 2, 3, 4, sec. 6, sub-sec. 1, 2.) —Eds. L. J.]

Officer acting out of office hours—Regularity of the proceedings.

Sarnia, 22nd June, 1863.

To the Editors of the Law Journal.

Gentlemen,—One point which, as I now see, was not sufficiently prominent in my last letter, was not noticed in your reply thereto in last number of the *Law Journal*, under date of 5th inst., viz.:

That the judgment then referred to was signed *out of office hours*, say at 9 a. m., although the clerk's office is not legally

open, except in term time, before 10 A. M., or after 3 P. M. (Con. Stat. U. C., cap. 15 sec. 26).

Under these circumstances is a judgment so signed out of such office hours regularly signed?

LAW STUDENT.

[We answer our correspondent in the language of the late Sir John Robinson:—"We take it that the appointing office-hours, during which the office must be kept open for the despatch of business, is a regulation for the convenience of suitors, that they may know when they will certainly find the office open. But we have found it nowhere held that an officer of the court is not competent to act before or after office-hours, as he has always been held competent to act on those holidays when he is not bound to attend his office at all." (*Walker et al* v. *Fuller*, 10 U. C. Q. B. 477.]—EDS. L. J.

Student—Call to the Bar—Admission as Attorney—Age.

Kingston, June 24th, 1863.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Could you inform me, through the pages of your excellent periodical, whether or not a student would be permitted to pass his examinations for "call" and "attorney" before he has attained his majority.

Of course he could not be sworn in until he is of the full age of twenty-one years.

And oblige,

AN INFANT STUDENT-AT-LAW.

[We have made inquiry, and so far as we can learn, infancy is no bar to examination, either for admission as an attorney or call to the bar. The student, however, must have attained twenty years before he can either be admitted as an attorney or called to the bar.]—EDS. L. J.

REVIEWS.

THE GENERAL ORDERS AND STATUTES RELATING TO THE PRACTICE, PLEADING, AND JURISDICTION OF THE COURT OF CHANCERY FOR UPPER CANADA, with copious Notes, compiled from English and Canadian Decisions, and a Book of Forms. By Richard Snelling and Frederick T. Jones. Toronto: Henry Rowsell, Law Bookseller and Publisher. 1863.

It is with much satisfaction that we have examined a copy of this publication. The Editors appear to have done their work well. The book is all that the title professes, and more too. In it are collected not only the various orders of the Court of Chancery in Upper Canada from 1853 to the present time, with copious practical and explanatory notes, but the orders of the Court of Error and Appeal, the orders, rules and regulations of the Privy Council, miscellaneous points on the orders, a collection of forms, and all the statutes of Upper Canada relating to the practice and jurisdiction of the Court of Chancery.

The Editors have done much to popularize the Court of Chancery, by not only collecting in one volume the orders of that court hitherto to be found, if found at all, in several volumes of the Reports, but by appending to these orders exhaustive notes on every point of doubt or difficulty likely to arise to a practitioner in the course of his practice. No man who studies this work can be otherwise than well up in the practice of that court. It is, so far as we can learn, decidedly the best work of the kind, on the subject to which it relates, that has been issued in Upper Canada. We have been told that Mr. Taylor, of the Equity bar, has issued a somewhat similar work, but as yet have never seen a copy of it. Those who have seen it, and on whose judgment we can rely, tell us that the work of Messrs. Snelling and Jones is superior to it; that it contains not only about 300 more pages, but that the notes are more elaborate and in every respect more valuable. We bespeak for the work under consideration a ready sale. It in all respects deserves it. The Editors are in receipt of letters of approval, as well from the judges of the Court of Chancery as leading members of the bar in that court. Their testimony is no unmeaning tribute to the Editors; but we trust the Editors will receive a still more substantial tribute in the shape of adequate remuneration for their valuable services to the profession.

The senior Editor of the work is a man of no ordinary industry. He has, in the publication of this work, acquitted himself with immense credit. It is a good sign to know that in this Province we have so far progressed as to make it worth while for men of talent and industry, inclined to literary pursuits, to apply themselves according to the bent of their inclination. The work before us would be a credit not only to any man but to any country. It is really more elaborate than the well known work of Morgan on the Statutes, General Orders and Regulations relating to the Practice, Pleading and Jurisdiction of the English Court of Chancery.

It is pleasing also for us to add, that Mr. Rowsell, the publisher, has acquitted himself with great credit. Both the type and paper are excellent. The appearance of the book is all that can be desired. It is convenient in size; so portable that it may be used with ease in court or on circuit; besides, the notes are in general so complete as to render references to the reports of the decided cases unnecessary. The book is a library in itself.

The price is only $7 50. This was the price announced at a time when it was intended to limit the work to 500 pages. We are glad however to learn, that the support which the work has received, and is likely to receive, is such as to enable the publisher to give the additional matter, more than 200 pages, without additional cost. Such conduct deserves encouragement. The best encouragement will be a wide support, which day by day will rapidly expand till the whole edition is sold.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

WILLIAM POTTER, Esquire, Associate Coroner United Counties Leeds and Grenville. (Gazetted June 6, 1863.)

JOSEPH D. BOOTH, Esquire, Associate Coroner, County of Simcoe. (Gazetted June 6, 1863.)

WILLIAM B. QUARRY, Esquire, M.D., Associate Coroner, County of Middlesex. (Gazetted June 13, 1863.)

NOTARY PUBLIC.

MARTIN O'GARA, of Ottawa, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 6, 1863.)

TO CORRESPONDENTS.

C.—ROWLEY KILBORN—LAW STUDENT—AN INFANT STUDENT-AT-LAW—Under "General Correspondence."

DIARY FOR AUGUST.

2. SUNDAY..... *9th Sunday after Trinity.*
8. Saturday ..... Articles, &c., to be left with Secretary of Law Society.
9. SUNDAY..... *10th Sunday after Trinity.*
12. Wednesday... Last day for service for County Court.
16. SUNDAY..... *11th Sunday after Trinity.*
21. Friday ..... Long Vacation ends.
22. Saturday .... Declare for County Court.
23. SUNDAY..... *12th Sunday after Trinity.*
24. Monday..... TRINITY TERM begins.
28. Friday ..... Paper Day, Q. B.
29. Saturday ..... Paper Day, C. P.
20. SUNDAY..... *13th Sunday after Trinity.*
31. Monday..... Paper Day, Q. B. Last day for notice of trial for Co. Courts.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

AUGUST, 1863.

THE LAW AS TO CUSTODY OF CHILDREN.

The father is at common law, to the exclusion of all others (including the mother), the guardian of and entitled to the custody of the child, even though the child be an infant at the breast of its mother (*Rex* v. *DeManneville*, 5 East. 221), provided the child be legitimate (*The King* v. *Soper*, 5 T.R. 278; *In re Doyle*, 1 Clark, 154; *Hudson* v. *Hill*, 8 N. Hamp. 417; *Regina* v. *Armstrong*, 1 U.C. Prac. R. 8). It has been held that if a father consents to his child remaining with another person, he may at any time revoke the consent and recover possession of the child, although the consent was given in consideration of an agreement by the third person to take charge of the child, and although the father had entered into an agreement with such third person to pay for the maintenance of the child (*Regina* v. *Smith*, 22 L. J. Q. B. 116). So the father may, either by deed executed in his life time or by his last will and testament in writing, executed in the presence of two or more credible witnesses, in such manner and from time to time as he shall think fit, dispose of the custody and tuition of his child, not being married, for such time as the child remains under twenty-one years or any lesser time (12 Car. II. cap. 24, s. 8). The mother has no such right (*Ex parte Glover*, 4 Dowl. P. C. 491), and the right itself is not assignable to the mother or to any one else (*In re Bedford Charity*, 2 Swanst. 538).

The power of the parent over the child is however subordinate to that of the state (*Blisset's case*, Loft. 748). The acknowledged rights of the father are conferred by the law with the view to the performance by him of certain duties towards his children, and in a sense on condition of performing these duties, but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance. A man may be in narrow circumstances; he may be negligent, injudicious and faulty; he may be a person from whom the discreet, the intelligent and the well disposed, exercising a private judgment, would wish his children to be for their sakes and his own removed. But he may be all this without rendering himself liable to judicial interference. Before this jurisdiction can be called into action the court must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father is placed in such a position, or has shewn himself to be a person of such a description, or has so conducted himself, as to render it not merely better for the children, but essential to their safety or to their welfare in some very serious and important respect, that his right should be treated as lost or suspended (per Knight Bruce, V. C., *In re Fynn*, 2 De G. & S. 474.) Thus if the father be convicted of felony, the custody of the children will be taken from him (*Ex parte Bailey*, 4 Dowl. P.C. 311); or if, though not proved guilty of crime, he has so conducted himself that his children cannot associate with him without moral contamination (Anon, 2 Sim. N. S. 54); and yet it has been held that the father will not be deprived of his right on the ground that he has formed an adulterous connection which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, and does not intend to do so (*The King* v. *Greenhill*, 4 A. & E. 624; *S. P. Ball* v. *Ball*, 2 Sim. 35). Comparative destitution is certainly not sufficient (*Lyons* v. *Blenkin*, Jac. 245; *In re Pullbrook*, 11 Jur. 185); but such an habitual degree of cruelty as to render the father unfit to have the management of children may be a reason for the interference of the court (*Curtis* v. *Curtis*, 7 W. R. 474). So if it be shown that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles (2 Story's Equit. Jur. s. 134). It is not enough to show that the mere change would be a benefit to the infant. There must be some strong and weighty reason, rendering the same essential to their welfare. (Ib.)

In one case the court, on a representation by the wife of the father's profligacy and cruelty, referred the case to a barrister to determine as to the proper custody, the husband consenting to abide by the determination (*The*

King v. *Dobbyn*, 4 A. & E. 644, note). In another, it was referred to the Master to determine at what time and in what manner and under what circumstances the father who was unfit to have the custody of his children might have access to them (*The King* v. *Wilson*, 4 A. & E. 645, note).

When the father is dead the mother is guardian for nurture and guardianship for nurture continues till the child attains the age of fourteen years (*Ratcliff's case*, 3 Rep. 37 a, 38 b; *In re Moore*, 11 Ir. Com. Law Rep. 1). The legal sense of the word nurture is "to educate; to train; to bring up". (per Campbell, C. J., in *Regina* v. *Clarke*, 7 El. & B. 193). The mere fact that the father died a Protestant, and the mother is a Roman Catholic and will probably train up the child to the same faith, is no reason for depriving her of the right which the law gives her as guardian for nurture. (Ib.) It must be shewn that for reasons such as those already specified in the case of a father, she is unfitted to train up her children, or that her doing so will be destructive to their welfare. (Ib.) Where the mother was left a widow in India, with two children, and the mother of her deceased husband offered to take charge of the children if they were sent home to her in England, and one of them was accordingly sent home to her and resided with her till the time of her death, when she left property to trustees in trust for the children, and after her death the children had been put to school by the trustees, with which arrangements the mother had at various times expressed her satisfaction, the court refused at the instance of the mother, who married a second time, in the absence of some good cause for change of custody, to order the children into her custody (*In re Preston*, 5 D. & L. 233).

The jurisdiction of the Court of Chancery extends to the care of the person of an infant, so far as necessary for his protection or education; and to the care of the property of the infant, for its due management and preservation and proper application for his maintenance. It is upon the ground of the necessity for the due protection and education of the infant that the court interferes with the ordinary rights of parents as guardians by nature or by nurture, in regard to the custody or care of children (2 Story's Eq. Jur. s. 1341; see also *Ex parte Warner*, 5 Brown's Chan. C. 101; *De Manneville* v. *De Manneville*, 10 Ves. 52; *Whitfield* v. *Hales*, 12 Ves. 492; *Wellesley* v. *Beaufort*, 2 Russ. 1; *Thomas* v. *Roberts*, 3 De G. & S. 758). The jurisdiction of the courts of common law in regard to the disposal of the custody of infants is not nearly so extensive as that of chancery. Indeed though courts of common law may under certain circumstances refuse to exercise their jurisdiction in favor of an unworthy father seeking the custody of his children, their jurisdiction under any circumstances (independently of the Con. Stat. U.C. cap. 74, s. 8, to which we shall presently refer) to deprive him of that custody is gravely doubted (*In re Hakewell*, 12 C. B. 223; see also *Blisset's case*, Loft. 748; *Ex parte Skinner*, 9 Moore, 278; *De Manneville* v. *De Manneville*, 10 Ves. jun. 59; *Ex parte McLellan*, 1 Dowl. N.S. 84).

In 1839, Mr. Sergeant Talfourd succeeded in effecting an important amendment in the law regarding the custody of infants. He introduced into the legislature and carried through a bill which is now known as 2 & 3 Vic. cap. 54, entitled "An Act to amend the law relating to the custody of infants." It enacted, among other things, that it shall be lawful for the Lord Chancellor or Master of the Rolls, in England, and for the Lord Chancellor and Master of the Rolls in Ireland, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for access of the petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just. (s. 1.)

The object of the act is to protect mothers from the tyranny of those husbands who ill use them. As the law stood before the act, however much a woman might have been injured, she was precluded from seeking justice from her husband by the terror of that power which the law gave him of taking her children from her. That was felt to be so great a hardship and injustice, that parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife without the risk of any injury being done to her feelings as a mother. That was the object with which the act was introduced, and that is the construction to be put upon it. It gives the court the power of interfering; and when the court sees that the maternal feelings are tortured for the purpose of obtaining any thing like an unjust advantage over the mother, that is precisely the case in which it would be called upon and ought to interfere (per Lord Cottenham, in *Wade* v. *Wade*, 2 Phil. C. C. 787; see also *Ex parte Bartlett*, 2 Col. 661). Therefore where the wife leaves her husband without sufficient cause, she is not entitled to claim the protection of the act (*In re Taylor*, 11 Sim. 178; see also *In re Tomkinson*, 3 De G. & S. 371).

If the protection of the children can be attained consis-

tently with the common law right of the father to the custody of his child, that right ought not to be interfered with (*In re Halliday*, 17 Jur. 56). In one case a petition had been presented on the part of a husband, praying that his two children, who were under the custody of their mother, from whom he was separated, should be transferred to him; and affidavits were made, as well on the part of the husband as the wife, detailing the several differences which existed between them and the various matters which led to their separation, when Sir Edwin Sugden, then Lord Chancellor of Ireland, spoke of the 2 & 3 Vic. cap. 54, as follows:—"I do not think the act contemplated this case. I myself paid great attention to the act in its progress through the Commons, but I did not imagine that it enabled the mother to make a *legal* defence against the application of her husband. The statute merely gives the mother a right to apply to the court for an order, either that she shall have access to the children, or that they shall be delivered unto her until the age mentioned in the statute. The act therefore does not enable the mother, in a case like the present, to resist the husband's application. At the same time this difficulty would necessarily follow, that although I should deliver over the children on his application to the husband, according to the general principle of this court, I should the next hour, on the application of the mother, under this act, take them back and transfer them again to her, assuming the case to be one in which the court would in its discretion interfere to this extent on behalf of the mother. It seems to me to be clearly a *casus omissus* in the act" (*Carsellis* v. *Carsellis*, 1 D. & War. 235; see also *In re Fynn*, 2 De G. & S. 457).

It will be observed that the act makes a difference in respect to the age of the child. With respect to that, the legislature evidently considered that as between the legal guardians and the mother the very young children (i. e. those under seven) required the mother's nurture; and notwithstanding the legal rights of the father, they should be entrusted to her; but still enabled the court, in its discretion, to do that which it thinks best for the interest of the children. It did not consider as between the father and mother that the father had an equal interest with her, but that in the majority of cases the custody should be given to the mother; but under ordinary circumstances it was most desirable that it should be made entirely discretionary in the court. In the exercise of that discretion the court must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or mother, the tendency being to lean towards the mother where the children are of very tender age; but still the only material question was, what was for the children's benefit? (per Kindersley, V. C., in *Shilleto* v. *Collett*, 8 W. R. 683). Where it was shown that the mother was ignorant of managing her house and income, of non-domestic habits, married a second time, and concealed such marriage from the testamentary guardians, and was without means of personally contributing anything to the support of her children, the prayer of a petition presented by her under the above act was refused (*Shilletto* v. *Collett*, 8 W. R. 683; affirmed Ib. 696).

It now remains for us to add that our Legislature, in 1855, substantially adopted the Imperial statute 2 & 3 Vic. cap. 54, conferring the administration of the law as adopted upon the Superior Courts of Law and Equity in Upper Canada and to the Judges thereof (18 Vic. cap. 126). The act is now to be found in Con. Stat. U. C. cap. 74, s. 7, 8, 9, 10, and 11.

These sections are as follows:

"8. Any of the Superior Courts of Law or Equity in Upper Canada, or any judge of any such courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, may, if such court or judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such court or judge thinks convenient and just, and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such court or judge may direct, and such court or judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time, as, according to the pecuniary circumstances of such father or the value of such estate, such court or judge thinks just and reasonable.

"9. The court or judge as aforesaid may enforce the attendance of any person before such court or judge, to testify on oath respecting the matter of such petition by order or rule made for that purpose, and on the service of a copy thereof and the payment of expenses as a witness, in the same manner as in a suit or action in the said courts respectively, or may receive affidavits respecting the matters in such petition.

"10. All orders made by the court or a judge by virtue of this act, shall be enforceable by process of contempt by the court or judge by which or by whom such order has been made.

"11. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue

of this act, in favor of a mother, against whom adultery has been established by judgment in an action for criminal conversation, at the suit of her husband against any person. 18 V. c. 126, s. 4."

Upon comparison of our act with the imperial act from which it is taken some differences will be discovered. One is, that under our act the mother is entitled to ask for the custody of the child if within the age of *twelve* years, and to keep the custody of the child till it attain that age, whereas the English act is restricted in that respect to children "within seven years of age." Another, is that under our act (though not under the English act) the court or judge may make an order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant may be entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father, or the value of the estate, the court or judge thinks just and reasonable. Another, is that the court or judge may not only, on applications under the act, receive affidavits as under the English act, but enforce the attendance of any person to testify on oath respecting the matter of the petition, for which there is no provision in the English act. These, appear to us to be the substantial points of difference between the two acts. Both acts, however, are in principle the same, and we apprehend that the same rules of construction will be applied to our act as have already prevailed in the construction of the English act. We need not therefore repeat them.

The right in Upper Canada of appointing guardians of an infant not having a father alive or any other legal guardian, belongs exclusively to the Surrogate Court of the county within which the infants reside (Con. Stat. U. C. cap. 74, s. 1).

The ordinary remedy of a father or other legal guardian complaining that an infant is in illegal custody, is the writ *habeas corpus*. It is a common law writ of right, and, as is well known, is of a highly remedial character. It in general lies to bring up persons who are in custody, and who are alleged not to be legally restrained of their liberty. When the court perceives that they are illegally restrained, it will discharge them (*Ex parte Glover*, 4 Dowl. P. C. 293). In cases where it is issuable under 31 Car. II. c. 2, s. 1, it may be issued as well in vacation as in term. But the statute of Charles is restricted to cases where the party is committed "for criminal or supposed criminal matter." The statute 56 George III. c. 100, s. 1, which extends the statute of Charles to cases of restraint other than those for criminal or supposed criminal matter, is not in force in Upper Canada; and owing to the unpardonable and long continued neglect on the part of those from time to time in authority, has never that we can discover been adopted by our legislature (see *Ex parte McLellan*, 1 Dowl. P. C. 81). The writ may be and often is granted in the first instance (*In re Pearson*, 4 Moore, 366); and in one case the court not only granted the writ in the first instance, but gave a rule calling upon the person in whose custody the child was to show cause why an information should not be filed against her (*The King* v. *Ward*, 1 W. Bl. 386). But inasmuch as the return cannot be controverted by affidavit, it is not prudent to take the writ in the first instance, but rather to move for a rule to shew cause why the writ should not issue, and then the grounds for and object of the writ, and necessity for it, will be discussed conveniently upon affidavits properly filed on both sides (*The Queen* v. *Sheriff*, 6 U. C. Q. B. 197).

Service of the writ need not be in all cases personal. Service by leaving it with the brother and agent of the party to whom addressed, at his place of abode, in a case where the writ was shown to have come to the knowledge of the party, was held sufficient (*In re Hakewell*, 12 C. B. 223); and the court will receive the return, although the party called upon to make it is not present. (Ib.) A return to the writ that a child under fourteen "is not *detained* by, or in the custody, power or possession, or under the care or control," of the party to whom addressed, or any person employed by him, was held insufficient (*Regina* v. *Roberts et al.* 2 Fort & Fire, 272). If a return, which on the face of it is ambiguous, is not fortified by affidavit clearing up all doubt, the return will be held evasive and bad (Ib.) A case of cruelty should be raised on the face of the return, and not brought in by affidavit merely, to uphold a return which is evasive and bad. (Ib.) In cases of writs of *habeas corpus* directed to private persons to bring up infants, the court is bound *ex debito justitiæ* to set the infants free from improper restraint, but not bound to deliver them over to any body, or to give them any privilege (per Lord Mansfield, in *Rex* v. *Delaval et al.*, 3 Burr. 1436). This latter is left to the discretion of the court, to be exercised according to circumstances. (Ib.) When the infant is of an age to exercise a choice, the court in general leaves him to elect where he will go (*Rex* v. *Clarke*, 1 Burr. 606; *In re Ann Lloyd*, 3 M. & G. 547; *Regina* v. *Butler* and *Regina* v. *Snooks*, 2 U.C.Q.B. 370). If he be not of that age, and a want of direction would only expose him to dangers or seductions, the court will make an order for his being placed in proper custody (per Denman, C. J., in *The King* v. *Greenhill*, 4 A. & E. 640). The difficulty is to fix the age at which the child can be said to be too young to exercise a choice (See *Regina* v. *Clarke*, 7 El. & B. 194). Cockburn, C. J., recently, in strong terms repudiated the doctrine that mental precocity

gives the right of choice, if the child has not arrived at the age of discretion which the law recognizes; for, as he well observed, "that very precocity might be the thing of all others to lead a young girl into misery and danger" (*Ex parte Barford*, 3 L. T., N.S. 468; S.C. nom. *Reg.* v. *Howes*, 7 Jur. N.S. 22). The court therefore felt itself constrained to lay down a general rule as to the age when the minor might be left to freedom of choice, and fixed upon the age of sixteen as that up to which a female child ought to be subject to parental control. (Ib.) In the case of a male child it has been held that guardianship for nurture continues only till the child attains the age of fourteen, so that after that period the child is at liberty to exercise a choice as to dwelling or remaining with his father (*Hyde* v. *Hyde*, 29 L. J. Mat. case, 150). The order of the court, commanding the wife to deliver to the husband the body of their child, is sufficiently complied with by the wife placing the child in the charge of her husband (*Regina* v. *Sheriff*, 7 U.C.Q.B. 403). If the child return of her own free will to the mother, and is not afterwards forcibly detained, the court will not farther interfere. (Ib.)

SELECTIONS.

CASE OF THE ALABAMA.

The case of the *Alabama* is sufficiently remarkable, both in its facts and in the arguments to which it has given occasion, to call for a thorough review of both. It may be asserted, that, of all recent cases, this is the most likely to take its place as a leading one in the law of nations.

On June 23, 1862, Mr. Adams, the ambassador of the United States in London, addressed to Earl Russell, her Majesty's Secretary of State for Foreign Affairs, a letter in which, after mentioning the "equipment from the port of Liverpool of the gunboat, the *Oreto*, with intent to make war upon the United States," he says, "I am now under the painful necessity of apprising your lordship that a new and still more powerful war steamer is nearly ready for departure from the port of Liverpool on the same errand. This vessel has been built and launched from the dockyard of persons, one of whom is now sitting as a member of the House of Commons. and is fitting out for the especial and manifest purpose of carrying on hostilities by sea. * * * I now ask permission to solicit such action as may tend either to stop the projected expedition, or to establish the fact that its purpose is not inimical to the people of the United States." We omit the details which Mr. Adams communicated on this occasion in support of his statement, since they were not so authenticated that Lord Russell could take upon them any other action than that which he adopted without loss of time, in referring the matter to the Commissioners of Customs for inquiry. But we direct attention to the statement itself, because it expresses clearly the ground taken up by Mr. Adams, and to which he firmly adhered throughout. This is the more necessary on account of the subsequent introduction into the argument, by other parties to it, of the very different topic of passive contraband.

The name of passive contraband, not much known in England, and implying a doctrine little countenanced by English statesmen, has been given to the sale by neutrals, on their own soil, to the agents of a belligerent, of those articles which, if the neutrals transported them by sea to the belligerent, would be articles of contraband property so called. The name of course implies that the traffic so designated is held to be a breach of the duties of neutrality; but since it takes place on a neutral soil, a belligerent who should deem himself aggrieved by it would have no means of executing justice on the neutral with his own hand. If the goods are shipped, and he takes them at sea, the neutral suffers no loss, because, from the nature of the case, the goods have already become the property of the enemy. War, then, against the neutral is the only possible remedy of the aggrieved belligerent; and much learning and philosophy have been expended on the question whether a war undertaken for such a cause would be just. Upon that question we shall not spend much time, knowing that for such a cause no recorded war has been undertaken, and believing it to be in the highest degree improbable that any ever should be. If we imagine a neutral country to be so great a mart for arms and munitions of war that either belligerent is essentially aided by purchasing them there, the chance is enormous that the other belligerent will also have resorted to the same source of supply; and although it is not true that a breach of neutrality is excused by offering similar advantages to both sides impartially, yet it is not very probable that the balance of advantage derived by either will, in the case we have supposed, be so great an inconvenience to the other that, by declaring war against the neutral, he will multiply his enemies in order to get rid of it. Far be it from us to license the indulgence of all unfriendly dispositions which in any particular instance may not be likely to draw down actual vengeance on the misdemeanants. But to assert international duties, the positive enforcement of which is utterly and in every case improbable, is a folly like that of enacting national laws with no sanction of any kind. As such enactments, being surely disobeyed, could only tend to bring all law into contempt, so the denunciation of passive contraband by theorists tends to make neutrals reckless of the duties really incumbent on them. It does even worse than this, for it encourages belligerents to cherish a grudge at being wronged by a traffic which in fact is inevitable, since scarcely even the most despotically governed country could endure so systematic an interference by the authorities with the dealings between individuals within its territory, as would be necessary in order to prohibit it with effect. These considerations must outweigh the importance of rounding off a theory about contraband, of which, since there is no commerce that does not, directly or indirectly, augment the resources of a nation for war, it will never, after all, be possible to give a consistent account, while any intercourse between neutrals and belligerents is permitted.

Mr. Adams, then, took up no ground so weak as that which we have been exposing: his representation was based on the duty of a neutral not to permit the use of his territory as a starting point, or base of operations, for a hostile expedition. This duty is clear: to furnish our government with the means of performing it was the main object with which the Foreign Enlistment Act was passed in 1819. But there is a point in its application at which it becomes a matter of some nicety to distinguish the cases which fall under it from those which belong to the chimerical field of passive contraband. Suppose, for instance, that a single vessel sails from our ports, built and adapted for war alone, and in the actual service of a belligerent government, but wholly unarmed and unprovided with the munitions of war, and having no one on board who was enlisted within our territory into the service of her government: does this vessel constitute in herself a hostile expedition—equally inapt as she is for war and commerce, though, even in her unfurnished state, not absolutely incapable of either? Is there anything more in her case than the sale to a belligerent of a hostile weapon, for such is eminently a ship built for the purposes of war, but a sale effected in a

neutral port, and therefore exposing the neutral to no blame, though the purchaser carry off his acquisition and use it to the serious detriment of his adversary? We should have no difficulty in accepting the former alternative, considering the public service and hostile errand on which the vessel quits our shores. And we should claim a strong support for that opinion in the seventh section of the Foreign Enlistment Act, which makes it a misdemeanour to "*fit out or* arm" a vessel, for employment in foreign service, "*as a transport or storeship, or* with intent to cruise or commit hostilities against friendly powers;" and proceeds to declare the forfeiture of such vessel, and to empower the officers of customs and excise to seize her. Hence it clearly appears that the gist of the offence against the act lies in the public service against alien friends, independently of any armament, and even in spite of proof that the service intended, though hostile, is not that of an armed ship of war. Nor could it be objected that the Foreign Enlistment Act does not declare the law of nations; for its preamble recites that the offences against which it is directed "may be prejudicial to, and tend to endanger, the peace and welfare of this kingdom," which can only be by their giving just ground of complaint to foreign powers." But the case we have supposed falls short of that of the Alabama, by wanting the material ingredient of there being men on board enlisted within our territory for the service of the belligerent government; yet we are sorry to say that the argument of the *Alabama* case, in the British press and in parliament, has been marked by a laborious attempt to assimilate it to the cases of so-called passive contraband.

The next date of importance in the narrative is July 21, when the United States' consul at Liverpool presented six affidavits to the collector of customs at that port, "requesting me," says the collector, "to seize the gunboat" to which Mr. Adams had referred in his letter of June 23, then known as No. 290, but since as the *Alabama*. Copies of the same affidavits were received by Lord Russell from Mr. Adams on the following day (July 22), with a report of the consul's application to the collector "to act under the powers conferred by the Enlistment Act." Of this circumstance, and those which followed, the Solicitor-General gave the following account to the House of Commons:—

"It was on the 22nd that he (Mr. Adams) transmitted his first series of depositions; *he did not complete his evidence till the 24th, and the letter in which he sent them was not received till the 26th, so that he did not place the evidence on which he relied in the hands of the government till the 26th of July.* In the meantime he obtained the opinion of the honourable and learned member for Plymouth, who, on the 16th, stated his belief that there was a case of suspicion, but not enough to justify the detention of the vessel. When the evidence was completed, it was laid before the honourable and learned gentlemen, who, on the 23rd, thought there was a case sufficient to warrant her detention. Upon that evidence the legal advisers of the government came to the same conclusion as the honourable and learned member. But I wish the House to understand that in those depositions there was a great mass of hearsay evidence, which, taken by itself, could not form the basis of any action. Of the six depositions transmitted on the 22nd of July, only one was good for anything at all, namely the evidence of a person named Passmore, which was sufficient to prove material facts. Two more were sent, corroborating Passmore, on the 24th, and were received by Earl Russell *on the 26th, Mr. Adams having taken all that time to get his evidence ready.* Now what is the delay of which we are accused? The 26th was Saturday, and the 27th Sunday. *The complete evidence was not in the hands of Earl Russell till the 26th*, and he told Mr. Adams on the 28th, that is on the Monday, that the law officers of the Crown were consulted. He got their opinion on the 29th, and that very same day a telegraphic message was sent down to stop the ship. Really, sir, one is shocked at the perversion of mind which arises under, I admit, the most excusable circumstances; for the House will give me credit for sincerity when I say that no one makes more allowance than I do for the natural feeling of irritation on the part of the American nation. No one can be more anxious than I am that we should stand straight with them, and they with us; but I must say that, but for the perversion of mind consequent on an irritable state of feeling, traceable to causes with which we can sympathise, I cannot conceive how any human being can say that the government have not acted with the promptitude which they ought to have shown."

Three or four times in the above passage, and in as many different ways, does the Solicitor-General impress on the House and the world that Mr. Adams did not, till the 26th, complete his evidence, or get it ready, or place in the hands of the government the evidence on which he relied. We therefore believe that it is our readers who will have their turn of being shocked at the perversion of mind which arises under more or less excusable circumstances, when we tell them that the evidence transmitted by Mr. Adams to Earl Russell on the 22nd was a complete body of evidence; that he relied on it; that he requested her Majesty's government to act upon it; that he gave them no hint of any further evidence to come; and that if the government ever received any further evidence from Mr. Adams, it was not because he thought it necessary to his case, but because time had been given for its transmission by the refusal of the government to act upon the evidence on which they were formally and diplomatically required to act. That our readers may judge for themselves, we will place before them the full text of Mr. Adams's letter of the 22nd to Earl Russell:—

Legation of United States, London, July 22, 1862.

"My Lord,

"I have the honour to transmit copies of six depositions taken at Liverpool, tending to establish the character and destination of the vessel to which I called your lordship's attention in my note of the 23rd of June last.

"The originals of these papers have already been submitted to the collector of the customs at that port, in accordance with the suggestions made in your lordship's note to me of the 4th of July, as the basis of an application to him to act under the powers conferred by the Enlistment Act. But I feel it to be my duty further to communicate the facts, as there alleged, to her Majesty's government, and to request that such further proceedings may be had as may carry into full effect the determination which I doubt not it ever entertains to prevent, by all lawful means, the fitting out of hostile expeditions against the government of a country with which it is at peace. "I avail, &c.,

"Charles Francis Adams."

There cannot be a more hopeless contradiction than that which exists between the above letter and the statement that Mr. Adams did not, till the 26th, place in Earl Russell's hands the evidence on which he relied. But in Mr. Adams's letter of the 24th, enclosing the two additional depositions, and Mr. Collier's opinion on the case presented by all the eight affidavits, there does occur an expression which seems to sanction another of the phrases used by the Solicitor-General.

The letter is as follows:—

Legation of the United States, London, July 24, 1862.

"My Lord,

"In order that I may complete the evidence in the case of the vessel now fitting out at Liverpool, I have the honour to submit to your lordship's consideration the copies of two or more depositions taken respecting that subject.

"In the view which I have taken of this extraordinary proceeding as a violation of the Enlistment Act, I am happy to find myself sustained by the opinion of an eminent lawyer of Great Britain, a copy of which I do myself the honour likewise to submit. "Renewing, &c.,

"Charles Francis Adams."

What need was there that evidence should be "completed" on which Mr. Adams already relied? Clearly the completion was necessary to satisfy some other persons, who

did not rely on the evidence as it stood before. Who these persons were is shown by the following letter from the Commissioners of Customs to the Collector of Customs at Liverpool, which was not in the hands of members till after the delivery of the Solicitor-General's speech:—

London, July 22, 1862.

"Sir,

"Having considered your report of the 21st inst., No. 1,200, stating, with reference to previous correspondence which has taken place on the subject of a gunboat which is being fitted out by Messrs. Laird, of Birkenhead, that the United States' consul, accompanied by his solicitor, has attended at the custom-house with certain witnesses, whose affidavits you have taken and transmitted for our consideration, and has requested that the vessel may be seized under the provisions of the Foreign Enlistment Act, upon the ground that the evidence adduced affords proof that she is being fitted out for the government of the Confederate States of America:

"We acquaint you that we have communicated with our solicitor on the subject, who has advised us that the evidence submitted is not sufficient to justify any steps being taken against the vessel under either the 6th or 7th sec. of Act 59 Geo. III., cap. 69; and you are to govern yourself accordingly.

"The solicitor has, however, stated that if there should be sufficient evidence to satisfy a court of enlistment of individuals, they would be liable to pecuniary penalties, for security of which, if recovered, this department might detain the ship until those penalties are satisfied, or good bail given; but there is not sufficient evidence to require the Customs to prosecute; it is, however, competent for the United States' consul, or any other person, to do so, at their own risk, if they see fit.

"T. F. Fremantle,
"G. C. L. Berkeley."

It is true that, in the published documents, there is no other trace that the opinion of the solicitor of the Customs was communicated to Mr. Adams, than that which is furnished by the pregnant phrase, "in order that I may complete the evidence," in his letter of the 24th. But, besides that phrase, it is not conceivable that Mr. Adams's letter of the 22nd should have remained altogether without acknowledgment until the 28th, as on the face of the papers it would seem to have done; and whether or not Mr. Adams received a verbal communication of the opinion, he would at any rate hear it from the United States' consul at Liverpool, to whom its effect, in the refusal to stop the ship, must have been immediately known. Hence, no doubt, it was that he took the opinion of Mr. Collier on the 23rd, and applied the final stimulus to the government by the transmission of that opinion enclosed in his letter of the following day. But, if this be so, Mr. Adams's expression, "in order that I may complete the evidence," which, as repeated by the Solicitor-General, must have aided in impressing on the House that he took all the time till the 26th to get ready that "evidence *on which he relied*," really conveyed to those who knew the facts the opposite meaning of an attempt to satisfy some who, in Mr. Adams's distinctly expressed judgment, ought to have been satisfied before. However this may be, two things stand out clearly: first, that Mr. Adams did, by the 22nd—even by the 21st, if we take the date of its communication to the collector at Liverpool, who had power to act—"get ready" that "evidence *on which he relied*;" secondly, that, since a government opinion was actually given on the 22nd, the only excuse which it remains possible to suggest for not stopping the *Alabama* is that the opinion given on that day was the right one on the evidence as it then stood. To the question whether this was so, we shall now address ourselves.

Now, that question is sufficiently answered by pointing out that the additional affidavits contain no facts of a different description from those deposed to in the former ones. They are the affidavits of a ship-carpenter and a mariner, who had been enlisted for the gunboat by Captain Butcher, her commander, in each case with full notice of her being built for the Confederate government; and in the case of the mariner, who had told the captain "that he wanted to get South in order to have retaliation of the Northerners for robbing him of his clothes," with an express intimation in reply, "that if he went with him in his vessel he would very shortly have that opportunity." But the seaman Passmore, one of the former deponents, had given still more direct evidence to the same effect.

"Captain Butcher asked me if I knew where the vessel was going; in reply to which I told him I did not rightly understand about it. He then told me the vessel was going out to the government of the Confederate States of America. I asked him if there would be any fighting; to which he replied, 'Yes, they were going to fight for the Southern government.' * * * The said Captain Butcher then engaged me as an able seaman on board the said vessel, at the wages of £4 10s. per month: and it was arranged that I should join the ship in Messrs. Laird and Co.'s yard on the following Monday. To enable me to get on board, Captain Butcher gave me as a password the number 290. * * There are now about thirty hands on board her, who have been engaged to go out in her. Most of them are men who have previously served on board fighting ships."

Well might the Solicitor-General confess that Passmore's evidence "was sufficient to prove material facts," and that the subsequent depositions merely "corroborated" him. Material, indeed! Why, besides the power which we have already quoted to seize a ship fitted out for a hostile service against alien friends, the fifth section of the Foreign Enlistment Act, to which the solicitor of the Customs did not refer, gives power to detain any vessel having on board persons enlisted or engaged within the kingdom for foreign military or naval service. Well, too, might so great an advocate feel that when the affidavits and the dates of their receipts were already in the hands of members, a case could only be made out for the government by labouring to show that Mr. Adams had not, on the 22nd, put them under the necessity of saying aye or no, whether they would act on Passmore's evidence. That the law officers should be consulted on the Monday, and that a telegram should be sent on the Tuesday to stop the ship, speaks well for their promptitude, though not better than all who know the Solicitor-General would expect. It is even possible that the defence might have been more candid, had any personal blame been in question. But, however that may be, when the vice of advocacy intrudes itself into questions of state, and especially when the finishing touch of its rhetoric is one of disdainful pity for a great and sensitive nation, with which, in this matter at least, no fault is to be found, it becomes a duty to expose it.

But the *Alabama* sailed on the eighth morning after the request to detain her was made to the collector at Liverpool, the morning of the day on which a tardy effort was made to prevent the expedition. Now the right of a foreign state, to claim satisfaction for the hostile use of a territory professedly friendly, depends in no way on the means of preventing such use which the government of that territory may possess. If the French had seized Antwerp, and were preparing an expedition from it against our shores, we should not refrain from hostilities in the Scheldt, because the kings of the Belgians and the Netherlands might demonstrate their perfect innocence of all complicity. If Canada were invaded by a party coming from the state of New York, our ambassador at Washington would treat with contempt any disquisition on the respective constitutional powers of the Federal and state governments. The answer would be: "Of your constitution we know nothing but this, that it points out the authorities at Washington as the only ones to whom we are allowed diplomatic access; to us, therefore, those authorities are answerable for all that takes place within the territories which, towards us, they claim to represent." And as little as foreign states are concerned with the relations between a federal government

and the members of the federation, so little are they concerned with the relations between a government and its individual subjects. Whether the central power be strong or weak, whether the bond of union between the elements of a nation be firm or loose, are questions for itself alone. The united responsibility of the nation to foreigners, for the amicable employment of its territory, is among the first principles of international law. We do not trouble ourselves with thorny questions of Brazilian law, when our citizens, not voluntarily landing in Brazil, but thrown on her coast by the common perils of the sea, receive there a treatment reprobated by the common voice of humanity. If our statute book should contain any provisions going beyond the received law of nations, as if an act should be passed to prohibit any traffic within British territory which is affected by no international doctrine but the chimera of passive contraband, an ambassador who should request our government to enforce it would be bound to accept it such as it might be. But, putting the case of the *Alabama* on the ground which he most properly took up from the first, Mr. Adams was in no way concerned with any limitations or imperfections of the Foreign Enlistment Act. He might even ignore the question as to what Lord Russell calls "the legal authority of the law officers."* We, indeed, have made up our minds on that question, and consider that, with the evidence we have quoted in his hands, a Foreign Secretary might, on July 22, 1862, have ventured to decide for himself that a hostile expedition was on the point of departure from our shores, and that the Foreign Enlistment Act applied to the case. Nay, we will venture to assert that the law officers are not more the constitutional advisers of the Crown in the law of the land, than its responsible ministers are in the law of nations; and that however proper a reference to the former may be on the effect of the Foreign Enlistment Act in a difficult point, or on prize law as actually administered in our Admiralty Court, yet a Chatham or a Canning would have held it his business to instruct the law officers, in case of need, in the duties of neutrality. But we must repeat that our duties to the United States in this matter are quite independent of our statute law and constitutional usage.

Such was the opinion of Mr. Canning, in the debates on the Foreign Enlistment Bill in 1819, and on the motion for the repeal of that law in 1823. He never put it as a boon to Spain; the law was wrung from him by a sense of duty, that the nation might fulfil obligations independently incumbent on her, while his keen sympathy was with the cause of the American colonies, to whose case it was first to apply. We have already seen how carefully the preamble appealed to the same argument, to justify a measure which would otherwise have been too alien to the principles of liberty to receive a moment's consideration from any government we have had since the revolution; and Mr. Canning's own words were these:—

"I do not now pretend to argue in favour of a system of neutrality; but it being declared that we intend to remain neutral, I call upon the House to abide by that declaration, so long as it shall remain unaltered. No matter what ulterior course we may be inclined to adopt; no matter whether, at some ulterior period, the honour and the interests of this country may force us into a war; still, while we declare ourselves neutral, let us avoid passing the strict line of demarcation. When war comes, if come it must, let us enter into it with all the spirit and energy which become us as a great and independent nation. That period, however, I do not wish to anticipate, much less desire to hasten. If a war must come, let it come in the shape of satisfaction to be demanded for injuries, of rights to be asserted, of interests to be protected, of treaties to be fulfilled. But, in God's name let it not come in the paltry, pettifogging way of fitting out ships in our harbours to cruise for gain.

"At all events, let the country disdain to be sneaked into a war. Let us abide strictly by our neutrality as long as we mean to adhere to it, and, by so doing, we shall, in the event of any necessity of abandoning that system, be the better able to enter with effect upon any other course which the policy of this country may require."*

This was the language of an English statesman, when the struggles were scarcely closed which had made international topics as popular in England as those of free trade have since become. The spirit in which the legislation of that day will now be enforced is a test of the temper which a long peace, at least with all our ancient and most dreaded foes, has engendered. We are bound to say, that there is at present no cause to be dissatisfied with that spirit, seeing the activity which, during the last few weeks, has been shown in detaining gunboats reasonably suspected of being built in contravention of the law. That a most unfortunate slip was made in the case of the *Alabama*, is widely admitted by well informed persons whose speech is not moulded to official accents. But if men in official positions will persevere in falsifying public doctrines in order to cover the consequences of that slip, they must not be allowed to do so without a protest, more especially in these days, in which the study of state papers and parliamentary discussions, as containing the elements of international law, has been so largely developed.

The old furniture of that science consisted mainly in compilations of treaties and the opinions of those who are called jurists, whence the curious result followed, that a writer, while a theorist to his contemporaries, became, almost by the mere fact that he had written, an authority to his successors. This procedure was justified by the plea of collecting testimonies to the consent of mankind, who, or at least the thinking portion of them were supposed to be governed on the whole by reason. But the criticism of the nineteenth century has detected philosophical partisanship and national prejudice even among the most respected of the elder jurists, and its prolific authorship has farther diminished the authority of writers by increasing the numbers who claim to share it; and since, in truth, it is rather the consent of nations, than of men as individuals, which must decide, there is a still deeper reason why the utterances of private writers, no matter what their wisdom or their fame, cannot be reckoned with those of the statesmen who are specially deputed to manage this portion of the affairs of their respective countries. Especially since the close of the last general war, the cheapness of printing, and modern habits of publicity, have furnished large material for the kind of research which thus begins to distinguish international jurisprudence. Numerous cases which are made the subject of diplomatic correspondence, or of debates in public assemblies, but which neither give rise to treaties, nor would have become known in any authentic fashion to the writers of a century ago, are now recorded in the accumulating mass of published state papers. They illustrate international law in its daily working, as the laws of the land are illustrated by the experience of life, and supply that familiar knowledge of the matter with which its rules are concerned, without which he who should address himself to its more difficult questions would resemble a hermit brought from his desert into a strange city, to plead with book-learning a cause that turned on the manners of the place.

Nor need modern statesmen, as a class, fear the results of this publicity. They are not more warped by national interests and antipathies than the private writers of previous ages, who, moreover, were often put forward by their governments as unavowed and irresponsible champions. But as statesmen must now write and speak under a sense that they are furnishing quotations to generations of publicists yet unborn, so those who devote themselves to that line of research must be impartial, and as little connive at error as they would aid in propagating it. Their rule must be that of Dante:—

* Letter to Mr. Adams, of January 24, 1863.

* Canning's Speeches, vol. v., pp. 41—2; 8 Hansard, N.S., 1867.

"Ma per trattar del ben ch'ivi trovai,
Dirò dell' altre cose ch'io v'ho scorte."

We therefore point out for animadversion the attempt of Earl Russell to treat the case of the *Alabama* as analogous to "the accidental evasion of a municipal law of the United States by a particular ship;"* and the double error of the Solicitor-General, in saying that "the Foreign Enlistment Act was passed for the defence of our neutrality against any invasion of it by other powers, and not in consequence of any obligation imposed on us;" and in representing the case of the Alabama as one simply of the sale of an instrument of war. The latter assumption runs through his whole speech, and comes to the the surface in passages too numerous to cite, but of which the following may be taken as a sample:—"In the present instance, the sale of a vessel of war is an offence purely because our own law has declared it to be so." In fact, he altogether ignores the question of the hostile use of neutral territory, as the starting point of expeditions, and the base of their operations. So complete a preterition of a point often and clearly put by Mr. Adams, by an advocate whose intelligence never misses the force of an argument, and whose subtlety we never before knew at fault for an answer, is the highest testimony which we could have imagined to the strength of his adversary's case.

"It is clear," said Mr. Adams, in his letter to Earl Russell of November 20, 1862, "that the reciprocation of such practices could only lead in the end to the utter subversion of all security to private property upon the ocean. In the case of countries geographically approximated to one another, the preservation of peace between them for any length of time would be rendered by it almost impossible. *It would be, in short, permitting any or all irresponsible parties to prepare and fit out, in any country, just what armed enterprises against the property of their neighbours they might think fit to devise,* without the possibility of recovering a control over their acts the moment after they might succeed in escaping from the particular local jurisdiction into the high seas."

And again, in his letter to the same minister of December 30, 1862:—

"The only allegation which I find in your lordship's note in connexion with the United States is this, that vast supplies of arms and warlike stores have been purchased in this country, and have been shipped from British ports to New York for the use of the United States government. Admitting this statement to be true to its full extent, conceding even the propriety of the application of the term 'vast' to any purchases that have been made for the United States, the whole of it amounts to this, and no more, that arms and warlike stores have been purchased of British subjects by the agents of the government of the United States. It nowhere appears that the action of the British went further than simply to sell their goods for cash. *There has been no attempt whatever to embark in a single undertaking for the assistance of the United States in the war they are carrying on;* no ships of any kind have been constructed or equipped by her Majesty's subjects for the purpose of sustaining their cause, either by lawful or unlawful means, nor a shilling of money, so far as I know, expended with the intent to turn the scale in their favour. Whatever transactions may have taken place have been carried on in the ordinary mode of bargain and sale, without regard to any other consideration than the mere profits of trade. * * * My present object in referring so much at large to these offences is to show the great injustice of your lordship in proceeding to comment upon the action of the respective belligerents as if there was a semblance of similarity between them. So far as the United States are shown to be involved in censure, it is simply by the purchase and export of arms and munitions of war from a neutral—an act which your lordship expressly points out eminent authority to my attention to prove implies no censurable act on either party; whilst, on the other hand, it is American insurgents who find British allies to build, in this kingdom, and to equip and send forth war-ships to depredate on the commerce of a friendly nation. * * * * Surely this is a difference not unworthy of your lordship's deliberate observation."

This was no novel line of argument, and Earl Russell admitted its force. In his letter to Mr. Adams of January 24, 1863, after repeating the attempt to prove that the government had acted with sufficient promptitude, his lordship proceeds thus:—

"As to other points we are nearly agreed, so far as the law of nations is concerned. But with respect to the statement in your letter that large supplies of various kinds have been sent from this country by private speculators for the use of the Confederates, I have to observe that that statement is only a repetition, in detail, of a part of the assertion made in my previous letter of the 19th ultimo, that both parties in the civil war have, to the extent of their wants and means, induced British subjects to violate the Queen's proclamation of the 13th of May, 1861, which forbids her subjects from affording such supplies to either party. It is no doubt true that a neutral may furnish, as a matter of trade, supplies of arms and warlike stores impartially to both belligerents in a war, and it was not on the ground that such acts were at variance with the law of nations that the remark was made in the former note. But the Queen having issued a proclamation forbidding her subjects to afford such supplies to either party in the civil war, her Majesty's government are entitled to complain of both parties for having induced her Majesty's subjects to violate that proclamation; and their complaint applies most to the government of the United States, because it is by that government that by far the greatest amount of supplies have been ordered and procured."

It is rather strong, because a belligerent does not close his ports against contraband, to refuse to him the common duties of neutrality. And we find it hard to follow Lord Russell's reasoning about the Queen's proclamation. We have always understood that the sovereign of this realm can make nothing illegal by proclamation. So far, then, as the supply of arms and warlike stores to belligerents is not at variance either with the law of nations or with the statute law of England, a proclamation forbidding it must be a nullity; and it is not respectful to the sovereign to interpret in such a sense any proclamation which may have been issued. If, therefore, his lordship is not devoted to the theory of passive contraband—and the correspondence in this case sufficiently proves that he is not guilty of that heresy—we submit that he ought not to have expounded the Queen's proclamation as forbidding the sale of arms and warlike stores within the limits of her Majesty's dominions.* It was a desperate effort to cover, by recrimination, an unlucky practical slip, and we are happy to think that it does not interfere with the value of his lordship's recognition of the difference between common purchases in the markets of the world and the hostile use of neutral territory. We therefore leave this case with the confident

* Letter to Mr. Adams, of December 19, 1862, in Correspondence respecting the *Alabama*.

* The truth about the proclamation is simply this: it commands the Queen's subjects in general terms to observe a strict neutrality, and to abstain from violating either the law of the realm or that of nations; and it warns them of the consequences of certain specified acts, of which the carriage of contraband, but not its sale, is one. This is not what any one would understand from such an account of the proclamation as is given in Lord Russell's statement, that it "forbids the affording supplies." But let the expression pass. In substance, if his lordship refuses to the carriage of contraband, the result is that, since no belligerent can really be expected to close his ports against that kind of commerce at the moment when he most needs it, any power may free itself from the obligations of neutrality by warning its subjects against the penal consequences of carrying contraband. And if his lordship refers to the sale, then his statement that the proclamation forbids it must rest on the assumption that it is either a violation of neutrality, or of the law of England, or of the law of nations, every one of which things his lordship says repeatedly in this correspondence that it is not. We do not, therefore, positively insist on the suggestion as the text of a disrespectful interpretation of the Queen's proclamation. A theory at least equally plausible is that no intelligible interpretation at all is put on it in that memorable part of the correspondence which begins with the sentence—"With regard to the claim for compensation now put forward by the United States' government, it is, I regret to say, notorious that the Queen's proclamation of the 13th of May, 1861, enjoining neutrality in the unfortunate civil contest in North America, has in several instances been practically set at nought by parties in this country."—*Earl Russell's letter to Mr. Adams of December 19, 1862.*

belief that, memorable as it will remain among the precedents of international law, the sophistry which has been expended on it will not weaken any principle of that important science. —*Law Magazine and Law Review.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 178).

In case of the separation of a junior county from a union of counties, or the proceedings of any of the Division Courts of a senior county be transferred to any other Division Court, upon the order of the Judge, the clerks, or other officers of the courts, who hold writs or court documents, are required to deliver the same to such person as the Judge directs; and in case of refusal to do so, the clerk or officer in default is liable to be prosecuted in the same manner as persons wrongfully holding papers, may be proceeded against under section forty eight (sec. 12).

BAILIFF'S DUTIES.

As in the case of clerks, the details of a bailiffs' duty in respect to proceedings in the courts, will be fully treated of hereafter. The duties, generally, of bailiffs, are purely ministerial, and are to serve and execute all summonses, orders, warrants, and precepts delivered to them by the clerk for execution, whether bailiffs of the court out of which the same issue or not, and so soon as served, to return to the clerk of their own court (sec. 79). They may take confessions or acknowledgements of debt from any debtor or defendant desirous of executing the same (sec. 117). They must attend the sittings of the court, and see that order is preserved thereat; and every bailiff is required to exercise the authority of a constable during the actual holding of the court of which he is bailiff, with full power to prevent breaches of the peace, riots, or disturbances, not only in the court room or building in which the court is held, but in the public streets, squares, or other places within hearing of the court, and may, with or without warrant, arrest offenders, and bring them, for punishment, before a Justice of the Peace, or any other judicial officer having power to proceed in the matter (sec. 183).

In case the bailiff be assaulted while in the execution of any part of his duty, or any rescue be made or attempted of any property seized by him, under process of the court, he is authorised to take the offender into custody, with or without warrant, and bring him, for punishment, before the court, if sitting, or before a Justice of the Peace (sec. 184).

The general rules make specific provision in relation to the execution of process.

By the 11th Rule, a return must be made by the bailiff, to the clerk, of all summonses from the home court four days before the court day, at which they are returnable; and the returns must state the mode of service; and if a summons has not been served, the reason of non-service must be stated in writing, on the back thereof. Return of foreign summonses—that is, summonses from other courts—ought to be made immediately after service is effected, to allow time for their transmission to the court from which they issued.

Rule 21 is as follows:—"Where summons or other "process is required to be served out of the division of the "court, from which the same issues, the papers may be "transmitted by mail by the clerk issuing the same, (on "receiving the necessary postage and fees) to the clerk of "the division where the same is required to be served; and "such last mentioned clerk shall forthwith deliver such "summons or other process to the bailiff of his division, to "be executed; and such bailiff shall serve the same, and "forthwith make return thereof to the clerk of his court, in "the manner required by the eleventh rule; and such last "mentioned clerk, on return made, shall forthwith transmit "the papers by mail, with the necessary affidavits of service, "if effected, to the first-mentioned clerk."

In respect to executions, Rule 12 provides, that "Every bailiff levying and receiving any money by virtue of "any process, shall, within three days after the receipt "thereof, pay over or transmit the same to the proper "officer; and at every court, and at such other times as the "Judge shall require, the bailiff shall deliver to the clerk "of the court a statement or return, on oath, pursuant to "the form in the schedule, of what shall have been done "since his last return, under every warrant, precept, and "writ of execution, which he shall have been required to "execute."

This return must show the number and style of the cause—the nature of the process, and when received—the amount to be made—the amount levied, and when levied—the bailiff's charges—the amount paid to the clerk, and the time of payment.

To insure punctual discharge of this branch of the officer's duties, sec. 53 of the Act provides that if the bailiff neglects to return any process or execution within the time required by law—and the rules which have the force of law show when returns are to be made—he shall, for each such neglect, forfeit his fees thereon, which fees

the clerk must account for, and pay over to the county attorney of the county towards the fee fund; and by sec. 148 a bailiff neglecting to return an execution within three days after the return day thereof, or making a false return, may be held accountable for the whole amount of the execution.

It may be noticed, here, that a bailiff is not *required* to travel beyond the limits of his division, and is not allowed mileage for travel beyond the limits of the county (sec. 79).

UPPER CANADA REPORTS.

COURT OF ERROR AND APPEAL.

ON AN APPEAL FROM THE COURT OF QUEEN'S BENCH.

(*Reported by* ALEXANDER GRANT, Esq., *Barrister-at-Law.*)

[Before the Hon. ARCHIBALD MCLEAN, Chief Justice; The Hon. P. M. VANKOUGHNET, Chancellor; the Hon. W. H. DRAPER, C.B., Chief Justice (Common Pleas); the Hon. Vice-Chancellor ESTEN; the Hon. Vice-Chancellor SPRAGGE; the Hon. Mr Justice HAGARTY,*; and the Hon. Mr. Justice MORRISON.]

SEXTON v. PAXTON.

Ejectment—Question of Boundary—Costs.

Held, per Curiam.—Affirming the judgment of the Court below, that in an action of ejectment, the question of boundary may be tried to ascertain whether the land in question formed part of the lot claimed by the plaintiff. [DRAPER, C. J., and MORRISON, J., dissenting.]

Where the Court of Queen's Bench and Common Pleas had given opposing judgments on the same question, this Court, on affirming one of those judgments, dismissed the appeal without costs.

From the pleadings and evidence it appeared that the appellant brought ejectment in the Court of Queen's Bench, to recover from the respondent seven acres, two roods, and twenty perches of land, being a portion of lot ten, in the twelfth concession of the township of Scugog, formerly Cartwright, and which piece of land may be better known as follows: commencing at a post planted by W. E. Yarnold, P. L. S., on the fifth day of June, one thousand eight hundred and sixty-one, at the north-west angle of said lot, then south sixteen degrees east, thirty-five chains, more or less, to the centre of the concession, then north seventy degrees, east two chains, twenty-five links, to a certain blazed line, thence along the said line north thirteen degrees, west thirty-five chains, more or less, to the rear of the concession, then south seventy-four degrees, west two chains, six links, to the place of beginning.

The respondent appeared and defended for the whole of the said premises.

The appellant claimed title by deed, from the executrix and executors of the last will and testament of John Tucker Williams, the grantee of the Crown.

And the respondent, besides denying the appellant's title, claimed the said parcel of land as part of lot number nine, in the twelfth concession of said township.

The ownership of lots numbers ten and nine, by the appellant and respondent respectively, was admitted at the trial; when His Lordship, Mr. Justice RICHARDS, before whom the trial was had, ruled that a verdict should be entered for the appellant, as he could only be entitled to recover, by his writ of possession, the land if it formed part of lot number ten, which was admitted to be his: and if it was part of lot number nine, the verdict and judgment to be entered thereon would not authorise him to take possession of it, and that an action of ejectment was not the proper form of action to try a question of boundary.

This verdict, the court in banc set aside, on the ground that the respondent ought to have been permitted to shew that the land claimed by the appellant was not part of lot number 10, as reported in the U. C. Q. B. Rep., vol. xxi., p. 389.

From this decision, the plaintiff in the court below appealed on the ground stated by the learned judge, for his ruling at *nisi prius*.

On the appeal coming on,

* Was absent from the Province when judgment was pronounced.

M. C. Cameron, for appellant, referred to *Lund* v. *Savage*. *Lund* v. *Nesbitt*, 12 (C. R. U. C.) 43, and *Irwin* v. *Sager*, 21 U. C. Q. B., 373, as containing all the cases bearing on the question involved in this appeal.

J. Hillyard Cameron, Q. C., contra.

VANKOUGHNET, C.—I agree in the judgment delivered in the Court of Queen's Bench, upon the question submitted to us in this case. I think that the statute 19 Vic., ch. 43, made no change in the office of the action of ejectment; indeed, section 274 of the act expressly preserves the same jurisdiction as was exercised in the old action of ejectment, and such change as is effected in the form of procedure is more favourable to the procuring, by the plaintiff, of the trial of a question of boundary, than was the old process; for, what does the present writ in ejectment enable the plaintiff to do? While it requires him to describe the premises of which he seeks possession with reasonable certainty, it enables him to set them out with great particularity, just as was done in the present case, and to obtain a judgment, which shall declare that the claimant "was, and still is, entitled to the possession of the land within mentioned, as in the writ alleged." So that if, as in the present case, the defendant was not permitted to shew that the portion of land to which plaintiff claims to be entitled, as being part of lot ten, which he owns, is really not part of lot ten, but part of lot nine, then all a plaintiff need do now, in any case in which he seeks to get into possession of another man's land, is to describe it by metes and bounds, as being part of a lot to which he has an indisputable title, and either on production of that title, or because it is not denied, obtain a solemn judgment of the Court, entitling him to possession of the particular premises which he describes in his writ, and under that judgment obtain possession of it, through the process of the Court. Could an action of trespass be afterwards maintained against him or the officer who put him in possession, for the act of taking possession under such authority? *Wilkinson* v. *Kerby*, 15 C. B., 430. In the old action of ejectment, every thing was at large, unless the defendant chose to confine the dispute to certain described premises. The plaintiff had no object in narrowing them in his declaration, (though he might have done so, and have thereby directly presented a question involving boundary), and when the matter was left at large by the defendant, and the plaintiff showed title to any portion of the land covered by his declaration, he obtained a verdict, and took possession, at his peril, of more than his title covered. But, here the plaintiff, by his writ, challenges enquiry into his title to, and right to possession of the piece of land particularly set out, by reason of his being owner of lot ten, and of this piece of land forming part of it—a double proposition, which, it seems to me, the defendant is invited to combat. Under the statute it is expressly provided that at the trial it shall be a question whether the "Claimants are entitled to the whole or part, and if to part, then, to which part of the property in question?" and judgment is to be entered accordingly. How can this be done without trying the question of boundary? An action of ejectment is essentially a possessary action. Whatever a plaintiff's title may be, if he has not a right to the possession of the land at the time of action brought, he cannot recover. It is known as an action of trespass and ejectment. Indeed, the ouster, the act of trespass was the very foundation of the old form of action; and whereas a simple action of trespass, which can be supported by precisely the same evidence of title, would only give damages—an action of trespass and ejectment would give damages (in modern times only nominal, it is true,) and possession also. The action of ejectment was, as we all know, a fictitious proceeding, invented for the relief of termors who had been ousted of their possession; and originally questions of freehold title were not raised in it, but were left to be dealt with in real actions. In time, however, while the form of claiming by virtue of a term continued to be presumed, titles of landlords to the fee, came to be asserted in it. I have alluded to so much of the origin and early character of the action to shew that it was not originally intended as a means whereby titles to freehold should be tried. And yet, as I understand, it is now contended that nothing but a title can be tried in the action, and that you cannot in it enquire whether the title produced does, or does not, fit the particular piece of land in question. However rare may have been in England the instances in which a dispute as to boundary has been waged by means of this action, it is beyond doubt that such

an use of it has been made in this country for a long period of years, and for this no higher authority can be found than the judgment of that great and lamented judge, the late Chief Justice of the Queen's Bench, as reported in *Irving* v. *Sager*, 21 Q. B. 373. I need do no more on this head than refer to that report. We must take the Legislature to have known what was the law and practice of the courts, when they framed section 274 of the act already mentioned, and to have referred to our own courts, and the jurisdiction which had been exercised by them; and this, of itself, seems to me to settle the question. That ejectment is an inconvenient mode of trying such a question, and is, therefore, seldom, for that purpose, used in England, I admit, as it is not conclusive; but the same objection exists to trying a title in this form of action. A judgment in it is no more conclusive in the one case than in the other; and yet, there must be something tried in the action. Its principal object is to get possession of a particular parcel of land; and the plaintiff must either be compelled to adopt a less precise mode of description than he has done here—as, for instance, by claiming merely lot 10—to which claim no defence would have been made; or the defendant must, in justice, be allowed to shew, by any means he can, that the plaintiff is not entitled to the possession of the parcel described. To deny him this right would be to place him at the mercy of the plaintiff, and probably to allow the latter, by a fraud and an untruth, upheld by the process of the Court, to get his neighbour's property. It is not sufficient satisfaction to a defendant who has had his hands tied while this wrong is being committed on him, and he has, perhaps, been turned out of his dwelling house, to know that, in six months time, he can get into it again by, first, an action of trespass, to settle a question of boundary, which the plaintiff has, perhaps, improperly raised for his own purposes; and then, by an action of ejectment—or, by the latter action alone—inasmuch as the action, at the suit of the plaintiff, is not conclusive on the right. I think the Legislature, when they enacted "that the question at the trial shall be, whether the *statement* in the writ of the title of the claimant is true or false," meant something more than the mere enquiry into a title to lot 10, for instance, as in this case: they meant the enquiry to extend to the plaintiff's whole statement; and part of that statement here is a claim to a piece of land as being part of lot 10, and this, and only this, the defendant denies; and it is, therefore, the only question between the parties.

Draper, C. J.—I adhere to the judgment of the Court of Common Pleas in *Lund* v. *Savage* and *Lund* v. *Nesbitt*. The reasons for that judgment are fully expressed in the report in 12 C. P. U. C. 143. I need not here repeat them, for I have only to say that, in my humble opinion, they have, as yet, received no answer. There were but two substantial difficulties in that case: one arising from the enactment respecting improvements made by parties on land not their own, though believed to be so in consequence of unskilful surveys; the other arising from the practice which obtained in this Province, under the old form of the action of ejectment.

The first was, as I think, successfully dealt with in the judgment referred to. The difficulty was more easy to be got over, in the opinion of the Court, than those which the construction contended for under the Common Law Procedure Act, gave rise to. The latter was not considered by any of the Court of the importance which has been given to it.

So long as the action of ejectment was fictitious—moulded and governed by rules of Court—it was open to the power which created, to modify its own work. In Upper Canada, however, the deviation from the ordinary consent rule, which was without precedent or authority in English cases, seems to have introduced, without the sanction of the Court, in the first, though it was subsequently adopted and acted on. But I believe I am right in stating that there never was a general rule of Court introducing or sanctioning the innovation by which, when a plaintiff declared in ejectment for (*ex. gr.*) No. 1, in the 1st Con., the defendant in the consent rule could not, admitting possession as the general rule required, state that he was in possession of a specified piece of land which he claimed and defended for as part of No. 2. From the time this change was established, it became, practically, the rule to make the question of title entirely subservient and secondary to the question of boundary; and the practice so established, had its advantages for surveyors and for attornies, and for those suitors who did not count the cost of litigation, however often renewed. I repeat, however, that for this practice, neither reported cases of English Courts, nor text books of English writers, affords either precedent or authority.

And this practice was unchallenged until after the passing of our Common Law Procedure Act. Not that the objectionable results of it were undiscovered or unfelt, but from a deference to the authority which permitted it to grow up, and finally had recognised and sustained it.

With an exception, which I will presently notice, our Common Law Procedure Act of 1856, was, as to the ordinary action of ejectment, a transcript of the English statute. That an act of our Legislature, identical or nearly so in language with the English act, should mean the same thing, and should receive the same construction, is, I humbly submit, a reasonable expectation, more especially when we draw upon English authority, as upon the fountain from which our jurisprudence is derived. If the effect of the plain language of the act is to alter the practice and proceeding which was previously in use, then, we are bound by the expression of Legislative will, and no argument can be solidly based upon previous practice. The Courts may sanction a departure from their own rules, or an addition to what such rules prescribe, but the Courts have no power to add to or vary an act of Parliament; nor to add to the simple appearance which the statute directs; qualifying or varying matter, tending to raise a different question from that which the statute directs, namely, whether the statement in the writ of the title of the claimant be true or false. It is admitted that if the claimant proves title to a single inch of that which *he claims* in his writ, he must recover; that admission appears to me fatal to the contention that defendant can add anything to his appearance except the notice that he defends for part only, which is to form part of the issue to be tried. Up to this time I have not doubted that an appearance which contained additional matter was irregular, because, all the statute authorizes is, that the defendant may appear as he may in any other action: it goes no further, and impliedly, at least, prohibits more.

The exception I have above adverted to is the requirement that each party shall give to the other notice of the title on which he means to rely at the trial. I have not succeeded in extracting from this enactment any foundation for an opinion that our Legislature intended to depart from the English act, and to sanction mere questions of boundary being tried under the name or colour of disputes of title. That a claimant may so frame his writ of ejectment as to mix, inseparably, the questions of title and boundary, I do not, and did not, in the judgment referred to, deny. But the defendant can always obtain an order for better particulars of the land claimed, and has some authority in one judgment, at least, of the Court of Queen's Bench, for asking that the number of the lot, or other name of it—when it has one derived from public authority—should be given; and if the plaintiff then claims a lot, or part of a lot, to which the defendant has no title, he is under no necessity to defend. He never need be embarrassed by a want of reasonable certainty in the description in the writ, for, if that exists, the statute provides him a remedy; and this affords an answer to any suggestion of unfair advantage that an unscrupulous plaintiff, with the aid of a tricky attorney, might try to obtain.

I will only add that I have endeavoured, but in vain, to discover how the section which provides what the effect of a judgment in ejectment under our statute shall be, can influence a decision as to what it was intended by another section, should be the question raised at the trial.

If, after the most careful and repeated consideration, I felt any doubt as to the opinion I have formed, I would have let this case be disposed of without making an observation. The real doubt which the decision of this Court tends to create in my mind, is my ability to arrive at a right conclusion; and hence, must arise a distrust of my own judgment, embarrassing during the period, be it longer or shorter, during which I may continue in my present vocation. I may be excused from saying that if I stood alone in my opinion, this distrust would have been painfully increased. My opinion is shared by three of the present Judges of the Courts of Common Law. I submit, as in duty bound, to the authority of this tribunal, but I have not been able to add conviction to submission.

Esten, V. C.—I think the judgment should be affirmed with costs.

It appears that a practice had grown up in this country of trying questions of boundary by means of an action of ejectment. I think the late act makes no difference in this respect. By the 21st section, I consider that the writ and notices annexed to it are incorporated for the purpose of affording a statement of the plaintiff's title: and the question to be determined, at the trial is, whether their statement is or not true. In the present instance, if we take the writ and the notices together, we shall see that the plaintiff shews a title, by his notice, only to lot 10; but not at all to the piece of land in dispute: by his writ, however, he shews a title to that as part of lot 10; and the title, as claimed, is composed of a right to lot 10, and a right to the piece of land in dispute as part of that lot; and the question to be determined at the trial was whether that claim was or not true. The plaintiff, who did not simply claim lot 10, has, by the form of his claim, raised a question of boundary, and the defendant, only meeting him on his own ground, ought, I think, to have been allowed to prove his case.

Spragge, V. C., concurred in the opinion delivered by V. C. Esten.

Morrison, J., agreed with the views expressed by His Lordship the Chief Justice of the Common Pleas.

McLean, C. J., suggested that as the courts below had come to different conclusions on the same question, it was a proper case in which to dismiss the appeal without costs, although on dismissing appeals the practice was almost uniform to give to the successful party, his costs of the appeal.

Per Curiam.—Appeal dismissed without costs. [Draper, C. J., and Morrison, J., dissenting.]

Richards, J., who was present when judgment was delivered, stated that having been absent on the argument of the appeal, he could not give any judgment. At the same time stating that subsequent consideration of the point had failed to change his views, and that he adhered to the opinion delivered by him in the cases referred to by his Lordship, the Chief Justice of the Common Pleas.

COMMON PLEAS.

(*Reported by* E. C. Jones, *Barrister-at-Law, Reporter to the Court.*)

Crawford v. Beard et al.

Contract—To pay money in Cleveland—Payment into court—Payment in Canada funds—Pleading.

The declaration claimed a sum of money upon the common counts. The defendants pleaded as to goods sold and delivered, a contract entered into for the purchase of 724 tons of coal at $2.75 per ton, that the amount due thereon, $1991, was payable to plaintiff at Cleveland; also another quantity of 284 tons, payable in $804 of current money of Canada; and as to the money due in Cleveland they bring into court $1314.06 of lawful money of Canada, and say the same is sufficient to satisfy the plaintiff's claim.

To this the plaintiff demurred, because the plea admitted a cause of action for a certain sum, and pleaded payment of a smaller sum in satisfaction. *Held*, that upon this plea the only question was whether the sum paid into court was equal in value to the amount admitted to be due the plaintiff, which, being a matter of fact to be tried by a jury, the defendants were entitled to judgment.

(C. P., H. T., 26 Vic., 1863.)

Declaration for goods sold and delivered; goods bargained and sold; money lent; money paid; money received; interest and account stated.

Plea.—Except as to the claim for goods sold and delivered and for interest—never indebted, and as to the claim for goods sold and delivered and for interest—that the said goods were a quantity, to wit, 724 tons of coal, sold and delivered to defendants under a contract to deliver and accept the same at Cleveland in the United States of America, and defendants agreed to pay and plaintiffs to accept for said coal, two dollars and seventy-five cents per ton. That $1991 was the amount so payable for the 724 tons, which amount was to be paid to plaintiff at Cleveland in the said United States. And also another quantity, to wit, 284 tons of coal, which was sold and delivered by virtue of another contract, to be delivered and accepted at Cleveland aforesaid, and plaintiff agreed to accept, and defendants agreed to pay, $804, of lawful money of Canada, for the last mentioned coal. That the interest mentioned in the declaration is the interest on the said sums of $1991 and $804, and amounts to $42 05. And so the defendants say that except as to the sum of $1991 of lawful currency of the United States of America, which said sum of $1991 of lawful currency of the United States of America is equal in value to $1314.06 of lawful money of Canada, and the said sum of $804 of lawful money of Canada, and the said sum of $40 of lawful money of Canada, making in all the sum of $2152 of lawful money of Canada, they were never indebted, and they bring into court $2158.06, and say the same is enough to satisfy the plaintiff's claim.

Demurrer to this plea, because it admits the plaintiff's cause of action to a certain amount, and shews no answer except bringing into court a much smaller sum in discharge thereof.

Eccles, Q. C., supported the demurrer.

Anderson and *Crombie*, contra, referred to *Eakins* v. *East India Co.*, 1 P. W. 396.

Draper, C. J.—Whether the sum of $1991 of lawful currency of the United States of America is equal in value to $1314 06 of lawful money of Canada and no more, as the plea affirms, is a question of fact and not of law. It is true each sum of money is expressed in dollars, but unless we can judicially notice the value of a dollar in the United States, we can neither say that the plea is good as a matter of fact, if its truth be denied nor that it is bad, because the sum brought into court is less than the sum in answer to which it is pleaded. We know that a dollar of lawful money of Canada is to be held to be equivalent to and to represent ¼ of 101-821-1000, grains troy weight of gold of the standard of fineness prescribed by law for the gold coins of the United Kingdom, on the 1st of August, 1854. We know also that the gold eagle of the United States, coined before the 1st of July, 1834, and of a certain weight, is a legal tender in this province for $10 662-3-100, and that the gold eagle of the United States, coined after that date and before the 1st of January, 1852, or after that day, but while the standard of fineness for gold coins then fixed by the laws of the United States remains unchanged, is a legal tender in this province for $10, but it does not follow that, at the time the payment to be made under the contract pleaded fell due, or at the time of plea pleaded the dollar in the United States and the dollar in Canada were of the same value. The similarity of the name of the coin affords no criterion of identity of actual or of current value. The English shilling and the Irish shilling were formerly of different values, and the shilling of Halifax currency and that of New York currency were similar only in name, and whatever the par of exchange between the two countries may be, the rate of exchange may be wholly different, and would, if different, affect the amount in our money necessary to pay a similar nominal amount in the United States.

Looking at the whole plea, it appears to me substantially to aver that the value of the money brought into court is equal in value to the amount admitted to be due to the plaintiff; whether it is or not, is, I think, clearly a question of fact, and therefore the defendant must have judgment on this demurrer.

It is not improbable from what fell during the argument, that there is a confusion of ideas, between a money payment and a payment in notes or bills of some sort, which are of much less current value than money. The demurrer presents no such question, and the contract is stated to be that defendant should pay $2.75 for each ton of coal at Cleveland in the United States. *Primâ facie* this imports a payment in money and not in some substitute for, or representative of, money.

Per cur.—Judgment for defendants.

Hamilton et al v. Holcomb.

Judgment—Power of attorney—Assignment for benefit of creditors—Execution of, under power of attorney.

The plaintiffs in this action executed a power of attorney authorising one J. H. to take such proceedings as he should think proper to secure, or for the recovery of a judgment, and to accept any security for the whole or any part of the same, and upon such terms as should seem meet, and to give time for payment and to execute, and do all agreements, deeds, matters and things that might be expedient or necessary in the premises.

Under this power of attorney J. H. executed a deed of assignment dated the 20th of July, 1858, which contained a releasing clause from all those creditors who should execute the same.

This action was brought to recover the amount of this judgment, to which the defendants pleaded the release executed under the above power of attorney.

Held, that by the power of attorney no authority was given to the attorney to compromise or accept a part in satisfaction of the whole, the general words therein applying only to what immediately precede them, that is, the accepting of security, and the giving of time. And therefore the defendants were not released.

In Gray's Law of Costs, 371, "costs of the day" are said to be such costs which have been incurred by the party in preparing to try the cause according to notice as are thrown away and must be incurred over again for the purpose of a trial at a future time.

It has been the invariable rule of practice in this province that "costs of the day are all such costs which have been incurred by the party in preparing to try according to notice, as are thrown away and must be incurred over again for the purpose of a trial;" and to treat those costs which a party is entitled to where his opponent does not proceed to trial pursuant to notice as the costs of the day. These two expressions mean the same thing, and I do not think we are at all affected by the niceties that may exist in England about town causes and others, and whether tried at the sittings in term or out of term or at the assizes.

It is true by our C. L. P. Act, sections 205, 226, and 227, a distinction is made between town and country causes, but that is for the mere purpose of providing for the extra assize which takes place in the city of Toronto and in York and Peel.

The course of proceeding at the trial is stated to be as follows, in the 11th Edition of Archbold's Practice, 381: "The attorneys for the plaintiff and defendant should take care to be in court with their evidence and witnesses in readiness when the cause is called on; otherwise, if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be nonsuited; or if the defendant's attorney and witnesses be not in attendance, the plaintiff may proceed in their absence. If neither party be present when the cause is called on it will be struck out of the list."

The question which arises in this case is whether, when the defendant's counsel is present and ready to proceed, but the plaintiff's counsel is not present, the defendant's counsel must have a jury sworn and the plaintiff called and nonsuited to entitle him to costs, or whether he may get the costs of the day for not proceeding to trial pursuant to notice if in such a case the cause is struck out of the list.

No doubt, if the plaintiff give notice of trial and do not countermand or enter the record, or even if he enter his record but afterwards withdraw it, the defendant may get the costs of the day; but can the defendant get the costs of the day in any case when the cause is struck out of the list, the plaintiff not being present, and he, the defendant, although present, not asking for a nonsuit?

In *Warne* v. *Hill*, (7 C. B. N. S. 726, 6 Jur. N. S. 959,) it is said by Williams, J., that if the defendant is present and the plaintiff is not, he may pursue one of two courses—either he may get the cause struck out and then come to the court and ask for costs of the day, or he may insist upon a nonsuit; and *Allott* v. *Bearcroft* (4 D. & L. 327,) is referred to as laying down the rule as above stated.

In *Morgan* v. *Fernyhaugh*, (11 Exch. 205,) it was held that a defendant is not entitled to costs of the day for the plaintiff not proceeding to trial pursuant to notice, where no one appeared on the defendant's behalf at the trial when the cause was struck out. It is not quite easy to make out from the case whether the court in their further observations mean that even if the defendant had been present he could not have claimed the costs of the day when the cause was struck out, because his proper course was to have the plaintiff nonsuited, or what else is meant, for the Chief Baron says: "If the defendant had been present at the trial, the costs he now seeks to recover would not have been thrown away." That is, a nonsuit would have ended the suit entirely, whereas, after the costs of the day are paid, the defendant may again take the plaintiff down to trial, and nonsuit him, which is going over a part of the same proceedings again, which have been already paid for, to gain the same end, namely, a nonsuit, which might have been had upon the first occasion.

There can be no question but that formerly the defendant might have got a rule for costs of the day for one default, and judgment as in the case of a nonsuit for a subsequent default. *Clarke* v. *Simpson*, (4 Taunt. 591;) *Dyke* v. *Edwards*, (2 Dowl. P. C. 53.) But in *Leech* v. *Gibson*, (10 Weekly Reporter, 354,) it is expressly decided that if a defendant be in court, and the plaintiff be not ready to try, the defendant must insist upon a nonsuit, if he desire to get the costs for not going to trial; and if he do not take this course, but the cause is struck out by the judge, he cannot then have the costs of the day. The plaintiff applied to set aside the rule of the defendant, directing the plaintiff to pay the costs of the day. The cause was entered for trial at Liverpool. The plaintiff's attorney had not delivered any brief, nor was he in court with his witnesses when the cause was called on. The defendant's affidavits shewed that the defendant's counsel was present, and said he was ready when the cause was called, and that he had his witnesses also present. The defendant's counsel did not apply for a nonsuit, and the cause was simply struck out. "*Brett, Q. C.*, for the defendant showed cause. A defendant is not bound to ask for a nonsuit. [Wilde, B.—But if he does not do so, can he have the costs?] The costs of the day, which are quite different from the costs of a nonsuit. [Wilde, B.—But if he waives the costs to which he is entitled, can he have other and different costs, to which, by the practice, he is not entitled?] The cause was struck out. [Channell, B.—If the defendant does not apply for a nonsuit it is the act of the court to strike out the cause.] [Bramwell, B.—There is the side-bar rule for costs for not proceeding to trial. The plaintiff did not proceed to trial. It might be said, perhaps, in your favour, that a defendant is not only not bound to ask for a nonsuit, but may prefer that the plaintiff should not be nonsuited, because that allows him to sue again, and the defendant may desire not to have another action. Now the plaintiff, if there is no nonsuit must either go on with the same action, or give up his action altogether; and the defendant may say, 'I do not wish to help him to put an end to this action, and so leave him to bring another: I wish to have the action put an end to at once.'] Just so. [Bramwell, B.—Only that tends to shew that your proper course was to take out a rule for costs for not proceeding to trial.] [Pollock, C.B.—As you did not apply for any thing, it was as though you had not appeared at all at the trial.] It has never been so held. [Pollock, C. B.—The contrary has never been held.] Perhaps not, but if it is so held now, it will come to this, that a defendant must always *insist* upon a nonsuit. The effect will be to increase the expense of litigation. [Wilde, B.—There is good sense in that argument, no doubt. * * Suppose you had applied to me for costs of the day, could I have given them?] Yes. [Wilde, B.—The plaintiff not being there? Surely not.] [Channell, B.—It has been held that the plaintiff cannot be nonsuited if the defendant is not present to have the cause called, and the jury sworn.—*Morgan* v. *Fernyhaugh*, 1 Jur. N.S. 688.] There the defendant was in default. [Wilde, B.—Still the case is, *in principle*, the same as this. The defendant in this case, in effect, did not appear. He did not apply to have the case called on.] * * ["Bramwell, B.—The rule must be absolute to set aside the defendant's side-bar rule for costs of the day. It is not necessary to say anything more than was said in the course of the argument. We abide by the principle then laid down, that the defendant must take the ordinary course of applying for a nonsuit. If the cause is once entered for trial, it may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendant to have it called on for trial, and insist upon a nonsuit. If the defendant does not take that course, he cannot claim the costs of the day. The cases cited on the argument are very nearly in point."

Theoretically, the decision just referred to is the proper one, but this has not been the course of practice in this province. I cannot, however, say that when these defendants' counsel was ready at the trial, and the plaintiff's counsel was not, and the defendants' counsel did not ask for a nonsuit, but the judge struck the cause out of the list, that the master has done wrong in refusing to tax to the defendants their costs for the plaintiff not proceeding to trial pursuant to notice, for, as above stated: "It may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendants to have it called on for trial, and to insist upon a nonsuit."

And it appears to me there is much force in this reasoning, for it was held, while judgment as in the case of a nonsuit could be moved for, that such a motion never could be made when the cause had been once taken down to trial, and made a remanet, or referred to arbitration, &c., for the plaintiff had complied with the statute by having it taken down, and it was for the defendant afterwards to take the record down by proviso.

I must therefore refuse the application, and refer the defendants to the full court, if they shall be so advised to proceed further.

Order refused,

Calder v. Gilbert.

Arbitration—Costs.

A cause was referred at *nisi prius*, and a verdict taken subject to an award. Costs of the cause were to abide the event, and the same power was given to the arbitrators to certify for costs as the judge at the trial would have. The award reduced the verdict to $68, and directed that the defendant should pay the plaintiff's costs of suit according to the scale to be certified by the court of Queen's Bench.

Held, that the arbitrators having express power to certify, and having omitted to do so, a judge in Chambers had no power to order full costs.

[Chambers, June, 1863.]

At *nisi prius* a verdict by consent was taken for the plaintiff, for $414 damages, subject to be increased, reduced, or a verdict entered for defendant, subject to a reference to two persons, and to such third person as they should appoint, to whom all matters in difference in the cause were referred.

The costs of the cause were to abide the event, and the costs of the reference and award to be in the discretion of the arbitrators, and the arbitrators were to have the same power to certify for costs, and amend particulars or pleadings, as a judge at *nisi prius* would have.

The award was that the plaintiff should recover from the defendant $68, in full of his claim, and that the defendant should pay the plaintiff the plaintiff's costs of suit according to the scale to be certified by the Court of Queen's Bench, and should also pay the costs of the reference and award.

Richards, Q. C., now moved for an order upon these papers, and upon affidavits, to the master to tax full costs of suit to the plaintiff.

Adam Wilson, J.—The affidavits shew a case very clearly beyond the jurisdiction of the county court, but the verdict as reduced by the award shews a case within the competency of the division court.

If the costs had been merely to abide the event of the suit, it is likely the cases cited by Mr. Richards, of *Morse* v. *Teetzel*, (1 U. C. P. R. 375,) and *Elmore* v. *Colman*, (4 U. C. O. S. 321,) would have been full authority for granting an order for full costs.

But in this case the arbitrators have the power to certify for costs as a judge at *nisi prius* could have done, and they have not certified, but they have left the scale of costs to be certified by the court.

Now this is the very thing—the scale of costs—they were to have adjudicated upon themselves, for the control of the costs was not submitted to them: they were to abide the event of the award. And how can the court now, when both plaintiff and defendant have by express agreement conferred this power upon the arbitrators, assume to decide this very question at the plaintiff's request, either *ex parte* at his instance, or adversely upon notice to the defendant?

I think this is not a case within the 162nd section of the C. L. P. Act, in which the arbitrator may "state his award as to the whole or any part in the form of a special case for the opinion of the court."

Spain v. *Cadell*, (9 Dowl. P. C. 745,) and the other cases cited in Harrison's C. L. P. Act, 516, &c., clearly shew, I think, that this power was exerciseable by the arbitrators, and that it must be exercised in like manner as the judge would have exercised it, namely, immediately after his decision, by putting it in the award, which precludes the power of a reference by him to the court.

If the arbitrators have power to certify and omit to exercise it, the judge before whom the cause came on for trial cannot grant a certificate, his power being transferred by the submission to the arbitrator.—*Richardson* v. *Kensit*, (6 M. & G. 712.) Where the certificate of the judge may be given at any time, and no power is given to the arbitrator to certify for costs, the judge by whom the cause was referred may certify after the award made.—*Ivey* v. *Young*, (5 Dowl. P. C. 450,) Russell on Awards, 389-90; *Astley* v. *Joy*, (9 A. & E. 702.)

Section 328 of the C. L. P. Act requires this certificate to be given by the judge who tried the cause. His power may be delegated to an arbitrator; then the arbitrator must exercise it. He has not done so. I cannot therefore interfere. It is needless to say whether, if no power had been given to the arbitrator to certify, either a court or a judge could properly interfere. The cases above cited in our own courts shew it might be done, but this case is not such a case as was decided upon on either of these occasions.

I therefore must refuse the order.

Order refused.

Bonser v. Boice.

Overholding tenancy—Con. Stat. U. C., cap. 27, secs. 63, 68—Precept to Sheriff.

Where A. B., having become purchaser at Sheriff's sale, under execution, of C. D.'s interest in a term of years, held under a third party, at a time when C. D. was in possession—afterwards, upon C. D.'s request, allowed him to continue in possession for five days, it was held that there was no privity between the parties, so as to bring the case within the overholding tenancy clauses of the ejectment act; and so, although the jury summoned under the act, found in favor of the claimant, a precept to the Sheriff, to deliver possession pursuant to the finding, was refused.

(Chambers, June, 1863.)

This was an application for a precept to the Sheriff under sec. 68 of the ejectment act, commanding the Sheriff to put a landlord in possession of premises said to be overheld by his tenant.

On a *fi. fa.* goods in a case of *Cleveland* v. *Boice*, the Sheriff of Oxford, on 28th of February, 1863, sold to plaintiff (Bonser) the right of defendant (Boice) to a term of years, ending 1st of March, 1865; and on same day made a deed thereof to Bonser.

On the 18th of March, a writ issued against the defendant as an over-holding tenant; and on 24th of March last an inquisition was had on this writ before the County Judge, and he certified a finding of the jury that Boice was tenant to Bonser for a term expired, and wrongfully refused to go out of possession.

The evidence taken before the jury returned, and was produced on this application.

It was not shewn under whom Boice held, but it was sworn that at or after the sale to Bonser, Boice asked him to leave him in possession till March 5, (five days) to which Bonser assented.

Boice afterwards refused to go out, and on the 7th of March, Bonser demanded possession.

At the taking of the inquisition, *Richardson*, counsel for Boice, objected that there was no evidence of any tenancy between the parties.

Hagarty, J.—I cannot understand on what pretence the overholding tenancy clauses are resorted to to enforce possession in favour of the purchaser, at Sheriff's sale, of a tenant's interest in a term held under some other person. I presume it is urged that, by Boice asking leave to remain for five days, and Bonser assenting, a term was thereby created between them for that period. I cannot agree to this on such evidence as this case presents. I see no privity between the parties, and nothing to bring the case within the statute, and, therefore, refuse the application for a precept to Sheriff to place Bonser in possession.

Order refused.

Hall v. Boulton.

Execution.

Under the old law (before the 20 Vic., ch. 57, sec. 10) it was sufficient to issue a writ of execution within a year from the entry of judgment, and it was unnecessary to return and file it within that time.

[Chambers, June, 1863.]

The defendant obtained a summons calling on the plaintiff to shew cause why the *fi. fa.* herein in this cause should not be set aside, on the ground that the judgment on which it was issued was more than ten years old, and had not been revived; and on the ground that the judgment had been satisfied by agreement and settlement between the parties, and that the execution was issued in breach of the agreement, and contrary to good faith.

The defendant filed an affidavit that the action was commenced in the fall of 1851, and a verdict obtained in October of that year for £30 15s.; that in February following an execution issued, which was in due course retured *nulla bona*; that though eleven years had passed since the entry of judgment, no application or order to revive the same had been made; and that the *fi. fa.* now moved against, and in the hands of the sheriff of the county of Simcoe, was issued and tested on the 30th of December, 1862.

The plaintiff's affidavits stated that the original writ of *fi. fa.* was issued and returned by the sheriff within a year and a day of the entry of the judgment; and that the said writ having been lost, a judge's order was obtained in August, 1862, allowing a duplicate to issue, to which a return was procured, and on such writ and return the present writ was issued. The supposed inability of defendant to meet the demand was alleged as the reason for the long delay.

In Gray's Law of Costs, 371, "costs of the day" are said to be such costs which have been incurred by the party in preparing to try the cause according to notice as are thrown away and must be incurred over again for the purpose of a trial at a future time.

It has been the invariable rule of practice in this province that "costs of the day are all such costs which have been incurred by the party in preparing to try according to notice, as are thrown away and must be incurred over again for the purpose of a trial;" and to treat those costs which a party is entitled to where his opponent does not proceed to trial pursuant to notice as the costs of the day. These two expressions mean the same thing, and I do not think we are at all affected by the niceties that may exist in England about town causes and others, and whether tried at the sittings in term or out of term or at the assizes.

It is true by our C. L. P. Act, sections 205, 226, and 227, a distinction is made between town and country causes, but that is for the mere purpose of providing for the extra assize which takes place in the city of Toronto and in York and Peel.

The course of proceeding at the trial is stated to be as follows, in the 11th Edition of Archbold's Practice, 381: "The attorneys for the plaintiff and defendant should take care to be in court with their evidence and witnesses in readiness when the cause is called on; otherwise, if the plaintiff's attorney and witnesses be not in attendance, the plaintiff will be nonsuited; or if the defendant's attorney and witnesses be not in attendance, the plaintiff may proceed in their absence. If neither party be present when the cause is called on it will be struck out of the list."

The question which arises in this case is whether, when the defendant's counsel is present and ready to proceed, but the plaintiff's counsel is not present, the defendant's counsel must have a jury sworn and the plaintiff called and nonsuited to entitle him to costs, or whether he may get the costs of the day for not proceeding to trial pursuant to notice if in such a case the cause is struck out of the list.

No doubt, if the plaintiff give notice of trial and do not countermand or enter the record, or even if he enter his record but afterwards withdraw it, the defendant may get the costs of the day; but can the defendant get the costs of the day in any case when the cause is struck out of the list, the plaintiff not being present, and he, the defendant, although present, not asking for a nonsuit?

In *Warne* v. *Hill*, (7 C. B. N. S. 726, 6 Jur. N. S. 959,) it is said by Williams, J., that if the defendant is present and the plaintiff is not, he may pursue one of two courses—either he may get the cause struck out and then come to the court and ask for costs of the day, or he may insist upon a nonsuit; and *Allott* v. *Bearcroft* (4 D. & L. 327,) is referred to as laying down the rule as above stated.

In *Morgan* v. *Fernyhaugh*, (11 Exch. 205,) it was held that a defendant is not entitled to costs of the day for the plaintiff not proceeding to trial pursuant to notice, where no one appeared on the defendant's behalf at the trial when the cause was struck out. It is not quite easy to make out from the case whether the court in their further observations mean that even if the defendant had been present he could not have claimed the costs of the day when the cause was struck out, because his proper course was to have the plaintiff nonsuited, or what else is meant, for the Chief Baron says: "If the defendant had been present at the trial, the costs he now seeks to recover would not have been thrown away." That is, a nonsuit would have ended the suit entirely, whereas, after the costs of the day are paid, the defendant may again take the plaintiff down to trial, and nonsuit him, which is going over a part of the same proceedings again, which have been already paid for, to gain the same end, namely, a nonsuit, which might have been had upon the first occasion.

There can be no question but that formerly the defendant might have got a rule for costs of the day for one default, and judgment as in the case of a nonsuit for a subsequent default. *Clarke* v. *Simpson*, (4 Taunt. 591;) *Dyke* v. *Edwards*, (2 Dowl. P. C. 53.) But in *Leech* v. *Gibson*, (10 Weekly Reporter, 354,) it is expressly decided that if a defendant be in court, and the plaintiff be not ready to try, the defendant must insist upon a nonsuit, if he desire to get the costs for not going to trial; and if he do not take this course, but the cause is struck out by the judge, he cannot then have the costs of the day. The plaintiff applied to set aside the rule of the defendant, directing the plaintiff to pay the costs of the day. The cause was entered for trial at Liverpool. The plaintiff's attorney had not delivered any brief, nor was he in court with his witnesses when the cause was called on. The defendant's affidavits shewed that the defendant's counsel was present, and said he was ready when the cause was called, and that he had his witnesses also present. The defendant's counsel did not apply for a nonsuit, and the cause was simply struck out. "*Brett, Q. C.*, for the defendant showed cause. A defendant is not bound to ask for a nonsuit. [Wilde, B.—But if he does not do so, can he have the costs?] The costs of the day, which are quite different from the costs of a nonsuit. [Wilde, B.—But if he waives the costs to which he is entitled, can he have other and different costs, to which, by the practice, he is not entitled?] The cause was struck out. [Channell, B.—If the defendant does not apply for a nonsuit it is the act of the court to strike out the cause.] [Bramwell, B.—There is the side-bar rule for costs for not proceeding to trial. The plaintiff did not proceed to trial. It might be said, perhaps, in your favour, that a defendant is not only not bound to ask for a nonsuit, but may prefer that the plaintiff should not be nonsuited, because that allows him to sue again, and the defendant may desire not to have another action. Now the plaintiff, if there is no nonsuit must either go on with the same action, or give up his action altogether; and the defendant may say, 'I do not wish to help him to put an end to this action, and so leave him to bring another: I wish to have the action put an end to at once.'] Just so. [Bramwell, B.—Only that tends to shew that your proper course was to take out a rule for costs for not proceeding to trial.] [Pollock, C.B.—As you did not apply for any thing, it was as though you had not appeared at all at the trial.] It has never been so held. [Pollock, C. B.—The contrary has never been held.] Perhaps not, but if it is so held now, it will come to this, that a defendant must always *insist* upon a nonsuit. The effect will be to increase the expense of litigation. [Wilde, B.—There is good sense in that argument, no doubt. * * Suppose you had applied to me for costs of the day, could I have given them?] Yes. [Wilde, B.—The plaintiff not being there? Surely not.] [Channell, B.—It has been held that the plaintiff cannot be nonsuited if the defendant is not present to have the cause called, and the jury sworn.—*Morgan* v. *Fernyhaugh*, 1 Jur. N.S. 688.] There the defendant was in default. [Wilde, B.—Still the case is, *in principle*, the same as this. The defendant in this case, in effect, did not appear. He did not apply to have the case called on.] * * [" Bramwell, B.—The rule must be absolute to set aside the defendant's side-bar rule for costs of the day. It is not necessary to say anything more than was said in the course of the argument. We abide by the principle then laid down, that the defendant must take the ordinary course of applying for a nonsuit. If the cause is once entered for trial, it may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendant to have it called on for trial, and insist upon a nonsuit. If the defendant does not take that course, he cannot claim the costs of the day. The cases cited on the argument are very nearly in point."

Theoretically, the decision just referred to is the proper one, but this has not been the course of practice in this province. I cannot, however, say that when these defendants' counsel was ready at the trial, and the plaintiff's counsel was not, and the defendants' counsel did not ask for a nonsuit, but the judge struck the cause out of the list, that the master has done wrong in refusing to tax to the defendants their costs for the plaintiff not proceeding to trial pursuant to notice, for, as above stated: "It may be said that the plaintiff has proceeded to trial, for he has taken the record down to trial, and put it in the power of the defendants to have it called on for trial, and to insist upon a nonsuit."

And it appears to me there is much force in this reasoning, for it was held, while judgment as in the case of a nonsuit could be moved for, that such a motion never could be made when the cause had been once taken down to trial, and made a remanet, or referred to arbitration, &c., for the plaintiff had complied with the statute by having it taken down, and it was for the defendant afterwards to take the record down by proviso.

I must therefore refuse the application, and refer the defendants to the full court, if they shall be so advised to proceed further.

Order refused.

Calder v. Gilbert.

Arbitration—Costs.

A cause was referred at *nisi prius*, and a verdict taken subject to an award. Costs of the cause were to abide the event, and the same power was given to the arbitrators to certify for costs as the judge at the trial would have. The award reduced the verdict to $68, and directed that the defendant should pay the plaintiff's costs of suit according to the scale to be certified by the court of Queen's Bench.

Held, that the arbitrators having express power to certify, and having omitted to do so, a judge in Chambers had no power to order full costs.

[Chambers, June, 1863.]

At *nisi prius* a verdict by consent was taken for the plaintiff, for $414 damages, subject to be increased, reduced, or a verdict entered for defendant, subject to a reference to two persons, and to such third person as they should appoint, to whom all matters in difference in the cause were referred.

The costs of the cause were to abide the event, and the costs of the reference and award to be in the discretion of the arbitrators, and the arbitrators were to have the same power to certify for costs, and amend particulars or pleadings, as a judge at *nisi prius* would have.

The award was that the plaintiff should recover from the defendant $68, in full of his claim, and that the defendant should pay the plaintiff the plaintiff's costs of suit according to the scale to be certified by the Court of Queen's Bench, and should also pay the costs of the reference and award.

Richards, Q. C., now moved for an order upon these papers, and upon affidavits, to the master to tax full costs of suit to the plaintiff.

Adam Wilson, J.—The affidavits shew a case very clearly beyond the jurisdiction of the county court, but the verdict as reduced by the award shews a case within the competency of the division court.

If the costs had been merely to abide the event of the suit, it is likely the cases cited by Mr. Richards, of *Morse* v. *Teetzel*, (1 U. C. P. R. 375,) and *Elmore* v. *Colman*, (4 U. C. O. S. 321,) would have been full authority for granting an order for full costs.

But in this case the arbitrators have the power to certify for costs as a judge at *nisi prius* could have done, and they have not certified, but they have left the scale of costs to be certified by the court.

Now this is the very thing—the scale of costs—they were to have adjudicated upon themselves, for the control of the costs was not submitted to them: they were to abide the event of the award. And how can the court now, when both plaintiff and defendant have by express agreement conferred this power upon the arbitrators, assume to decide this very question at the plaintiff's request, either *ex parte* at his instance, or adversely upon notice to the defendant?

I think this is not a case within the 162nd section of the C. L. P. Act, in which the arbitrator may "state his award as to the whole or any part in the form of a special case for the opinion of the court."

Spain v. *Cadell*, (9 Dowl. P. C. 745,) and the other cases cited in Harrison's C. L. P. Act, 516, &c., clearly shew, I think, that this power was exerciseable by the arbitrators, and that it must be exercised in like manner as the judge would have exercised it, namely, immediately after his decision, by putting it in the award, which precludes the power of a reference by him to the court.

If the arbitrators have power to certify and omit to exercise it, the judge before whom the cause came on for trial cannot grant a certificate, his power being transferred by the submission to the arbitrator.—*Richardson* v. *Kenrit*, (6 M. & G. 712.) Where the certificate of the judge may be given at any time, and no power is given to the arbitrator to certify for costs, the judge by whom the cause was referred may certify after the award made.—*Ivey* v. *Young*, (5 Dowl. P. C. 450,) Russell on Awards, 389-90; *Astley* v. *Joy*, (9 A. & E. 702.)

Section 328 of the C. L. P. Act requires this certificate to be given by the judge who tried the cause. His power may be delegated to an arbitrator; then the arbitrator must exercise it. He has not done so. I cannot therefore interfere. It is needless to say whether, if no power had been given to the arbitrator to certify, either a court or a judge could properly interfere. The cases above cited in our own courts shew it might be done, but this case is not such a case as was decided upon on either of these occasions.

I therefore must refuse the order.

Order refused.

Bonser v. Boice.

Overholding tenancy—Con. Stat. U. C., cap. 27, secs. 63, 68—Precept to Sheriff.

Where A. B., having become purchaser at Sheriff's sale, under execution, of C. D.'s interest in a term of years, held under a third party, at a time when C. D. was in possession—afterwards, upon C. D.'s request, allowed him to continue in possession for five days, it was held that there was no privity between the parties, so as to bring the case within the overholding tenancy clauses of the ejectment act; and so, although the jury summoned under the act, found in favor of the claimant, a precept to the Sheriff, to deliver possession pursuant to the finding, was refused.

(Chambers, June, 1863.)

This was an application for a precept to the Sheriff under sec. 68 of the ejectment act, commanding the Sheriff to put a landlord in possession of premises said to be overheld by his tenant.

On a *fi fa.* goods in a case of *Cleveland* v. *Boice*, the Sheriff of Oxford, on 28th of February, 1863, sold to plaintiff (Bonser) the right of defendant (Boice) to a term of years, ending 1st of March, 1865; and on same day made a deed thereof to Bonser.

On the 18th of March, a writ issued against the defendant as an over-holding tenant; and on 24th of March last an inquisition was had on this writ before the County Judge, and he certified a finding of the jury that Boice was tenant to Bonser for a term expired, and wrongfully refused to go out of possession

The evidence taken before the jury returned, and was produced on this application.

It was not shewn under whom Boice held, but it was sworn that at or after the sale to Bonser, Boice asked him to leave him in possession till March 5, (five days) to which Bonser assented.

Boice afterwards refused to go out, and on the 7th of March, Bonser demanded possession.

At the taking of the inquisition, *Richardson*, counsel for Boice, objected that there was no evidence of any tenancy between the parties.

Hagarty, J.—I cannot understand on what pretence the overholding tenancy clauses are resorted to to enforce possession in favour of the purchaser, at Sheriff's sale, of a tenant's interest in a term held under some other person. I presume it is urged that, by Boice asking leave to remain for five days, and Bonser assenting, a term was thereby created between them for that period. I cannot agree to this on such evidence as this case presents. I see no privity between the parties, and nothing to bring the case within the statute, and, therefore, refuse the application for a precept to Sheriff to place Bonser in possession.

Order refused.

Hall v. Boulton.

Execution.

Under the old law (before the 20 Vic., ch. 57, sec. 10) it was sufficient to issue a writ of execution within a year from the entry of judgment, and it was unnecessary to return and file it within that time.

[Chambers, June, 1863.]

The defendant obtained a summons calling on the plaintiff to shew cause why the *fi. fa.* herein in this cause should not be set aside, on the ground that the judgment on which it was issued was more than ten years old, and had not been revived; and on the ground that the judgment had been satisfied by agreement and settlement between the parties, and that the execution was issued in breach of the agreement, and contrary to good faith.

The defendant filed an affidavit that the action was commenced in the fall of 1851, and a verdict obtained in October of that year for £30 15s.; that in February following an execution issued, which was in due course retured *nulla bona*; that though eleven years had passed since the entry of judgment, no application or order to revive the same had been made; and that the *fi. fa.* now moved against, and in the hands of the sheriff of the county of Simcoe, was issued and tested on the 30th of December, 1862.

The plaintiff's affidavits stated that the original writ of *fi. fa.* was issued and returned by the sheriff within a year and a day of the entry of the judgment; and that the said writ having been lost, a judge's order was obtained in August, 1862, allowing a duplicate to issue, to which a return was procured, and on such writ and return the present writ was issued. The supposed inability of defendant to meet the demand was alleged as the reason for the long delay.

Affidavits were filed on both sides as to the settlement mentioned in the summons, which was denied by the plaintiff; and upon that branch of the case, which it is unnecessary to report, the learned judge refused to interfere.

Adam Wilson, J.—As to the objection to the issuing of the present execution without first reviving the judgment, the question is, must an execution under the old law be not only issued on the judgment within one year from the entry of the judgment, but be also returned and filed in the office from which it issued within that time?

If it must be so issued, returned, and filed within that period, then the present execution was irregularly issued; if it need not, then so far as the point of law or practice is concerned it is not irregular.

Under the law as it existed in England before the 15 & 16 Vic., ch. 76, sec. 128, which prevailed here before the 20 Vic., ch. 57, sec. 10, now embodied in our C. L. P. Act, sec. 301, an execution was required to be issued within a year from the entry of the judgment, but it was not necessary it should have been returned and filed within the year.

The case of *Simpson* v. *Heath* (5 M. & W. 631) clearly settled this to have been the practice in England, and it certainly was the practice here also. I know it to have been the practice of the profession, and I am aware of the point having been decided more than once in Chambers. I know of no decision to the contrary, while the case of *Wilson* v. *Jamieson* (6 O. S. 481), takes this point for granted.

No question arises under the 301st section of the C. L. P. Act, before referred to, as the first writ issued many years before that act was passed. The question of regularity therefore is to be determed by the old law and the old law I take to be quite clearly in favour of the regularity of the proceedings.

Summons discharged with costs.

Ward v. Vance—Thompson, Garnishee.

Garnishment—Service of the attaching order and summons to pay over—Unauthorised acceptance of service—Waiver by appearing to the summons.

An attaching order had been served by leaving a copy at the store and residence of the garnishee. Service of a summons to pay over was accepted for him by a practising attorney, and this summons, with such acceptance endorsed, was afterwards served in the same way as the order. On the return of it another attorney appeared for the garnishee, and objected that the acceptance was given without authority, and that the service was insufficient.

Held, that personal service of the summons and order was not indispensable, but that the service in this case, if moved against, would have been insufficient, as it was not shewn that personal service could not have been effected, or that the papers had come to the knowledge of the garnishee; but

Held, also, that in this case no such application having been made, the acceptance should be held sufficient, and that any defect in the service of the attaching order was thus cured.

Held, also, that the appearance of the garnishee by another attorney duly authorised was a waiver of any objection to the service.

The order to pay over was therefore made.

[Chambers, June, 1863.]

The execution creditor had obtained a summons upon the garnishee to shew cause why he should not pay the judgment creditor the debt due to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debtor.

On the summons was endorsed an acceptance by Mr. Wilson, an attorney practising at Bradford, of service for Mr. Thompson.

O'Brien appeared on the return of the summons, and objected for Mr. Thompson to the service made, on the ground that Mr. Wilson had no authority from Mr. Thompson to accept this summons.

The summons was enlarged, subject to this exception.

On the return, *John Paterson* appeared and renewed the objection for Mr. Thompson. And he contended that the attaching order had never been properly served on Mr. Thompson, as the affidavit shewed that it was on the 14th of April served on Mr. Thompson, "by delivering a true copy thereof to and leaving it with Mr. Brunskill at the store and residence of the said David Thompson;" and on the 15th of April, "that a true copy of the summons and order, *and also of the endorsement thereon*, were served on the said David Thompson by leaving copies at the store and residence of said David Thompson." *Paterson* further urged that the 289th section of the C. L. P. Act—which provides that the "service upon the garnishee of an order that debts due," &c., "shall be attached, or notice thereof to the garnishee in such manner as the judge directs, shall bind such debts in his hands, and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge," &c., "to shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor," &c.—shews very clearly that personal service was contemplated by the act, and more particularly when by other provisions of the act the process is so summary against him "in case he does not appear upon the summons," which might readily happen if personal service were not made and insisted upon.

Tilt, in support of the summons, urged that the appearance now of Mr. Paterson for Mr. Thompson was quite sufficient to cure any defect of service, if there was any defect—but that there was none: that the acceptance of service by Mr. Wilson, being an attorney of this court, was *primâ facie* sufficient evidence of his authority to give such acceptance, and cured all prior defects, whatever they were, in the service.

Adam Wilson, J.—The statute does not require in express terms that there shall be a personal service, as our King's Bench Act of 1822 did of the *Ca. Re.* upon the defendant; and I cannot say that the rule of law is so stringent as to require a personal service of a copy of the attaching order, or to make void every other service than a personal service.

On the contrary, I am inclined to think that personal service is not imperatively demanded unless in those cases where it is sought—that is, where it is the purpose and object—to charge the party with a contempt for not appearing to or for not performing some act required by the summons, writ, rule or order.

I find this laid down in Tidd's Pr., 9th Ed., 500; Arch. Pr. 6th Ed., 1,210; and Arch. Pr., 11th Ed., 162.

Then as to some of the decisions upon this point:—in *Jones dem Griffiths* v. *Marsh*, (4 T. R., 464) it was decided that a notice to quit possession of land did not require personal service, although it was urged "this notice was to determine an interest is lands;" and service upon a maid-servant of the tenant at his house, although the house was not upon the premises in question, the notice being explained to her, but it was not shewn that it ever came to the defendant's hands, was held good service. Lord Kenyon, C. J., said, "This is different from cases of personal process; but even in the case alluded to of service" (of declaration of ejectment) "on the wife, I do not know that it is confined to a service on her on the premises; I believe that if it be served on her in the house it is sufficient. But in every case of the service of a notice, leaving it at the dwelling house of a party has always been deemed sufficient. So wherever the legislature has enacted that before a party shall be affected by any act, notice shall be given to him, leaving that notice at his house is sufficient. * * And indeed in some instances of process leaving it at the house is sufficient, as a subpœna out of Chancery, or a *Quo Minus* out of the Exchequer. In general, the difference is between process to bring the party into contempt and a notice of this kind, the former of which only need be personally served on him." "Buller, J., *Ex concessis* personal service is not necessary in all cases."

The service of the process of the courts it will clearly appear did not formerly require personal service, by a reference to Tidd's Pr., 109, 155 and 156, and to 2 Price, 2 and 4, and 3 Bl Com., 279, &c., although a *distringas* against lands and goods issued if the party failed to appear.

The summons in real actions was formerly served by attaching a copy of it to a white wand set up on the premises; and it is familiar law to practioners who remember the former proceeding in ejectment, that personal service to change the title was not demanded.

The nature or kind of service is entirely different from an utter want of service, and may be insufficient as a general course of practice, while the latter is utterly void; as when a defendant was ordered to pay under the Court of Requests Act in England, corresponding with our Act, 13 & 14 Vic., ch. 53, secs. 91-93, it was held that if he made default he must be summoned to shew cause why he had made such default before he could be committed to confinement.—See *Abley* v. *Dale*, 14 Jur. 1070, citing 1 Str. 567; where it is said, "The laws of God and man both give the party an opportunity to make his defence if he has any."

I am not prepared, then, to say as a rule of law that the service of the attaching order or of the summons upon the garnishee to shew cause why he should not pay over must be personal, and if not personal that it must be void, and be therefore set aside by the court.

Then as to the particular cases in which services not personal have been held to be sufficient:—In *Howard* v. *Ramsbottom*, (3 Taunt. 526,) the statute required that the notice of disputing the proceedings in bankruptcy should be given to the assignees. And the court held that although service on a maid-servant at the assignee's residence was not sufficient, yet service on the attorney was sufficient.

In *Rhodes* v. *Innes*, (7 Bing. 329,) where a father eluded personal service of process, and it was served on the son at his, defendant's residence, who, on being told what it was, said he would give it to his father, who was in the house: *Held*, this was good personal service of the process, under the statute, which required personal service. Tindal, C. J., says, "There is no magic in the word *personal*, and if a party by his conduct or agreement chooses to waive personal service, a service less strict may be sufficient." This case must be considered as very much qualified, if not overruled, by the cases of *Gogg* v. *Lord Huntingtower*, (1 D. & L., 599) *Christmas* v. *Eicke*, (6 D. & L., 156) *Russell* v. *Lowe*, (2 Dowl. N. S., 233) and *Grand Junction Water Works Co.* v. *Roy*, (16 L. J. C. P., 200).

In *The Queen* v. *The Justices of the North Riding of Yorkshire* (7 Q B., 154) the statute provided that an appeal from a conviction of justices might be brought by the party "first giving or causing to be given to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, notice in writing of his intention," &c. It was held that service of such notice at the dwelling-house of the justices, though not personal, was sufficient, although it was urged the appeal affected them as to costs, and as to their liability to an action of trespass, and that it did not appear the notice had ever come to their hands.

In *Mason* v. *Muggeridge*, (18 C. B., 642) service of a judge's order for the defendant to appear and be examined as to debts due to him, &c., was held not sufficiently made by serving the wife, without showing that it had since come to the defendant's knowledge, and the attachment was refused. But this was because the process was to procure an attachment if default were made.

In *Warwick* v. *Bacon*, (7 M. & G., 961) service of a rule to compute on a clerk of defendant at the defendant's counting-house, *held*, not sufficient, the usual and proper course being to serve at the *dwelling-house* all rules which need not be personally served.

In *Rowland Vizetelly, et al.*, (6 M. & G., 728) a rule to compute served "on a clerk or servant of the defendant's at their warehouse," was held insufficient. Maule, J, says, "Service on a domestic servant at the defendant's place of residence is held sufficient, on the ground that it is the servant's duty to receive papers and letters left there for his master, and to deliver them to him. That may not be the case with respect to this clerk."

I am not quite prepared to say that the service of the attaching order was well made by serving *a clerk* at the store, and even *at the residence* of the garnishee, without shewing that the order had subsequently come to the knowledge or hands of the garnishee, or without shewing some excuse why a service on the garnishee was not made, or was not made on some member of the garnishee's family at his dwelling-house. For all that appears from the affidavit, the garnishee could have been served personally, in which case a better service should have been made.

As was said by Mr. Justice Williams, in *Davies* v. *Westmacott*, (7 C. B. N. S., 829) "Every word of the affidavit may be true, and yet the process-server might without any difficulty have ascertained the defendant's dwelling;" or to apply it to this case, might without any difficulty have made a better service than was made on the clerk at the garnishee's store and residence.

I think I should, if the application had been duly made, have held that this affidavit did not shew sufficient facts to constitute the service made a good service, without holding that it was absolutely necessary the service should have been a *personal* service.

But this objection arises not directly, but incidentally, upon the summons to pay over, after one attorney has accepted service of it for the garnishee and another attorney has appeared on the return of the summons to except against the validity and effect of this acceptance by the attorney.

Now, as to the acceptance by the attorney of the service of the attaching order, I conceive this to have been irregular if the attorney had no authority to receive it.

The rule is, as is laid down in *Bayley* v. *Buckland*, (1 Ex 6.) "When a defendant has been served with process, and an attorney without authority appears for him, we think the court must proceed as if the attorney really had authority, because in that case, the defendant having knowledge of the suit being commenced, is guilty of an omission in not appearing and making defence by his own attorney, if he has any defence on the merits. There the plaintiff is without blame, and the defendant is guilty of negligence; but even in that case, if the attorney be not solvent, we should relieve the defendant upon equitable terms if he had a defence an the merits. If the attorney was solvent, it would not be unjust to leave the defendant to his remedy by summary application against him. On the other hand, if the plaintiff, without serving the defendant, accepts the appearance of an unauthorised attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant there is wholly free from blame, and the plaintiff not so."

But although this acceptance by the attorney was on the 17th of the month, and although this matter has been several times before the Judge in Chambers, no application has yet been made by the garnishee to set aside this service. He only asserts by another attorney that the first attorney had no such authority as he has assumed to exercise, but makes no affidavit of the fact.

I think, under such circumstances, I should not interfere with the act of the first attorney. This supineness of the garnishee is some evidence of actual authority in the first attorney, and he is, moreover, within the language of the above decision, "guilty of negligence."

If this service stands, I think the prior *primâ facie* defective service of the attaching order is cured.

But assuming that the acceptance by the attorney was irregular, does the appearance of the party by a duly constituted attorney to object to this service as cause why he should not answer the summons, cure the objection of service.

In *Levy* v. *Duncombe*, (3 Dowl. P. C., 444) a rule *nisi* had been obtained by the plaintiff for an attachment against his late attorney, for not having delivered his bill of costs pursuant to judge's order, and which had been made a rule of court, and personally served. Humfrey and Hughes shewed cause, and objected that the rule could not be made absolute, because it had not been personally served. Lord Abinger, C. B.—"The rule *nisi* is served merely for the purpose of bringing the party here; if he appears, as he does here by his counsel, that obviates the necessity of enquiring whether the service of the rule was personal or not, though if no one had appeared, the court would probably not have made the rule absolute for an attachment, except on an affidavit of personal service. The contempt for which the attachment is prayed was in not obeying a previous rule, which had been personally served."

So in this case, the object of this summons was "merely for the purpose of bringing the party here," and he has appeared by counsel or attorney; and I think in such a case, although he appears to object to no service, or no sufficient service, that his appearance does of itself remove the objection, and answer the purpose for which the summons was issued.

While an *essoin* or excuse for not appearing to process could be cast, it was refused to a party who was seen in court, as in the case of the secondary of the court himself claiming it, while he was actually in attendance upon the *essoin* day, wherein he *essoined*. *Anson* v. *Jefferson* (2 Wils. 164.)

And perhaps the former course in England of declaring "by the bye," may illustrate what the effect is of a party being actually or presumably present in court.

The plaintiff in every case, and in some cases any other person who had not sued out process against the defendant at all, when

the defendant had appeared, or when an appearance was entered for him, or when he was in the actual custody of the marshal, could serve a declaration against him for any different cause of action than that he had been brought into court to answer; and the reason of it was that the defendant being actually or presumably in court, there was no necessity to take out other process against him, and that being in court for one purpose, he was present for all purposes, and for every one, and not only for the plaintiff who had brought him there. *Smith* v. *Miller*, (3 T. R., 627); *Niller* v. *Andrews*, (5 T. R., 634); *Sulyard* v. *Harris*, (4 Burr. 2180.)

I here think, then,

That as a rule of law, personal service is not necessary, either of the order to attach or of the summons to shew cause why the garnishee should not pay over:—

That the service, if not personal, should at any rate be shewn to have been made upon the wife, or upon some member of the family at the dwelling-house of the party, in such a manner as would have constituted good service under the old practice of the declaration in ejectment, by which the possession was sought to be changed:—

That the service in the case of the attaching order is *primâ facie* not sufficient:—

That the acceptance of service of the summons to pay over by an attorney is *primâ facie* sufficient:—

That either of these services could have been set aside by an application for the purpose:—

That as no such application has been made, but as an attorney has appeared to shew cause against the validity of the last service, his appearance is in truth an appearance to the summons, and cures all previous defects.

But such an appearance as this must be distinguished from a substantive application, after proceedings have been taken upon the defective service, to set them aside: and from those cases where the court has held the service deficient when no cause was shewn; and also from those where service is not denied, but it is complained of as having been made on an improper day, as a Sunday, at too late an hour, at an improper place, or while the party was in attendance upon the courts, and so privileged for the time—for in all these cases the service is admitted, but the regularity of it is alone questioned, which is very different from a case where the effect and substance of the objection is that no service has been made at all, and yet there is the anomaly of the party being seen in court, and personally making an excuse for not being there.

Under all these circumstances I will make the order, which is, of course, subject to the correction and revision of the court.

Order accordingly.

COUNTY COURTS.

In the County Court of the United Counties of Huron and Bruce, before ROBERT COOPER, Esq., County Judge.

HOLMES v. McLEAN & ROSS.

Action on a joint and several promissory note. Set off by agreement of a separate demand. Demurrer. Equitable pleading.

This was an action on a joint and several promissory note, dated 1st May, 1860, made by the defendants, payable to the plaintiff on or before 15th April, 1861, for $180.

Pleas—The defendant Ross pleaded a set off of $400, balance due on a covenant dated 30th January, 1858, made between him and the plaintiff, whereby the plaintiff covenanted to pay him $800 on a day which had elapsed before the commencement of this suit. Alleging that at the time the note was made it was agreed between the plaintiff and the defendants that the plaintiff would deduct the amount of the note out of the amount due by him to the defendant Ross on the covenant, and concluding with the allegation that it was on this understanding that defendant Ross signed the note.

The defendant McLean pleaded on equitable grounds that he made the note jointly and severally with Ross, and for Ross's accommodation and as his surety only, which the plaintiff well knew. That when he made the note, there was outstanding and in full force against the plaintiff and in favor of the defendant Ross, the covenant set out in defendant Ross's plea. Averment that at the time of the making of the note it was agreed by and between the plaintiff and the defendant Ross, that the plaintiff should, at the maturity of the note, deduct the amount thereof out of the said covenant, and that in pursuance of that agreement the defendant McLean made the said note as aforesaid. This plea then proceeded as follows: "And the defendant McLean further avers that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant Ross in an amount greater than the plaintiff's claim, upon a deed bearing date" (Setting out the deed as in Ross's plea), concluding thus: "And the defendant McLean avers that the defendant Ross has always been ready and willing to deduct from said amount due on said covenant the amount claimed on said note by the plaintiff, and to set off the same against said covenant, of all which the plaintiff had due notice"

The plaintiff took issue upon and demurred to both these pleas, on the following grounds, among others.

Demurrer to Ross's plea—

1. That a debt due by the plaintiff to the defendant Ross cannot be set off in this action brought by the plaintiff against the defendants, McLean and Ross.

2. That the alleged subject matter of set off is not shewn in its nature and circumstances to arise out of or to be connected with the promissory note sued upon.

3. That the agreement in said plea mentioned, as stated, is a *nudum pactum*.

4. That said plea seeks to introduce parol evidence to vary, contradict and control, the operation of a written contract.

5. That said plea confesses, without avoiding, the plaintiff's cause of action.

Demurrer to McLean's plea—

1. That the debt due by the plaintiff to the defendant Ross does not constitute an equity attaching to the note sued upon by the plaintiff.

2. Same as 2nd ground of demurrer to Ross's plea.

3. Same as 3rd ground of demurrer to Ross's plea.

4. Same as 4th ground of demurrer to Ross's plea.

5. That said plea discloses no matter entitling the defendant McLean to an absolute and unconditional injunction in a court of equity.

6. That said plea, if admitted as a defence in this action, would render necessary the taking of accounts before relief could be granted, and so is not such a plea as can be pleaded as an equitable defence in a court of law.

Joinder in demurrer.

The issues in law were first disposed of.

Saunders for demurrer.

Malcolm C. Cameron contra.

COOPER, Co. J.—The defendant Ross pleads set off. He sets up an outstanding specialty debt. It is not necessary to consider whether this could be set off without any agreement that it should be; for the plea goes further, and sets up an agreement—good—taking the statements to be true—that the two claims should be set off.

The plea is clearly good. It sets up that which if proven would be a good answer to the action.

Lest this should not be sufficient, the defendant has put nearly the same defence in substance in the shape of an equitable plea.

I do not understand the doctrine that an equitable plea must set up a state of facts, enabling this court to give complete relief. In a County Court there can be no injunction. If therefore every equitable defence on which the courts of common law cannot grant final relief is shut out, then the system of equitable defences at common law ceases in effect to exist. The language, "absolute and unconditional injunction," is not easily understood in relation to this argument. If it means that the plea is such, that if it were framed as a bill in equity it would not state sufficient facts to entitle the pleader to relief in equity, then the demurrer does not hold, for the plea does state such a case. It sets up a sufficient equitable defence. Both pleas might possibly have been more concise, but any surplusage does not render them bad. It

is not the only case in which an answer might be set up on the same facts, either in the shape of a legal defence or an equitable case or defence. The rule that you must necessarily elect to invoke the jurisdiction of either a court of law or a court of equity is not without its exceptions, and these exceptions have necessarily become more apparent since the system of equitable defences to legal claims has been adopted.

I think both pleas must be sustained, though grounded mainly on the same facts. Judgment for defendant.

QUARTER SESSIONS.

(In the Quarter Sessions for the County of Elgin, his Honor JUDGE HUGHES, Chairman.)

McLEAN, Appellant v. McLEAN, Respondent.

Power of Justices to alter their Order for Quashing a Summary Conviction during the same Session.

On the first day of the session, the appellant's counsel called on and proved his case. The respondent did not appear. It was not known that he had employed counsel. And the Court ordered the conviction to be granted.

On the second day, counsel appeared and stated he had been employed, and was taken by surprise; and applied to have the order of the Court discharged for a hearing.

Held, that the Court had power to revoke the order for quashing the conviction.

On the 9th of December, 1862 (the first day of the sittings) *Horton*, for the appellant, entered an appeal, proved his case, and the conviction was ordered to be quashed. No one appeared for the respondent.

On the 10th of December (the second day of the session) *Stanton* appeared, and stated he had been employed as counsel by the respondent, and then, for the first time, to his surprise, learned that the appeal had been heard on the preceding day, and moved the Court to discharge the order for quashing the conviction, and for a rehearing.

Horton, contra, stated he was not aware Mr. Stanton had been retained, but objected that the case could not be heard again, nor could the Court grant a new trial.

HUGHES, County Judge, Chairman.—With reference to this appeal, and the application of the respondent's counsel for the Court to discharge its order for quashing the conviction, I think the authorities cited open the way for our doing so; but it must not be understood as in the nature of a new trial, for, had a jury decided this case, I doubt the authority of this Court to disturb the verdict.

Assuming that all the respondent's counsel has stated to the Court to be true, as explaining the cause of the respondent's not appearing yesterday, and its not appearing to be doubted on the opposite side, I think the case reported in 2 Salk., 494 and 606, as digested in Arch. Q. S. practice, 289 and 290, (*St. Andrews Holborn* v. *Clement Danes*) to be very similar to this case to establish the principle, and should govern us in the present application.

It is there said, "The Justices may alter their judgments at any time during the same session; where, upon hearing an appeal against an order for removal, the respondents not appearing, the order was quashed; but afterwards, during the same session, the respondents were let in to try the appeal, on payment of costs; and upon the trial the order was confirmed. All these orders being removed by *certiorari*, it was moved in one of the Superior Courts to quash the latter order of session, by which the order of removal was confirmed on the ground that the sessions having once made the order for quashing the order for removal, could not afterwards make another order to confirm it; but the Court above denied this, and said the sessions has authority to alter their judgments at any time during the same sessions."

The order of this Court, therefore, passed yesterday, should be cancelled upon payment of costs.

This power ought to be, as suggested in Dickenson Q. S. practice 934, "to be exercised with delicacy and discretion." I have known it once, in the spirit of party, to have been attempted to reverse the decision of about thirty magistrates of the Court by a fresh accession of justices the next day, after most of the thirty had gone to their homes; but all such instances will be discouraged. This application does not bear that complexion.

In this determination the Court are unanimous.

Per cur.—Order cancelled on payment of costs.

In the Matter of Appeal between ROBERT NEIL, Appellant, and JOHN SELLS, Respondent.

Appeal from a Summary Conviction in a case not criminal—Recognizance not necessary as a preliminary step to give the Court jurisdiction.

Appeal against a summary conviction for breach of a by-law of the Corporation of St. Thomas, for selling spirituous liquors without license. The appellant gave notice of appeal in due time, but entered into no recognizance to prosecute his appeal with effect; nor did he afterwards give notice before the sittings of the Sessions, of the abandonment of his appeal, under Sec. 4 of Con. Stat. of U. C., page 964.

Held, respondent entitled to costs.

Horton, counsel for respondent, put in a notice of appeal, served upon his clients, which *Stanton*, for appellant, admitted was served, but contended that the Court could not make any order, as they had no jurisdiction, inasmuch as the appellant had not entered into a recognizance to prosecute his appeal with effect, and cited Dickenson, Q. S. 639. *Rex* v. *Oxfordshire*, 1 M. & S., 448. *Rex* v. *King's Langley*, Salk. 605. *Rex* v. *Lincolnshire*, 3 B. & C., 548; 7 U. C. L. J., page 5, and Arch. Q. S. practice, 280, and Con. Stat. of U. C., 114, section 1.

HUGHES, County Judge, Chairman.—There can be no question whatever, that in order to give the Court jurisdiction, or the parties a *locus standi* in the Court, the preliminaries required by law must be entered into.

It is to be observed, however, that the preliminary steps required by the statute respecting appeals in cases of summary conviction before Justices of the Peace, in cases not amounting to crimes, (Con. Stat. of U. C., 963) are different from those required by the Con. Stat. of Canada, page 1304, in cases of summary convictions under the criminal acts; for, in the latter it is necessary for the appellant, in all cases where the party thinks himself aggrieved by the conviction or decision, and wishes to appeal to the Sessions, within three days after the conviction, and seven days before the Sessions, to give to the other party notice in writing of his intention to appeal, and either to remain in custody until the Sessions, or enter into a recognizance with two sufficient sureties, before a Justice of the Peace, conditioned to appear at the Sessions and try the appeal.

Under the first named statute, the recognizance is not, in all cases, necessary. It is applicable only to cases where the convicted party is in custody or on bail.

This case is admitted not to be for breach of any criminal law, but for selling liquor without license, contrary to a municipal by-law, and that the appellant was neither in custody nor on bail. I therefore think the notice of appeal was all that was necessary, and that a recognizance was unnecessary, and that the respondent is entitled to ask for costs, because the appellant did not give notice to the respondent, under the 4th sec. of the act first alluded to, of the appeal being abandond. *Rex* v. *Justices of Essex*, 4 Bar. and Ald., 276, shews that under 30 Geo. 3, cap. 48, sec. 25, no notice of appeal was necessary, but merely a recognizance. Here the notice of appeal was necessary, and not the recognizance.

In an analogous case to the present, in this Court, of *Barclay*, appellant v. *Barr*, respondent, at the June Quarter Sessions, 1861, the counsel for this appellant contended that a recognizance was not necessary under the statute first referred to, and the Court thought with him, and so decided. This conviction must be affirmed.

Per cur.—Judgment for respondent, with costs.

In the case of an appeal against a poor rate, unless the appeal is *entered*, the Sessions cannot order the appellant to pay the costs which his notice may have occasioned to the respondents, in preparing to resist the appeal, for it is not "*heard and determined*." Dickenson Q. S. 659. In *Rex* v. *Justices of Essex*, 8 T. R. 582, it was determined that the Court of Quarter Sessions have no authority to award costs under 17 Geo. II. ch. 38, s. 4, unless an appeal has been "*entered and determined*"—for the determination of the appeal is a condition precedent to their power to give costs. The decision, however, in the foregoing case, seems to have turned upon the necessity of entering into a recognizance under the particular circumstances and statute, to which allusion is made.

In the Matter of Appeal between JOHN PERRIN, Appellant, and JOHN NEIL, Respondent.

Master and Servants Act—Con. Stat. U. C., cap. 75.

Under Master and Apprentices' Act a magistrate has no jurisdiction to award the payment of wages.

The respondent was a minor, and by indentures, was apprenticed for a term of three years, unexpired, to the appellant, and was to get $35 the first year, and increased wages afterwards. No time was fixed for the payment of wages. The appellant gave up his business for a short time—abandoned himself to habits of intemperance—and afterwards resumed his business, but did not pay the wages due to respondent up to the time of the respondent leaving him, which was during the currency, and not at the end of the first year. He had served 9½ months only.

The respondent complained before the Mayor of St. Thomas, who ordered the master to pay wages, with costs, under the master and servants act. (Con. Stat. U. C., cap. 75).

The master appealed to the Quarter Sessions.

Horton, for appellant, objected, 1. That the respondent being a minor, could not sue in his own name, excepting in the Division Court, and if any proceeding were adopted, either at common law or otherwise, except in the Division Court, it should have been in the name of the father, and cited *Ferris* v. *Fox*, 11 U. C. Q B 612.

2. That the respondent is an apprentice, bound by indentures, and that a magistrate has no jurisdiction in a matter of wages between a master and his apprentice, and referred to 9th sec. Con. Stat. of U. C., cap. 76.

3. That there are no wages due until the end of the first year, and that the indentures could not be cancelled without the consent of the father.

Stanton, for respondent, contended, 1. That, under the master and servants act, and the master and apprentices' act, the magistrate had the right to award a sum for not providing the apprentice with provisions.

2. That, under the master and servants act, the conviction can be sustained, because the agreement existing was cancelled, and a new agreement made. The respondent had been discharged, and the relation of master and servant subsisted.

Horton, contra, cited *Rex* v. *Inhabitants of Edengale*, 21 E. C. L. R., 158; also, *Rex* v. *Inhabitants of St. Margarets Lynn*, 13 E. C. L. R., 108; *Rex* v. *Inhabitants of Combre*, 8 Bar. & Cr., 82, 15 E. C. L., 155; *In re Joyce and Anglim*, 19 U. C. Q. B., 197; *Regina* v. *Roberts*, 11 U. C Q. B., 621; and contended there were no wages due until the end of the year, and respondent could make no agreement without the consent of his father.

The Court decided that the relation of master and servant did not subsist between the parties; and the magistrate had no jurisdiction to order payment of wages, as between a master and an apprentice; and that respondent, being an apprentice, and not a servant, the conviction was bad.

Per cur.—Conviction quashed.

LOWER CANADA REPORTS.

SUPERIOR COURT.—MONTREAL.

(*From the Lower Canada Reports.*)

BOTTOMLEY, ET AL., VS. LUMLEY.

By the Consolidated Statutes of L. C., chap. 87, sec. 8, it is enacted that the Superior Court of L. C., or any Judge thereof, may order any person arrested for debt to be discharged from custody, on satisfactory proof "that the cause of action arose in a foreign country."

Held:—That for the purposes of this act, England must be considered to be a foreign country; and that the defendant, arrested in Lower Canada, for a debt contracted for goods purchased in England, for which he had accepted bills of exchange drawn upon him at his then place of business at Toronto, but made payable at a bank in England, must be discharged, and the *capias* quashed notwithstanding a disclosure of evident fraud in the affidavit.

Judgment rendered the 25th February, 1863.

MONK, J.—In this cause a writ of *capias ad respondendum* was issued against the defendant, formerly of Toronto, in Upper Canada, now described as of the city of Montreal, for a debt (£1078. 8s. 10d.) for goods purchased by the defendant from the plaintiffs in England, for which the defendant had accepted bills drawn on him at Toronto, and made payable at a Bank in England. A motion has been made to quash the *capias* on several grounds, but the only ground which has attracted the attention of the Court, is one founded upon the provincial statute, which enacts as follows: "The Court or any Judge of the Court whence any process has issued to arrest any person, may, either in term or in vacation, order such person to be discharged out of custody, if it is made to appear, on summary petition and satisfactory proof, either that the defendant is a priest or a minister of any religious denomination, or is of the age of seventy years or upwards, or is a female, *or that the cause of action arose in a foreign country, &c.* (Consol. Stat. L. C., Chap. 87, sect. 8, p. 810.)

The affidavit discloses with minuteness and precision one of the grossest cases of fraud, and on a scale quite unusual, and is in every respect complete; the difficulty arises as to whether under the clause of the statute England is to be considered a "foreign country." It was held in a recent case, (See 6 L. C. Jurist. p. 312.) by the senior Judge of this Court, that under this statute, Barbadoes must be held to be a foreign country, and this decision was rendered after much deliberation. When the question was raised, I strongly dissented from the conclusion arrived at; nor do I see how England can be held to be a foreign country, when the imperial parliament can pass laws reaching to Canada, and when our supreme resort is appeal to Her Majesty in Her Privy Council. Under the circumstances which connect us with the mother country our merchants, in trading with England, cannot surely be supposed to be trading with foreigners. It was urged that under the act for the proof of foreign judgments and decrees (Consol. Stat. of L. C., chap. 90, sect. 1.) a foreign judgment was therein declared to be one "not obtained in either Upper or Lower Canada," and the declaration was intelligible for the purposes of that act. I do not however think that in this case, England can be held to be a *pays étranger*, but the matter must be held to be one of very considerable doubt, and I therefore consider it more prudent to follow the judgment rendered by the learned judge referred to, although in this case, I do so with much regret and hesitation, considering the atrocity of the fraud disclosed in the affidavit.

Judgment, quashing *capias*.

Robertson, A. and *W.*, for plaintiffs.
Devlin, for defendant.

ENGLISH REPORTS.

PRIVY COUNCIL.

GRANT V. THE ETNA INSURANCE COMPANY.

Marine Insurance—Construction of Policy—Warranty—Description.

Held, that the words in a Policy of Insurance describing the vessel insured "as now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for winter in a place approved of by the Company, who will not be liable for explosion by steam or gunpowder," did not amount to a warranty that the vessel should be used as described, but mere matter of description immaterial to the risk. (July 5, 1862.)

This was an appeal to the Privy Council from the decision of the Court of Queen's Bench in Lower Canada. The facts of the case sufficiently appear in the judgment, which was read by Lord Kingsdown. It was as follows.

On the 30th July, 1858, the appellant effected an insurance with the respondents on the steam-boat "Malakoff," by which the Company engaged to assure the appellant against loss by fire to the steamboat for twelve months to the extent of £1,000.

The policy of insurance described the "Malakoff" "as now lying in Tait's Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for winter in a place approved of by the Company, who will not be liable for explosion either by steam or gunpowder."

The steam-boat never left Tait's Wharf, and was burnt there on the 25th June, 1859.

An action was brought by the appellant in the Superior Court of

Lower Canada to recover damages upon the policy. The case was tried by a jury, and a verdict found for the plaintiff.

An application by way of motion was made to the court by the defendants on the 20th February, 1860, that judgment *non obstante veredicto* might be entered for the defendants, and that the plaintiff's action might be dismissed with costs.

On the 31st March, 1860, the Superior Court made an order to that effect.

The plaintiff appealed against the order to the Court of Queen's Bench in Lower Canada, when it was affirmed, the Chief Justice dissenting from the majority of the Judges.

The case now comes before us on appeal to Her Majesty in Council from these several orders. The judgments in the courts below proceeded on the ground that the words which we have read from the policy contained a warranty that the steam-boat should navigate the St. Lawrence and the lakes in the manner there described; and that, as in fact she never left Tait's Dock, the policy became void.

It was contended before us, in a very able argument, that the words referred to contained no warranty; but that if they did the warranty extended only to this—that an intention to employ the ship in the manner described was *bonâ fide* entertained by the insured when the policy was effected.

It was argued that this would be the meaning of the words if they were merely representations, according to several authorities cited; and it was argued that though the effect of a warranty was very different from that of a representation, the meaning of the words used must be the same, whether they were found in or out of the policy.

Their Lordships are of opinion that the question depends entirely on the meaning to be attached to these words. If they import an agreement that the ship shall navigate in the manner described in the policy—then being an engagement contained in the policy—they must be considered as a warranty, and the engagement not having been performed, whether the engagement was material or not material, the insurers are discharged.

But their Lordships think that this is not the true meaning of the words used. They consider that the clause in question amounts only to this: The assured says, my ship is now lying in Tait's Dock; I mean to remove her for the purpose of navigation in the manner described, and if I do the policy shall still be in force; but in that case I engage to lay her up in winter in a place to be approved of by the Company.

This construction, which implies no contract to navigate, seems to their Lordships the natural meaning of the words used, and imputes a reasonable intention to the parties to the Policy.

Their Lordships must, therefore, advise Her Majesty to reverse the judgments complained of, and to direct that the defendant's motion be dismissed, and that the appellant's costs of the motion in the Superior Court, and of the appeal to the Queen's Bench, and of the appeal to Her Majesty in Council, be paid to him by the respondents.

It is unnecessary to pronounce any decision on a point raised in the argument, viz., that it is not competent to a defendant in a suit to make a motion for judgment *non obstante veredicto*. Such appears to be the rule in England, but the practice in jury trials in Lower Canada differs in many and important respects from that which prevails in this country. Their Lordships are always indisposed to interfere with the judgment of a colonial court on a question of its forms and practice.

It appears that, besides the motion of which we are now disposing, two other motions were made by the respondents in the Superior Court, one in arrest of judgment, and the other for a new trial. Neither of these motions is before us, and we do not express any opinion upon them, or intend to affect the rights either of the appellant or respondents in respect of them. They will stand in the same situation as if the Queen's Bench had made the order upon this motion, which we think that it ought to have made. To prevent any misconstruction upon this point, which, however, we do not think likely, we shall advise Her Majesty to add to the order which we have already suggested, a declaration "that this order is not intended in any manner to prejudice the rights either of the appellant or respondents with respect to any other proceedings which have taken place, or may take place in the cause."

Appeal allowed.

JUDGE'S CHAMBERS.

Cruickshank v. Moss.

Fi. fa.

To issue execution on the same day that costs are taxed, is an abuse of the procedure of the court, and the costs of such an execution were ordered to be returned.

This was an application to set aside the writ of *fi. fa.*, and all subsequent proceedings.

Clare for the plaintiff; *James* for the defendant.

The circumstances of the case were as follows:—The plaintiff having made an order of Williams, J. a rule of court, taxed his costs, and forthwith, on the same day, issued execution. On the same day, and before the execution had been levied, the defendant tendered to the plaintiff's attorney the amount of the master's allocatur, which was, however, refused. A levy was subsequently made, and thereupon the defendant paid the amount under protest, and made the present application.

James contended that the defendant was entitled to the whole of the day on which the master had given his allocatur, and cited *Perkins* v. *The National Assurance Company*, 29 L. T. Rep. 65.

Willes, J., having taken time to consider, made an order that the writ of *fi. fa.*, and all subsequent proceedings, should be set aside, on the ground that they were an abuse of the practice of the court; that the money paid to the sheriff should be returned, and that the plaintiff should pay the costs of and occasioned by the application.

UNITED STATES REPORTS.

SUPREME COURT OF NEW YORK.

From the Lawrence Legal Observer.

Hayne v. Powers.

Congress has power under the Constitution to declare treasury notes a legal tender in payment of all debts.

Johnston, J.—The tender by the defendant of the legal tender notes, in satisfaction of the plaintiff's demand, was valid, and they should have been received by the latter, unless it shall be found upon examination, that his objection, that the act of Congress under which such notes were issued and declared to be a legal tender is unconstitutional, was tenable.

The act in question, which was approved February 25, 1862, amongst other provisions, declared that these notes, when issued, "shall also be lawful money and a legal tender in payment of all debts, public and private, except duties on imports and interest as aforesaid."

Any law made by the Congress in the United States, in pursuance of the Constitution, and duly approved, "the supreme law of the land, and the Judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Constitution, Art 6.) Unless, therefore, it can be shown that the act of Congress in question is not in pursuance of the Constitution, it is the supreme law of the land, and the tender was valid and must be held to satisfy and discharge the demand created by the deposit.

The General Government possessing all the essential attributes of a national sovereignity, and the Legislature being the branch thereof invested with paramount authority, the presumption is unquestionably in favor of the validity of any and all of its acts, and it lies primarily with the party objecting to show that any particular act is in derogation of the Constitution. This, however, is of little consequence where the standard is a written organic law, which may always be appealed to, and must determine in all cases where the authority to enact is seriously challenged.

In considering the question thus presented, it must be admitted in the outset that the Government of the United States is limited in its powers and authority, to the exercise of those conferred by the organic law, in which it has its being, and that all powers not delegated to it by the Constitution, nor prohibited by it to the

States, are reserved to the States respectively or to the people thereof.

But it by no means follows from this, that it can take nothing by implication, like a special and inferior tribunal created by statute. It is still a national sovereignty, and within the just scope and measure of the powers with which it has been endowed, is as supreme and potent in its authority as any other human government. And in passing upon the question of the constitutionality of any law of Congress, this important consideration is not to be lost sight of.

The object which the framers of the Constitution and the people who ratified and adopted it as the organic law of this National Government had in view, is clearly and plainly expressed in the preamble. It was amongst other things to "establish justice, insure domestic tranquility, provide for the common defence and general welfare, and to secure the blessings of liberty to ourselves and our posterity."

To secure the attainment of these cardinal ends of all government, the powers deemed necessary or essential thereto were enumerated and conferred under separate and distinct general heads; each of which necessarily comprehends and embraces, as it was intended, all the subordinate and auxilliary powers necessary or incident to the supremacy of such general head of power. And hence, in section eight, after specifying the several powers which Congress shall have, in sub-division seventeen, the power is in express terms given "to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Here is a plain and unambiguous test in the text of the Constitution itself, if the rule prescribed by the statute is not within the plain letter or evident scope of the power enumerated. The question then is whether the law is necessary or proper for carrying into execution all or either of the enumerated and granted powers. If it is either necessary or proper without being absolutely necessary, the statute is valid and becomes the supreme law of the land, binding upon the judges of every State.

But to come more directly to the statute in question: has Congress the power within the letter or evident meaning of either of the enumerated powers conferred, to declare these treasury notes lawful money; and make them a legal tender in payment of all debts, public and private?—Among the powers enumerated and expressly conferred, are these: to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; to borrow money on the cridit of the United States; to regulate commerce with foreign nations and among the several States, and with the Indian tribes; to coin money and regulate the value thereof and of foreign coin; to provide for the punishment of counterfeiting the securities and current coin of the United States; to declare war, to raise and support armies; to provide and maintain a navy.

Unless the power to declare these notes lawful money is fairly embraced in the terms of the power "to coin money and regulate the value thereof," it must be conceded that it is not within the express letter of any of the powers enumerated.

It is perfectly obvious upon looking into the various provisions of the Constitution that it was the intention to place the entire power of creating money, and determining and regulating its value for the whole country in the General Government; and hence it is forbidden to the several States by section 10 to "coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts." Money is the medium of exchange —the standard or representative of all commercial values. It is that which men receive in exchange and in satisfaction of labor and its various products; and whether it is intrinsically valuable or otherwise, it is the standard of values by which alone they are all measured. In all civilized governments it consists of coin, of gold, silver and copper, and of bank bills, or bills of credit, issued by the authority of such government.

Gold and silver are not naturally money, any more than any other metal product or fabric. They are made so by law only when manufactured into pieces of coin of prescribed weight and fineness, and stamped with the requisite inscriptions and devices. These metals are by common consent better adapted for use as money than any other yet discovered, but they become money by the force and operation of law alone.

It is conceded, as I understand the argument, that the power "to coin money and regulate the value thereof," is a power given to Congress to enact suitable laws on the subject of the current money of the country. But it is insisted that the power is limited to the enactment of laws for the minting or fabrication of gold and silver only into money, and the regulation and value of money of that description. This might be so if the language employed had been, "to coin gold and silver into money and regulate the value thereof." But the terms used are "coin money, and regulate the value thereof." In order, therefore, to place this restriction, it must be made to appear not only that "to coin" signifies shaping and stamping metals exclusively, but also that the term "money" in its ordinary popular signification, at the time the Constitution was framed and adopted, meant gold and silver coin and nothing else.

But neither of these propositions is true. By looking into any dictionary it will be seen that "to coin," means not only to shape and stamp, or mint metals, but to make or fabricate other things as well. And we cannot but know from the history of the times, that at the adoption of the Constitution, neither in this country nor in any other civilized country, did the money in use consist of gold and silver exclusively. It consisted then, as it has ever since, and probably ever will, in gold and silver, and in paper representing gold and silver in the shape of bank bills, or bills of credit.

The power is, in my judgment, most clearly, to make laws, prescribing what the money of the country shall be, and the value of the money thus created by such laws. If it was intended to restrict the exercise of this power to enactments on the subject of gold and silver only, we should naturally expect that some terms would have been chosen clearly expressing such limitations.

The framers of the Constitution certainly must be supposed to have known something of what is termed the evils of paper money, and if it was intended to exclude the creation of that species of money from the power of Congress, nothing is more rational or national than that something of the kind should have been said in clear and explicit terms.

If "to coin" is to be restricted in its definition to work upon metals, it applies to other metals as well as gold and silver, and proves too much for the argument. It is not claimed that it was the design to have any other species of metal created money by law; and as neither gold nor silver is mentioned as the substance to be coined, I think it must be held, that the power granted is simply to determine by law what the money of the country shall consist of and to regulate its standard value.

Considerable stress is laid upon the debates in the Convention in which the Constitution was framed, but I think it far safer to look carefully at the Constitution as it was adopted, and endeavor to construe it according to its evident and natural import. It is by no means certain that these debates may not rather mislead than enlighten the judicial mind.

The framers of the Constitution were but the agents of the people, to prepare it for their acceptance or rejection, and if we could be certain that we have arrived at the exact meaning of these agents, we might still doubt whether the people, when they ratified and accepted it, did not give it a broader and more generous interpretation.

We can only arrive at their intention with any degree of certainty by attending carefully to the ideas expressed. I can have no doubt that should any other metal, or combination of metals, be discovered, which, in the judgment of Congress, was more convenient and suitable for use as money than gold or silver, it might by law make such metal or combination money, and prohibit the use of gold and silver as money.

And I have as little doubt that Congress has, under this general head of power, to make laws on the subject of the money of the country, ample authority to declare and make by law these promises of the Government, money and a legal tender in payment of all debts whatever. This seems to me a fair and reasonable interpretation of the instrument in view of the subject of the power, the nature and functions of the body upon which it was conferred, and the purposes for which it was thus conferred.

The interpretation contended for in behalf of the plaintiff, so far from being strict and rigid, as is claimed, would, as it seems to me, be exceedingly loose and conjectural in its very narrownes and poverty of apprehension. It is an authority to make a supreme law and not a mere employment to bestow labor upon metals, as it would seem to be regarded.

It must be admitted that no power is in express terms anywhere given in the Constitution to Congress, to make anything a legal tender in payment of debts public or private. The States are prohibited from making anything but gold and silver such legal tender. But Congress is neither prohibited from making a law upon the subject, nor expressly authorized to enact one. If a direct and explicit authority is needed, it has no power whatever to make gold or silver even, or bullion, or bank notes, or bills of credit, such legal tender. This power, if it exists in Congress at all, is lodged there as a necessary and proper incident only, to the full and perfect exercise of some power expressly granted in the instrument. And the statute in this regard, must find its warrant and sanction in the fact of its necessity or propriety as an auxilliary to the legitimate exercise of some one or more of the enumerated and granted powers.

But there is, I think, no serious difficulty in respect to the existence of this power in Congress, to provide that a legal tender may be made in payment, and satisfaction of all debts existing within the jurisdiction of the Government whether public or private.

The only controversy which can seriously arise, as it seems to me, must be in regard to what shall be made the legal tender. It is a power which Congress has uniformly exercised, and is clearly an incident to the power to regulate commerce. Contracting and paying debts are strictly part and parcel of commerce. And under no civilized government can its commercial business be regulated, without some specific provision of law, in regard to paying, satisfying and discharging all debts and obligations, not only to the Government, but between individuals. The power to regulate commerce includes the power to make laws for everything which belongs to commerce, a material part of which is the contracting and the payment and final discharge of the debts created thereby.

It is claimed, however, on behalf of the plaintiff, that conceding to Congress the power to provide by law for a legal tender, in payment and satisfaction of debts, it is limited in the exercise of such power by the Constitution, to making gold and silver coin only such tender. It is admitted that no such restriction is to be found in the language of the Constitution, but it is claimed to be irresistibly inferable from the provision prohibiting the States from making anything else a legal tender. This proposition is wholly untenable. To say, as matter of judicial construction, that a limitation and restriction upon the power of and inferior, by a superior, implies the same limitation and restriction upon the power of the superior, would be in the last degree unwarrantable, within any known rule of construction. The mere statement of such a proposition is its sufficient refutation. Another argument is sought to be derived against the existence of the power to make paper of this description a legal tender, from what is claimed to have been the uniform practice of the Government, from the beginning, to make nothing but gold and silver coin such legal tender.

This, if it had been the uniform practice, would be in no respect conclusive, though it would not be entirely without force as an argument. For it is well understood that the General Government has many powers which it has never called into existence, the occasion for their proper exercise having never as yet arisen.

But the fact is otherwise. The Government has not only issued paper of this description from the beginning, whenever the public exigencies required it, but has generally provided by law that it should be receivable in payment of all public dues. And it was held to be a lawful tender in payment of such dues by Judge Story, in *Thorndike* v. *The United States*, 2 Mason, 1.

It is said, in answer to this, that Government may properly make such regulations in regard to its own debts as it chooses, and that it would not follow that it could make such notes a lawful tender between individuals, if it could in discharge of its own dues.

But this is no answer. The question is not what the Government may do by contract between its agents and other individuals, but what rule it may prescribe as a public and general law.

If Congress has no power to pass a law making them a legal tender, any such law would be void and they could not be lawfully tendered in satisfaction of a debt, even to the Government. But if Congress has the power to make them a lawful tender in payment of any debt, it may unquestionably make them such in payment of all debts.

The decision, therefore, necessarily affirms the power of Congress to make a valid law authorizing the tender in question.

A debt between individuals is no more sacred or removed from the reach of the power of Government than one from an individual to the Government. The question is, has Congress the power to provide by law that they shall be a legal tender in payment of any debt?

It is thus seen that Congress has, in repeated instances, exercised this very power, not to the same extent or in the same degree, perhaps, but identical in kind, whenever in its judgment the necessities or the inconvenience of the country required it. The power is clearly, in my judgment is one of the attributes of governmental sovereignty, and may be exercised whenever it is deemed necessary or proper by the sovereign authority. And were it even true and made lawful money, I have no doubt they could still be made a legal tender. Congress having the power to provide for a tender, in satisfaction of a debt, has necessarily the right to declare what the tender shall consist of. It is not a question of policy or expediency merely, but of power.—Of the expediency and propriety of the measure, Congress is the sole and exclusive judge. If it has the power to make such a law, its judgment as to the necessity or propriety of it at the present time, is conclusive. The Courts have no right to question it, except to determine the existence of the power.

It is also claimed that the act is invalid on the ground that it impairs the obligation of contracts by compelling the creditor to receive something less valuable than gold or silver coin in payment of his lawful demands against his debtors.

It cannot be denied that it does in one sense and to a material extent impair the obligation of contracts in the particular above stated. But it is not invalid for that reason. The power to pass laws to impair the obligations of contracts is prohibited to the States only which can pass no law impairing directly or indirectly the obligations of any contract. There is no such limitation upon the power of Congress. The argument that the one implies the other has already been answered. The same effect may, however, be produced by regulating the value of coin, which, it is admitted may properly be made a legal tender. Instances are not wanting in our own Legislature of changing by law, the existing standard or degree of fineness of our coin, and laws making foreign coin, a legal tender have been repealed. Congress has also enacted general brankrupt laws, which, to a still greater degree, affect the obligation of contracts, destroying entirely their obligatory force, without the consent of the creditor. Such acts have been held constitutional by the Supreme Court of the United States and by State Courts. In the matter of Edward Kleim How. U. S. R, 277; opinion of Mr. Justice Catron; *M'Cormic* v. *Pickering*, 4 Coms., 276; *Kinsler* v. *Kohane*, 5 Hill, 317; *Sacket* v. *Andross*, id. 327.

I do not, however, rely upon these decisions as controlling in the present case. The power to enact a general brankrupt law, so manifestly includes in it the power to impair the obligations of contracts brought within the operation of the law, that there scarcely seems room for two opinions on the subject.

There is, however, authority for the proposition, that where the subject of the enactment is clearly within the granted powers the fact that it incidentally impairs the obligation of contracts furnishes no valid ground of objection that the act is unconstitutional.

The grant of the power to make all laws which shall be necessary or proper for carrying into execution "The foregoing power and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," is an express and not an implied grant. It carries with it, and includes in it, all legitimate incidents and consequences of the laws thus made of necessity. It would be a strange and unwarrantable

proposition that a law clearly within the letter and spirit of an express power, should be held invalid and unconstitutional, merely because in its operation it affected some particular right or interest injuriously.

But while I am able to find ample authority in the grant of power to regulate commerce, for making the notes in question a legal tender, I do not intend by any means to rest my opinion upon that head of power exclusively. We must of necessity take judicial notice of the alarming and critical condition of the Government and of the country. We cannot, if we would ignore the fact that armed rebellion, by open and flagrant violence, is seeking the overthrow of the Government, menacing its complete and total destruction. Nor that the Government thus assailed, in order to perserve its existence and restore its rightful authority, is compelled to raise and support powerful armies and supply them with munitions of war, to provide and maintain a navy of a magnitude wholly unprecedented in our history involving an expenditure probably of millions of dollars daily. To meet this extraordinary demand, the ordinary means of the Government, and indeed, the ordinary currency of the whole country, is entirely inadequate. The Government must, therefore, not only borrow but must create, as far as practicable, an additional currency, to meet its urgent and immediate necessities. The right to borrow necessarily includes in it the right to promise to pay. But in order to borrow to advantage, or indeed to borrow at all, its promises must necessarily have credit, and should have the highest credit which the Goverment is able to confer upon them. If, in the judgment of Congress, it was either necessary or proper to enhance the credit of these Goverment promises, to make them a legal tender in payment of private as well as public debts, it had, unquestionable, as I think, the right so to do, and even to declare them lawful money. It would be but the making of a law, necessary and proper for carrying fairly and reasonably into execution several of the powers expressly granted.

That this was the object and purpose Congress had in view, is evident not only from the debates when the act was under consideration before that body, but also from the application of the Secretary of the Treasury to it to insert such a provision in the act.

Amongst other reasons assigned by that officer to Congress in favour of this act he says, "But unfortunately there are some persons and some institutions which refuse to receive and pay them, and whose action tends not merely to the unnecessary depreciations in business against those who in this matter give a candid support to the Government, and in favor of those who do not." But we can see plainly, aside from this, that it was a means well adapted to the accomplishment of the purpose, and therefore entirely legitimate. And this brings this feature of the law within the express words of the grant of power "to make all laws which shall be necessary or proper for carrying into execution the foregoing power."

I have no hesitation, therefore, in pronouncing this provision of the act in question perfectly in accordance with the plain letter, intent and spirit of the Constitution.

I have come to the conclusion upon what has seemed to my mind the plain and necessary construction of the organic law, as it stands written by its framers, and without calling to aid the consideration of those ultimate and extreme powers which every government, having the right to an existence and a place among the nations of the earth, may of necessity employ as a means of self-preservation when assailed by a public enemy with flagrant violence, and thus involved in actual war. No one doubts, I suppose, that any government thus situated may rightfully, if need be, by any suitable means, call to its aid and service the might of every arm and the use of every dollar of the property of each and every subject and citizen within its jurisdiction. These are, however considerations which it is wholly unnecessary to press into this case.

The defendant is therefore entitled to judgment upon the facts presented by the case.

Judge E. D. Smith concurred in a separate opinion, reaching the same result, and the other judge concurred in the above opinion.

GENERAL CORRESPONDENCE.

Articled clerk—Under age—Father not party to the articles—Effect thereof.

To the Editors of the Law Journal.

London, July 28, 1863.

Gentlemen,—Could you inform me, through the pages of your valuable periodical, whether a father is a necessary party to articles of clerkship, where the son is living with the father and under age, to enable him to pass his examination and be admitted as an attorney?

And oblige yours truly,

Law Student.

[Where an articled clerk is a minor, the father is a necessary party merely for the protection of the attorney to whom the minor is articled, because the minor himself is incapable of making a binding engagement of the kind. But where the minor, without his father being a party to the articles of clerkship, faithfully serves his term of probation, ratifies the articles when he comes of age, and is of age at the time of his application for admission, and is in other respects qualified for examination and admission, we apprehend that the fact of his father not having been a party to the contract of service at the time it was entered into, will not be an objection on the part of the Law Society.—Eds. L. J.]

Articled Clerks—Articles expiring within fourteen days of term—Remedy.

To the Editors of the Law Journal.

Gentlemen,—Profiting by your suggestion in the *Journal* for this month my remarks shall be brief and questions few.

By cap. 35, Con. Stat. U. C., persons applying for admission as attorneys are required, at least fourteen days next before the first day of the Term in which they seek admission, to deposit with the Secretary of the Law Society their contract of service, and an affidavit of the execution thereof and due service thereunder, &c. Now, I see that the practice in England, as per Archbold's Practice, page 40, is to deposit those papers in the proper office within the first fourteen days of the Term, thereby preventing in many cases a loss of three months to the student. My articles expire ten days prior to the first day of Michaelmas Term of this year. *Query*—Could my examination be proceeded with in Michaelmas upon the papers being filed fourteen days before the first day of Term, with an affidavit of due service thereunder up to that time, and that four days thereafter the full term of five years would be completed; or could I in any other way obtain admission during that Term? Or if not, could my examination be made during that Term, and my admission during the following Term?

Law Student.

[*In re MacGachen*, 7 U. C. L. J. 147, is apparently conclusive against the right of our correspondent, under the law as it stands, to obtain admission during Michaelmas Term, but upon inquiry we learn from the Treasurer of the Law Society

that the Benchers have come to the conclusion, in the case of students whose articles expire within fourteen days of a particular Term, to allow the student at least fourteen days before the Term to leave with the Secretary of the Law Society:—

1. His contract of service;
2. Any assignment thereof;
3. An affidavit of the execution thereof;
4. A certificate of his having attended the sitting of the court or courts during two Terms;
5. And a special affidavit showing that his articles not expired—that they will expire within fourteen days before Term—and of service during so much of the term as expired.

And then to undergo his examination *de bene esse*, and afterwards on the first day of Term to file a further affidavit showing the expiry of the articles and service thereunder for remainder of the term, and so gain admission without the loss of three months.

This will be good news to our correspondent and others in like circumstances. The Benchers deserve great credit for the desire which they have thus evinced of securing deserving young men, who can ill afford any loss, against the loss of a Term.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. C. GREGORY v. GORTAN.

Covenant—Demise of chattels—Judgment against executor.

In an action of covenant upon a demise of bleach works, and articles, matters, and things, mentioned in the indenture which the lessee was authorized to replace, the declaration alleged that in case a valuation at the end of the term, should exceed a certain sum, it was agreed that the lessor, his heirs, executors, administrators, or assigns, should pay the difference; that during the term the lessor died, having by his will appointed the defendant his executor, and having devised the several reversions in the demised premises and articles, matters and things to the defendant, and that the defendant had not paid the amount of the said difference between the value &c., of the said articles, matters and things. The jury having found for the plaintiff.

Held (upon error assigned on the record) that the covenant did not run with the land, and that the judgment ought to be against the defendant as executor,—as to damages and costs *de bonis testatoris si si non*,—as to costs *de bonis propriis*.

EX. C. WOOLLEN v. WRIGHT.

Sheriff—Interpleader issue, acceptance of, by execution creditor—Ratification.

The acceptance by an execution creditor of an interpleader issue, is not a ratification of an illegal seizure by the sheriff, where the sheriff under a *fi. fa.* upon a judgment obtained by the defendant against J., seized the plaintiff's goods, and the defendant, who, except by delivering the writ to the sheriff, had not interfered before the seizure accepted on interpleader issue.

It was *held* in an action for trespass, that he was not responsible.

C. C. R. REG v. EDWARD HOLMAN.

Pleading—Misjoinder of counts—Election.

An indictment contained two counts, the first embezzlement as servant, the second for larceny as bailee. At the close of the case for the prosecution, it was objected that the indictment was bad for misjoinder of counts, and that the court had no power to allow the counsel for the prosecution, to elect on which count he would proceed. The court overruled the objection, and the counsel for the prosecution having elected to proceed upon the second count, the prisoner was convicted.

Held, that the conviction must be affirmed.

EX. HUDSON v. MALCOLM.

Mortgage—Re-conveyance—Order for delivery up of deeds—Attachment for non performance.

When there has been an assignment of a mortgage and a re-conveyance to mortgagor, and then a re-mortgage to the same mortgagee, upon the usual order on redemption for delivering up of deeds relating to the title of the mortgaged property, the original mortgage and re-conveyance, as they form links in the title, ought to be delivered up.

EX. STUCKLEY v. BAILEY.

Contract—Warranty—Evidence—Letter—Representation.

Though, where parties have communicated entirely by letter, so that their contract must be wholly in writing, the construction of it is for the court; yet where it is not so, as in the case of sale, where the parties or their agents have had interviews and oral communications, and have seen the subject of the contract together, the whole matter must be for the jury; and evidence of oral communication to the plaintiff, to the effect that if he desired to be satisfied as to latent unsoundness, he must have the article examined.

Held, admissible, as tending to show that the statement as to soundness in the letters were not part of the contract, but that they were matters of mere representation.

Quære, whether at the sale of a ship, a warranty not mentioned in the bill of sale can be set up.

C. P. POOLE v. WHITCOMBE.

Costs—Verdict—Improper statement to jury.

The jury at a trial of a cause, have no right in estimating damage to take into their consideration what amount will carry costs; and if it appears they were thereby influenced in their finding, it is ground for granting a new trial.

TANVACO AND OTHERS v. LUCAS AND OTHERS.

Ship and shipping—Contract to deliver "shipping documents"—Policy, sufficiency of a question for jury.

A contract was made in London by which the plaintiffs sold to the defendants a cargo of wheat, 40s. per quarter, free on board at Lagangrog, and including freight and insurance to any safe port in the United Kingdom. The wheat was to be shipped in a particular class of vessel, and payment to be by cash in London, in exchange for shipping documents. The plaintiffs having obtained in market a cargo afloat answering the requirements of the contract, tendered to the defendants the shipping documents, and a provisional invoice which, following the bill of lading, stated the cargo to be 1,860 quarters at 50s. £4,625 less frieght at 10s. 9d. per quarter, £1,001 10s. The policy of assurance tendered as one of the shipping documents, was on the cargo of 1,850 quarters, valued at £3,600. The defendants refused the tender and defended an action for the contract, on the ground that the policy tendered was of unsufficient amount.

Held, that it was a question for the jury, whether the policy tendered was a shipping document, within the meaning of the contract.

LAWSON v. BURNESS.

Shipping—Charter party—Demurrage—Delay on loading—Regular term for loading—Custom of colliery or wharf—Reasonable term—Liability to chartered.

Where a ship had been chartered to proceed to a certain dock and there take and load in the customary manner from agents of the charterer, a full and complete cargo of the coal of a particular colliery, to be loaded in regular turn, and it being found as a fact

that this meant the "turn" on which the vessel should arrive and be ready to receive cargo, not merely the "turn" according to the custom of the colliery, (it not being a known and established custom.)

Held, that the charterer was liable for demurrage during a delay in loading, caused by the ship not being able to receive her cargo, when ready to do so not in the order in which according to the custom of the colliery, she was allowed to be loaded.

EX. SCOTT V. SEYMOUR.

Right of action—Assault committed abroad—Foreign jurisdiction.

An action lies in this country for an assault and battery committed in a foreign land by one British subject upon another, although it appears that it is a matter there of criminal cognizance.

Quære, whether it would be so if it also appeared that it was not of civil cognizance, and that no claim for compensation could be supported in the courts of a foreign country.

EX. SHEEN V. BUMSTED.

Evidence—Fradulent representation—Question as to belief or repute.

In an action for a false representation, that a third party to the best of his knowledge, was responsible, the defendant may be asked in chief whether at the time of the representation he believed the debtor to be in good credit, and other persons residing in the neighbourhood may be asked a similar question.

EX. WILKS V. HORNBY.

Bill of exchange—Pleading—Consideration—Failure of—Fraudulent misrepresentation—Accommodation, acceptance, which is—Disputed accounts.

In an action on a bill of exchange, on pleas of fraud and of an accommodation acceptance, it is no defence that the bill was given for a supposed balance of account, as represented by the plaintiff, but which, as alleged by the defendant, did not exist nor was really due.

EX. BRADWORTH V. FOSHAW.

Pleading—Action for negligence—Proof—Practice—Trial—Amendment.

An amendment of a declaration will not be allowed at the trial, where in a case of tort the plaintiff has stated one cause of action, and then, his evidence failing to sustain it, has endeavoured to raise another one.

Q. B. PATTESON V. HARRIS.

Costs—Taxation—Policy of assurance—Total loss—Partial loss—Divisibility.

Where, upon an insurance of goods, part of the goods is lost by perils of the sea, and subsequently the remaining part is lost not by perils of the sea, the issue upon the plea denying the loss is divisible; and the plaintiff can only enter a verdict in respect of the part lost by perils of the sea, and the defendant may enter a verdict for the remainder.

C. P. OFFORD V. DAVIES AND ANOTHER.

Revocation of guarantee—Demurrer.

The declaration set out the following guarantee: "In consideration of your discounting at our request bills of exchange for D. & Co., we hereby jointly and severally guarantee, for the space of twelve months, the due payment of all such bills to the extent of £600." To this one of the defendants pleaded that, after making the said guarantee and before the plaintiff had discounted such bills and before he had advanced such sums of money, the defendant countermanded the said guarantee, and requested the plaintiff not to discount such bills of exchange or to advance such sums of money.

Held on demurrer, that the defendant had a right to revoke the promise, and that the rights of the parties were not affected either by the promise for twelve months or by the fact that some discount had been made and repaid.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW, for May, 1863. London: Butterworths, 7 Fleet Street, Strand.

Our notice of this number has been unavoidably delayed. We refer to the number with pleasure.

The articles are, as usual, instructive and well written, viz., 1. Discipline of the bar—a paper suggested by the misconduct of Edwin James and Digby Seymour. 2. The rights, disabilities and usages of the ancient English peasantry, continued. 3. Accord and satisfaction—a brief and practical paper on an important branch of law. 4. May's Constitutional History of England reviewed. 5. Administration to foreigners dying in England. 6. Frederick Carl Von Savigny—a biography of this remarkrble and learned man. 7. Case of the *Alabama*, which we copy entire. 8. Lord Mackensie on Roman law. 9. Judicial Statistics, 1861.

The subscription to the *Law Magazine and Review* is only 20s. sterling per annum. Its cheapness, combined with its worth, should secure for the publication a much more extended support than it possesses in Canada. It is of use not only to the lawyer, but to the jurisconsult and the legislator. The articles are at all times suggestive, and as such give much pleasure to the intelligent reader. The reading of this magazine is of itself a great relaxation to the practical lawyer. His mind, while relieved, is instructed. In a word, both pleasure and profit are the portions of those who habitually read the Law Magazine and Review.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Honorable ARCHIBALD McLEAN, late Chief Justice of Upper Canada, to be the Presiding Judge of the Court of Error and Appeal in Upper Canada, in the room and stead of the Honorable Sir John Beverley Robinson, Baronet, C. B., deceased. (Gazetted July 25, 1863.)

The Honorable WILLIAM HENRY DRAPER, C.B., Chief Justice of the Court of Common Pleas in Upper Canada, to be Chief Justice of Upper Canada, in the room and stead of the Honorable Archibald McLean, resigned. (Gazetted, July 25, 1863.)

The Honorable WILLIAM BUELL RICHARDS, one of her Majesty's Justices of the Court of Common Pleas in Upper Canada, to be Chief Justice of the said Court of Common Pleas in Upper Canada, in the room and stead of the Honorable William Henry Draper, C.B., resigned. (Gazetted July 25, 1863.)

The Honorable JOHN WILSON, of Osgoode Hall, Barrister-at-Law and Q.C., to be one of her Majesty's Justices of the Court of Common Pleas in Upper Canada. (Gazetted July 25, 1863.)

POLICE MAGISTRATE.

MARTIN O'GARA, Esquire, Barrister-at-Law, to be Police Magistrate for the City of Ottawa, in the room and stead of John B. Lewis, Esquire, resigned. (Gazetted July 25, 1863.)

CROWN ATTORNEY.

SAMUEL H. COCHRANE, LL.B., of Osgoode Hall, Esquire, Barrister-at-Law, to be County Crown Attorney for the County of Ontario, in the room and stead of W. H. Tremayne, Esquire, removed. (Gazetted July 25, 1863.)

NOTARIES PUBLIC.

SAMUEL BARKER, of the City of London, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 4, 1863.)

STEPHEN KNERSHAW, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 4, 1863.)

DAVID G. HATTON, of Peterborough, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 11, 1863.)

THOMAS BEASLEY, of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 11, 1863.)

JAMES CAUFIELD, of Ingersoll, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 18, 1863.)

PETER JOHNSON BROWN, of Ingersoll, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted July 18, 1863.)

CORONER.

JOHN WESLEY CORSON, Esquire, M.D., Associate Coroner United Counties of York and Peel. (Gazetted July 11, 1863.)

TO CORRESPONDENTS.

LAW STUDENT—LAW STUDENT.—Under the head of "General Correspondence."

DIARY FOR SEPTEMBER.

1. Tuesday..... Paper Day, C. P.
2. Wednesday... Paper Day, Q. B.
3. Thursday..... Paper Day, C. P.
5. Saturday ..... TRINITY TERM ends.
6. SUNDAY..... *14th Sunday after Trinity.*
7. Monday..... Recorder's Court Sits.
8. Tuesday ..... Quarter Sessions and County Court Sittings in each County.
13. SUNDAY ..... *15th Sunday after Trinity.*
15. Tuesday ..... Last day for service for York and Peel.
20. SUNDAY ..... *16th Sunday after Trinity.*
25. Friday ..... Declare for York and Peel.
27. SUNDAY..... *17th Sunday after Trinity.*

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

SEPTEMBER, 1863.

THE LEADING STATUTES AS TO COSTS.

At common law costs were not recoverable *eo nomine* either by plaintiff or defendant. They were generally considered by the jury and estimated in the amount of damages. If the verdict was for defendant plaintiff was amerced to the king *pro falso clamore* (3 Bl. Com. 399.)

The statute of Gloucester, 6 Ed. 1, c. 1, passed in 1278, in substance enacts, that the demandant shall recover damages in certain forms of action specified, and that the demandant may recover against the tenant the costs of his writ purchased, together with the damages; and that the act shall hold place in all cases where the party is entitled to recover damages.

Though the costs of "the writ" only is mentioned in the statute, the statute has been held to extend to all the costs of the suit without reference to any particular scale of taxation, (2 Inst. 288, Witham v. Hill, 2 Wils. 91.) But where the damages are newly given by a statute subsequent to that of Gloucester where no damages were formerly recoverable, the plaintiff can recover no costs unless given by the statute which gives the damages, (Pitfold's case, 10 Co. 116 a; Gilb, C. P. 268; 1 Lill Abr. 467, b; Barnes 140; Cowp. 368.) If a statute subsequent to that of Gloucester gives double or treble damages in a case where single damages only were recoverable formerly, the costs also as parcel of the damages shall be doubled or trebled though no costs be given by the subsequent statute, (Cowp. 368, Hull, costs, 17; Tidd's Pr. 945.)

Costs were first given to a defendant on a writ of right of ward, (statute of Marleberge,) which became obsolete by the extinction of the military tenures; but now a defendant, by virtue of the 23 Hen. VIII., c. 15, s. 1, passed in 1535, and 4 Jac. 1, c. 3, s. 2, passed in 1606, is in general entitled to costs on judgment in his favor in all cases where a plaintiff would have been entitled to costs in case judgment had been given for the plaintiff.

The superior courts of law have jurisdiction in all actions great or small. Under the statute of Gloucester, a plaintiff in a superior court recovering any amount of damages, no matter how trifling, was entitled to full costs of suit. So long as this was permitted without limitation there was much vexatious litigation. The legislature, as we shall presently see, has from time to time endeavored to discourage vexatious actions, and to restrict trifling actions to courts of inferior jurisdiction.

The first act of the kind 43 Eliz. cap. 6, s. 2, passed in 1601, enacted, that "If upon any action personal to be brought in any of Her Majesty's courts at Westminster, (not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery) it shall appear to the judges for the same court, and so signified or set down before the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of forty shillings, or above, that in every such case the judge and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion."

When this act was passed the County or Sheriff's court had exclusive cognisance of all personal actions (not being for trespass *vi et armis* or for lands of freehold) under the value of *forty shillings* (6 Ed. 1, c. 8, *Vennard* v. *Jones*, 4 T. R. 495, Com. Dig. County C. 8), and therefore for the purpose of taking a case out of the inferior jurisdiction it was a common device to lay the damages in the declaration at an amount above forty shillings. The object of the statute of Elizabeth, and of other statutes of a like nature to which we shall presently refer, is to make such a device of none effect, and so compel plaintiffs to elect the proper tribunals for their suits at the risk of losing either the costs of the suit or the great bulk of the costs. (Ib.)

Payment into court of a sum exceeding forty shillings, takes the case out of the statute and deprives the judge of the power to certify to deprive the plaintiff of costs, in the event of his recovering a sum less than forty shillings,

beyond the sum paid into court (*Richards* v. *Bluck*, 6 C. B. 443). The certificate, in cases where it is proper to grant it, need not be granted immediately after the trial (*Holland* v. *Gore*, 3 T. R. 38 *n*; and see *Woolley* v. *Whitby*, 2 B. & C. 580; *Johnson* v. *Stanton*, *Ib.* 621), and where a verdict is entered for plaintiff pursuant to leave reserved the judge who tried the case may then certify to deprive the plaintiff of costs (*Richardson* v. *Barnes*, 4 Ex. 128). If the certificate be not applied for at the proper time, it cannot be granted after judgment and execution; but in such a case the court may, if so disposed, set aside the judgment (*Lyons* v. *Hyman*, 5 Ex. 749). But if the judge, at the trial, express his intention of certifying, the certificate may be indorsed on the postea, after judgment and taxation of costs (*Foxall* v. *Banks*, 5 B. & A. 536; *Davis* v. *Cole*, 6 M. & W., 624). The judge has power, under certain circumstances, to rescind his certificate (*Anderson* v. *Sherwin*, 7 C. & P. 527), but if he do so at all, it must be within a reasonable time (*Whalley* v. *Williamson*, 5 Bing. N. C. 200). The court may inquire if the judge had power to certify, and if it find he had power, will not interfere with the exercise of his discretion (*Cann* v. *Facey*, 4 A. & E. 68; *Richardson* v. *Barnes*, 4 Ex. 128).

The statute of Elizabeth, so far as it relates to costs in actions of trespass, or trespass on the case, is, in England, repealed by the 3 & 4 Vic. cap. 24, to which we shall hereafter refer; but it would seem even in England to be still unrepealed as to actions on promises (per Maule, J., in *Morrison* v. *Salmon*, 10 L. J. C. P. 92) and other personal actions of that kind (*Townsend* v. *Syms*, 2 C. & K. 381). In Upper Canada, however, the statute of Elizabeth has not been, in express terms, repealed (*Pedder* v. *Moore*, 1 U. C. Prac. 117).

In 1623, for the further prevention of vexatious suits, it was enacted by 21 Jac. I, cap. 16 sec. 6, that "In all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons, in any of the courts of record at Westminster, or in any court whatsoever that hath power to hold plea of the same, after the end of this present session of Parliament, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same, any law, statute, custom or usage to the contrary in anywise notwithstanding."

This statute is confined to words spoken of the person (*Browne* v. *Gibbons*, 1 Salk. 206). It does not apply to slander of title (*Hale* v. *Warner*, 2 Tidd. Pr., 9th Edn. 997). It is confined to words actionable in themselves, or actionable only by reason of their being spoken of the plaintiff in his trade or business (*Surman* v. *Shelletto*, 3 Burr. 1688; *Collier* v. *Gaillard*, 2 H. Bla. 1062; *Burry* v. *Perry*, 2 Ld. Rayd. 1588; *Turner* v. *Horton*, Willes 438; *Grenfell* v. *Pierson*, 1 Dowl. P. C. 406; *Goodhall* v. *Ensall*, 3 Dowl. P. C. 743). If special damages be laid and the words are not *per se* actionable, the statute is inapplicable (*Greaver* v. *Warner*, Hull 28; *Pedder* v. *Moore*, 1 U. C. Prac. R. 117) even though the declaration contain counts for words actionable *per se* (*Saville* v. *Jardine*, 2 H. Bl. 531; *Kelly* v. *Partington*, 5 B. & Ad. 645). But a plea of justification found for the plaintiff will not entitle him to full costs (*Halford* v. *Smith*, 4 East. 567).

The statute of James is not at all repealed or interfered with by the 3 & 4 Vic. cap. 24 (*Evans* v. *Rees*, 9 C. B., N. S., 391) nor by the act of Upper Canada Con. Stat. U. C. cap. 22 secs. 324, 325 which is a transcript of it (*Pedder* v. *Moore*, 1 U. C. Pra. R. 117) to both of which we shall hereafter refer.

In 1670, the Legislature of England, for the further prevention of frivolous and vexatious actions, passed the 22 & 23 Car. 2, cap. 9, which enacted, that "In all actions of trespass, assault and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify, under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of forty shillings, shall not recover or obtain more costs of suit than the damages so found shall amount unto; and if any more costs in any such action shall be awarded, the judgment shall be void, and the defendant is hereby acquitted of and from the same, and may have his action against the plaintiff for such vexatious suit, and recover his damages and costs of such suit, in any of the said courts of record."

What the Legislature must have meant by this act was, that in all actions of trespass, assault and battery, and other personal actions, where damages less than forty shillings shall be recovered, the plaintiff shall have no more costs than damages, unless the case be such that the judge can truly certify that a battery was proved, or that the freehold or title to land came chiefly in question. If, therefore, there be actions of trespass, or personal actions, in which it might occur that title came in question, or that a battery was proved, but yet the judge does not certify that the fact was so, the plaintiff is restrained in his costs. And if there be actions of trespass or personal actions in which, from the nature of things, title could not come into

question, or a battery could not have been proved, then of course we need not look for a certificate, for it is enough that those circumstances could not have have existed, in deference to which the Legislature had shown themselves willing to allow costs; and one would suppose it should follow as a consequence that, having no pretence in the latter class of cases for a certificate, the plaintiff must equally lose his costs. Instead of that, however, the courts determined that whenever there could be no pretence in the nature of things for expecting or asking a certificate, then the plaintiff should have full costs, because he could obtain no certificate! This appears to have arisen from from the Legislature adopting too general a form of expression when they spoke of "other personal actions," meaning, perhaps, actions for torts to the person or personal property. The courts held that the Legislature could not have intended the statute to apply to all actions that are called personal actions, which would include all actions that are not real or mixed; and, therefore, restricted the meaning to actions of trespass in which title might come in question, or trespass in which a battery might be proved. The consequence was, that if a plaintiff before the recent statute, to which we are now about to refer, brought trespass for taking a dozen of potatoes, he was entitled to full costs, so far as the statute was concerned, though he recovered only sixpence damages (per Robinson, C. J., in *Hawkes* v. *Richardson et al*, 9 U. C. Q. B. 229).

To remedy this state of things the statute 3 & 4 Vic. cap. 24 was passed. It recites the acts of Elizabeth and Charles, and that the evils which those acts were intended to remedy "doth still prevail and increase;" and for remedy, after repealing so much of the act of Elizabeth as relates to costs in actions of trespass or trespass on the case, and so much of the act of Charles the Second as relates to costs in personal actions, enacts "That if the plaintiff in any action of trespass or trespass on the case, brought or to be brought in any of her Majesty's courts at Westminster, &c., shall recover by the verdict of a jury less damages than forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default unless the judge or presiding officer before whom such verdict shall be obtained shall, immediately afterwards, certify on the back of the record or writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful or malicious; provided always, that nothing herein contained shall extend to or be construed to extend to deprive any plaintiff of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations or enclosures, or for entering into any dwellings, out-buildings or premises, in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

This statute applies where a verdict is taken subject to an award (*Reid* v. *Ashby*, 13 C. B. 897; *Cooper* v. *Pegg*, 16 C. B. 264, 454; and see *Griffith* v. *Thomas*, 4 D. & L. 109), but the arbitrator may certify in the event of power being given him to do so (*Spain* v. *Cadell*, 8 M. & W. 129; *Bury* v. *Dunn*, 1 D. & L. 141). This statute, unlike that of Elizabeth, also applies, notwithstanding the payment into court of a sum exceeding forty shillings; and in such a case, if plaintiff obtains a verdict for a less sum than forty shillings beyond the sum paid into court, in the absence of a certificate, he will be deprived of costs (*Reid* v. *Ashby*, 13 C. B. 897). The fact of there being several issues on the record does not preclude the operation of the act (*Newton* v. *Rowe*, 1 C. B. 187). The judge has power to certify whenever the action is such that a question of right besides the mere right to recover damages might arise (*Morrison* v. *Salmon*, 9 Dowl. P. C. 387), and if such be the nature of the case, the court will not inquire into the exercise of discretion by the judge (*Shuttleworth* v. *Cocker*, 1 M. & G. 829; *Barber* v. *Hollier*, 8 M. & W. 813; *Bury* v. *Dunn*, 1 D. & L. 141). It is sufficient if the action is really brought to try a right, whether it is fitted for that purpose or not (per Maule J., in *Morrison* v. *Salmon*, 9 Dowl. P. C. 387). The proviso of the act includes trespasses by continuing after notice (*Bowyer* v. *Cook*, 4 C. B. 236). In cases within the proviso, the proper mode of obtaining costs is by entering a suggestion on the record that the trespass was committed after notice (*Ib.*) This suggestion is traversable (per Parke, B., in *Sherwin* v. *Swindall*, 12 M. & W. 786; *Watson* v. *Quilter*, 11 M. & W. 760), and leave to enter a suggestion may be obtained after the trial, although the judge has refused to certify (*Bowyer* v. *Cook*, 4 C. B. 286).

The Legislature of Upper Canada, in 1853, adopted the 3 & 4 Vic. cap. 24, without, however, in direct terms interfering either with the statute of Elizabeth or statute of Charles (16 Vic., cap. 175 sec. 26; Con. Stat. U. C., cap. 22 secs. 324, 325). It would have been a wiser course for our Legislature, when they applied themselves to the subject, to have, in express terms, repealed the statutes of Elizabeth, James and Charles, which have given rise to

most perplexing decisions, and substituted for them a plain and simple consolidation of those statutes (per Robinson, C. J., in *Pedder* v. *Moore*, 1 U. C. Prac. R. 119). But, not having done so, it follows that we can only take this isolated clause as it stands, and give effect to its provisions by allowing them to overrule any previous enactment with which they conflict (*Ib.*). It cannot be held that it virtually repeals all former laws on the subject, though it must be held to have virtually repealed whatever is clearly inconsistent with it (*Ib.*).

Division courts in Upper Canada have jurisdiction of all personal actions, where the debt or damages claimed do not exceed $40, and of all claims and demands of debt, account, or breach of contract or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100, as well as of actions of replevin, where the value of goods or other property or effects distrained, taken or detained does not exceed $40 (Con. Stat. U. C. cap. 19, s. 55, 23 Vic., cap. 45 sec. 6).

Subject to the following exceptions:

1. Actions for a gambling debt.

2. Actions for spirituous or malt liquors drunk in a tavern or ale-house.

3. Actions on notes of hand given wholly or partly in consideration thereof.

4. Actions of ejectment, or actions in which the right or title to any incorporeal hereditament, or any toll, custom or franchise comes in question.

5. Actions in which the validity of any devise, bequest or limitation under any will or settlement may be disputed.

6. Actions for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage.

7. Actions against a justice of the peace for anything done by him in the execution of his office, if he objects thereto.

(Con. Stat. U. C., cap. 19 secs. 54).

County courts in Upper Canada have jurisdiction—

1. In all personal actions where the debt or damages claimed do not exceed $200.

2. In all causes and suits relating to debt, covenant and contract to $400, where the amount is liquidated or ascertained by the act of the parties, or by the signature of the defendant.

3. To any amount on bail bonds given to a sheriff in any case in a county court, whatever may be the penalty.

4. On recognizances of bail taken in a county court, whatever may be the amount recovered, or for which the bail therein may be liable.

(Con. Stat. U. C., cap. 15, sec. 17).

5. In actions of replevin, where the value of the goods or other property or effects distrained, taken or detained does not exceed $200.

(Con. Stat. U. C., cap. 29 sec. 3).

Subject to the following exceptions:

1. Where the title to land is brought in question.

2. In which the validity of any devise, bequest or limitation under any will or settlement is disputed.

3. For any libel or slander.

4. For criminal conversation or seduction.

5. Actions against a justice of the peace for anything done by him in the execution of his office if he objects thereto.

(Con. Stat. U. C., cap. 15 sec. 16).

In case a suit of the proper competence of a county court be brought in either of the superior courts of common law in Upper Canada, or in case a suit of the proper competence of a division court be brought in either of such superior courts or in a county court, the defendant shall be liable to county court costs or to division court costs only (as the case may be) unless the judge who presides at the trial of the cause, in open court, immediately after the verdict has been recorded, certifies that it is a fit and proper cause to be withdrawn from the county court or division court (as the case may be) and brought in the superior court or a county court (as the case may be) (Con. Stat. U. C., cap. 22 sec. 328).

If the judge does not so certify, so much of the defendant's costs, taxed as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the county court or division court, shall, in entering judgment, be set off and allowed by the taxing officer against the plaintiff's county court or division court costs to be taxed; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxable costs, the defendant shall be entitled to execution for the excess (*Ib*).

The cases bearing upon the construction of the last mentioned enactments, showing the time within which the certificate may be given, the circumstances under which it ought to be given, and the effect of it not being given, have already been noticed in 7 U. C. L. J. 221, and need not be here repeated.

Under the various enactments to which we have referred where there is a verdict for a less sum than forty shillings, the following cases may occur:

1. In actions on the case for slanderous words, actionable *per se* if the plaintiff has a verdict for a less sum than forty shillings, the judge has no power to certify for costs, and plaintiff cannot, under any circumstances, have more costs than damages.

2. In *other* actions on the case and in actions of trespass,

if the plaintiff has a verdict for a less sum than forty shillings, he can have no costs whatever, unless—*first*, the judge certifies that the action was brought to try a right besides the mere right to recover damages; or, *secondly*, that the trespass was wilful and malicious; or, *thirdly*, unless it be suggested on the roll that the action was for a trespass to land, &c., after notice, *and* if the cause of action as to amount be within the jurisdiction of an inferior court, to entitle him to full costs must also have a certificate that the cause was preperly withdrawn from the inferior court.

3. In *all* personal actions (excepting trespass and case) if the plaintiff has a verdict for a less sum than forty shillings, and in the event of the cause of action being within the jurisdiction of an inferior as to amount, has a certificate that the cause was properly withdrawn, is entitled to full costs, unless the judge who tried the cause certifies, under the statute of Elizabeth, to deprive him of costs.

JUDICIAL CHANGES.

The Honourable Archibald McLean, on Monday, 24th August last, took his seat as President of the Court of Error and Appeal, in the room of the Honourable Sir J. B. Robinson, Bart., deceased.

The Honourable William Henry Draper, C.B., on same day, took his seat in the Court of Queen's Bench as Chief Justice of Upper Canada, in the room of the Honourable Archibald McLean, resigned.

The Honourable William Buell Richards, on the same day, took his seat as Chief Justice of the Court of Common Pleas, in the room of the Honourable William Henry Draper, C.B , transferred to the Court of Queen's Bench.

The Honourable John Wilson, the newly-appointed Puisne Judge, in the room of the Honourable William Buell Richards, promoted to the Chief Justiceship, on the same day took his seat in the Court of Common Pleas.

DEATH OF SIR CRESWELL CRESWELL.

The death of this able Judge has taken many by surprise. In July last, he was thrown from his horse and sustained an injury in his knee cap, which, contrary to the expectations of his friends, led to his death. He was the first Judge of the Divorce Court, the laborious duties of which he performed with marked success. Throughout life he was an able and distinguished lawyer. He was first generally known to the profession in 1822, when he became a contributor to Barnewall & Cresswell's Reports. He subsequently rose to a leading practice on the Northern circuit. In 1842 he was raised to a seat on the bench of the Court of Common Pleas, which he held till 1858, when appointed Judge of the Divorce Court. He was 65 years old at the time of his death. Sir James Plaisted Wilde is his successor.

EXPLANATION.

The Chief Justice of the Court of Common Pleas, in the matter of the Judge of the County Court of Elgin and Robert Macartney, one, &c., reported in 13 U. C. C. P. 74, and page 238 of this number, says: "I abstain from expressing any opinion as to whether the order is or is not in accordance with law, on the actual merits, because a perusal of the trust deed, or a disclosure of further circumstances, might change any view I should adopt upon the facts now apparent. There were, I should hope, *other facts* made apparent to justify the order, against which the attorney complains. I feel bound to assume this, as the order is of a different character from any which I have seen in any reported case," &c. The "other facts," which, in all fairness, ought to have been before the Court of Common Pleas on the application for the Mandamus, will be found, upon a perusal of *Ellison* v. *Ellison*, reported in other columns.

LAW SOCIETY—TRINITY TERM, 1863.

During this Term the following gentlemen passed the examination necessary for admission upon the books of the Law Society:—

In the University Class.—Messrs. John Cadenhead, B.A., Malcolm M. McMartin, B.A., Arthur L. Wilson, B.A., William G. Crawford, B.A., Hamilton F. Biggar, B.A., and John C. Deltor, B.A.

In the Junior Class.—Messrs. Alexander F. McLean, Horace Lapierre, Charles M. Masterson, Albert A. E. Lethbridge, Aaron I. Dunning, Alexander Dunbar, Samuel S. Robinson, Alex. M. Allan, John Gray, Stephen Gibson, jun., John Matthews, William A. McLean, Hugh S. S. Hubertus, Ralph H. Caddy, William E. Ledyard.

The following gentlemen were called to the Bar:—

J. A. Boyd, M.A., Toronto; B. F. Fitch, Toronto; Thomas Ferguson, Toronto; Robert Fraser, Toronto; G. B. Gordon Goderich; T. Holden, M.A., Toronto; John Hoskins, Toronto; George Lount, Toronto; A. Millar, Berlin; T. C. Patteson, Toronto; Charles E. Pegley, Chatham; A. R. Robertson, jun., Windsor; Richard Snelling, LL.B., Toronto.

The Benchers were so well satisfied with the written examinations of Messrs. Boyd and Hoskins, as to pass them without oral examination.

The following gentlemen passed as attornies:—John W Beynon, B.A., Perth; J. A. Boyd, M.A., Toronto; J. H Dumble, Cobourg; Thomas F. Fairbairn, Toronto; D. C. Feeley, Cobourg; A. W. Lauder, Toronto; John Robertson, Galt; Richard Snelling, LL.B., Toronto.

Mr. Boyd, upon this occasion, received the same mark of the Benchers' approbation as in his examination for call to the Bar.

TO LAW STUDENTS.

It is enacted by Con. Stat. U. C., cap. 35, that no person shall be admitted and enrolled as an attorney, unless, at least fourteen days before the first day of the term in which he seeks admission, he has left with the Secretary of the Law Society, among other things, his contract of service, and an affidavit of due service thereunder (s. 3, sub-s. 4).

The only exception created by the Legislature is in the case of persons who entered into contracts of service prior to 1st May, 1858. With regard to such persons, if, by reason of the expiration of the period of the contract of service during a term of the superior courts of common law, it be impossible for the applicant to comply with the foregoing enactment, the Law Society is empowered, upon satisfactory proof that the day of expiration of the contract of service has not arrived, but will arrive previous to the last Thursday of the term in which the applicant seeks admission, to proceed with the examination, although the period of service has not expired (*Ib.* s. 24).

Therefore, in the case of a student whose contract of service has been entered into since the 1st July, 1858, and which contract of service expires either within fourteen days of a given term of the court, or during such term, as the law stands, the loss of that term is inevitable (*In re Macgachen*, 7 U. C. L. J. 147).

Not long since, a student of the last mentioned class made application to us to know what he should do; and upon reference to the learned Treasurer of the Law Society, who made no inquiry as to the date of his contract of service, we were told that the Society would proceed with the student's examination, and allow him to file an additional affidavit of service during the term, so as to be admitted during that term; and we accordingly made public the information thus received (see answer to law student in 9 U. C. L. J. 222).

We are now told that the Treasurer intended to confine his observations to students whose contracts of service were entered into prior to 1st July, 1858, and that his observations must be so read and understood.

We hasten, therefore, to add the necessary qualification to the remarks of the learned Treasurer, which at the time we would not have omitted, had the qualification been made.

The distinction between students whose articles were entered into prior to and since 1st July, 1858, might, we think, safely be abolished. If the Law Society be competent in the one case to exercise a sound discretion, we presume it would be equally competent to exercise a discretionary power, if conferred upon them, in the other. Young men who enter upon the study of the law, know nothing, before their studies actually commence, about the terms of the superior courts of common law.

FALL ASSIZES, 1863.

EASTERN CIRCUIT.

THE HON. MR. JUSTICE JOHN WILSON.

Brockville	Tuesday	29th September.
Kingston	Monday	5th October.
Perth	Wednesday	14th "
Ottawa	Tuesday	20th "
L'Orignal	Tuesday	27th "
Cornwall	Monday	2nd November.

MIDLAND CIRCUIT.

THE HON. MR. JUSTICE MORRISON.

Whitby	Tuesday	29th September.
Lindsay	Monday	12th October.
Peterboro'	Thursday	15th "
Cobourg	Wednesday	21st "
Belleville	Monday	2nd November.
Picton	Wednesday	11th "

HOME CIRCUIT.

THE HON. MR. CHIEF JUSTICE RICHARDS.

Owen Sound	Tuesday	29th September.
Barrie	Monday	5th October.
Milton	Monday	12th "
Hamilton	Thursday	15th "
Welland	Monday	26th "
Niagara	Thursday	29th "

OXFORD CIRCUIT.

THE HON. MR. JUSTICE HAGARTY.

Cayuga	Monday	5th October.
Simcoe	Thursday	8th "
Stratford	Tuesday	18th "
Brantford	Monday	19th "
Woodstock	Monday	26th "
Berlin	Monday	2nd November.
Guelph	Monday	9th "

WESTERN CIRCUIT.

THE HON. THE CHIEF JUSTICE OF UPPER CANADA.

Goderich	Tuesday	29th September.
Sarnia	Tuesday	6th October.
Sandwich	Friday	9th "
Chatham	Thursday	15th "
London	Tuesday	20th "
St. Thomas	Tuesday	27th "

THE HON. MR. JUSTICE ADAM WILSON.

York and Peel	Monday	12th October.
City of Toronto	Thursday	29th "

COURT OF CHANCERY.

The business of the Court of Chancery is appointed to be transacted in the following order up to the Christmas vacation :—

1st—Saturday, 22nd August: Court, the Chancellor; Chambers, Mr. V. C. Spragge.

2nd—For week commencing 24th August: Court, Mr. V. C. Spragge; Chambers, the Chancellor; Wednesday, Thursday, Friday and Saturday of this week are appointed for Re-Hearing Term.

3rd—For week commencing 31st August: Court, the Chancellor; Chambers, Mr. V. C. Esten.

4th—For week ending 7th September: Court, Mr. V. C. Esten; Chambers, the Chancellor.

5th—Mr. V. C. Esten will probably be the only Judge in town from the 14th Sept. up to the 12th October.

6th—The Chancellor will, in all probability, be the only Judge in town from the 12th Oct. up to the 9th Nov.

7th—For week commencing 9th November: Court, Mr. V. C. Spragge; Chambers, the Chancellor.

8th—For week commencing 16th November: Court, the Chancellor; Chambers, Mr. V. C. Spragge.

9th—For week commencing 23rd November: Court, Mr. V. C. Spragge; Chambers, the Chancellor.

10th—For week commencing 30th November: Court, Mr. V. C. Esten; Chambers, Mr. V. C. Spragge.

11th—For week commencing 7th December: Court, the Chancellor; Chambers, Mr. V. C. Esten.

12th—For week commencing 14th December: Court, Mr. V. C. Spragge; Chambers, the Chancellor.

13th—For Monday, Tuesday, Wednesday and Thursday of the week commencing 21st December: Court, Mr. V. C. Esten; Chambers, Mr. V. C. Spragge.

FALL ASSIZES, 1863.*

ASSIZE.	Last day for service of writ.	Last day to declare.	Last day for service of notice of trial.	Assize day.
Brockville	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Kingston	Sept. 8	Sept. 18	Sept. 26	Oct. 5
Perth	Sept. 18	Sept. 28	Oct. 26	Oct. 14
Ottawa	Sept. 23	Oct. 3	Oct. 12	Oct. 20
L'Orignal	Sept. 30	Oct. 10	Oct. 19	Oct. 27
Cornwall	Oct. 6	Oct. 16	Oct. 24	Nov. 2
Whitby	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Lindsay	Sept. 15	Sept. 25	Oct. 3	Oct. 12
Peterborough	Sept. 19	Sept. 29	Oct. 7	Oct. 15
Cobourg	Sept. 24	Oct. 5	Oct. 13	Oct. 21
Belleville	Oct. 6	Oct. 16	Oct. 24	Nov. 2
Picton	Oct. 16	Oct. 26	Nov. 3	Nov. 11
Owen Sound	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Barrie	Sept. 8	Sept. 18	Sept. 26	Oct. 5
Milton	Sept. 15	Sept. 25	Oct. 3	Oct. 12
Hamilton	Sept. 19	Sept. 29	Oct. 7	Oct. 15
Welland	Sept. 29	Oct. 9	Oct. 17	Oct. 26
Niagara	Oct. 3	Oct. 13	Oct. 21	Oct. 29
Cayuga	Sept. 8	Sept. 18	Sept. 26	Oct. 5
Simcoe	Sept. 12	Sept. 22	Sept. 30	Oct. 8
Stratford	Sept. 16	Sept. 26	Oct. 5	Oct. 13
Brantford	Sept. 22	Oct. 2	Oct. 10	Oct. 19
Woodstock	Sept. 29	Oct. 9	Oct 17	Oct. 26
Berlin	Oct. 6	Oct. 16	Oct. 24	Nov. 2
Guelph	Oct. 13	Oct. 23	Oct. 31	Nov. 9
Goderich	Sept. 2	Sept. 12	Sept. 21	Sept. 29
Sarnia	Sept. 9	Sept. 19	Sept. 28	Oct. 6
Sandwich	Sept. 12	Sept. 23	Oct. 1	Oct. 9
Chatham	Sept. 19	Sept. 29	Oct. 7	Oct. 15
London	Sept. 23	Oct. 3	Oct. 12	Oct. 20
St. Thomas	Sept. 30	Oct. 10	Oct. 19	Oct. 27
York and Peel	Sept. 15	Sept. 25	Oct. 3	Oct. 12
City of Toronto	Oct. 3	Oct. 13	Oct. 21	Oct. 29

* This table, furnished by a Law Student, appears to have been carefully prepared, but we have not had sufficient time to examine it closely so as to vouch for its accuracy.

UNITED STATES JUDICIARY.

The judiciary system of the Union, excluding the Confederate States, comprises about four hundred and fifty Judges of Common Law and Equity Courts of Record. This is exclusive of County Courts, Probate Courts, and Justices of the Peace.

The salaries of these Judges range from $1,800—which is the usual salary of a Judge of the Supreme Courts in any of the smaller New England States, to $6,000, which is the salary of a Judge of the Supreme Court in California, and of the United States Supreme Court. The salaries in some of the Western States are as low as $1,200, but are, probably, in effect, increased by fees. That of the Chief Justice of the United States is $6,500.

The aggregate salaries of the four hundred and fifty judges is about $1,023,000, making an average salary of about $2,175.

Of these four hundred and fifty Judges who are charged with the administration of justice in the more important causes, about 200 compose courts whose judgments upon questions of law are regularly reported; and it may be said to be the chief business of at least two hundred Judges to hear and investigate questions of law, and deliver their opinions: which not only serve to determine the cause which gave rise to the investigation, but being published in the reports, go to swell the bulk of American jurisprudence.

JUDGMENTS.

ERROR AND APPEAL.

August 24, 1863.

The Corporation of the Town of Paris v. *The Queen.*—Judgment given in Court below affirmed; appeal dismissed with costs.

Dickson v. *Ward.*—Appeal dismissed with costs.

Wisconsin Bank v. *Bank of British North America.*—Appeal dismissed with costs.

Jameson v. *Fisher.*—Appeal dismissed with costs.

QUEEN'S BENCH.

August 24, 1863.

Martin v. *Crowe.*—Judgment for plaintiff.

Boyle v. *Leslie.*—Appeal dismissed.

Irving v. *Hagaman.*—Rule discharged.

Dickson v. *McFarlane.*—Rule absolute to enter verdict for plaintiff.

Ganton v. *Sies.*—Rule absolute for new trial without costs.

McCreary v. *McCreary.*—Rule absolute to reduce verdict to $150.

Principal Secretary of War v. *Corporation of the City of Toronto.*—Judgment for plaintiff.

In re. Rose and the United Counties of Stormont, Dundas and Glengary.—Rule absolute to quash two by-laws in part with costs.

The Queen v. *Jerrett.*—Rule absolute for new trial.

August 26th, 1863.

Smith v. *The Trust and Loan Co.*—Appeal dismissed with costs.

COMMON PLEAS.

August 24, 1863.

Laughtenborough v. *Watson.*—Appeal allowed.

Jacques v. *Beaty.*—Appeal dismissed.

Johnson v. *Niagara District Insurance Co.*—Judgment for defendant on demurrer.

The Queen v. *Port Whitby Harbour Co.*—Rule discharged.

August 27th, 1863.

Freson v. *Mason.*—Rule discharged.

Shaw v. *Stead.*—Appeal dismissed with costs.

In re Judson and Griffin.—Appeal allowed, and rule for new trial in court below, discharged with costs.

In re Davis and Williams.—Appeal allowed. Judgment of court below set aside and new trial, costs to abide the event.

CHANCERY.

August 25th, 1863.

Brown v. *Perry*—Appeal dismissed without costs.

Hannon v. *Hannon*—Plaintiff to have full costs; case not one for County Court.

Commercial Bank v. *Cook*—Decree for Plaintiffs, with costs.

Bedson v. *Smith*—Plaintiff to be at liberty to redeem; or Bill dismissed with costs.

Brown v. *Davison*—Enquiry directed as to the indebtedness of father at time of the conveyance.

McCall v. *Fairthorn*—Bill dismissed with costs.

McLaren v. *Smith*—Appeal dismissed with costs.

Miller v. *McNaughton*—Reference back to Master. Further directions reserved.

Johns v. *McCarthy*—Reference back to Master. No costs to either party.

Moore v. *Gould*—Appeal of Plaintiff disallowed, with costs. Appeal of other parties allowed; no costs,

Moffatt v. *Nicholl*—Bill dismissed with costs.

Scott v. *Wright*—Decree to declare confession void. Money realized by Sheriff to be paid into Court. Costs up to hearing to be paid by Marshall.

Bartels v. *Benson*—Plaintiff to be enjoined from proceeding in ejectment, and to pay costs of application.

McDougall v. *Barron*—Enquiry directed. Costs reserved.

Lawson v. *Moffatt.*—Bill dismissed with costs.

August 27th, 1863.

Wallis v. *Andrews.*—Decree affirmed with costs.

McMahon v. *O'Neil.*—The Chancellor referred to judgment given by him on hearing on further directions. Mr. V. C. Spragge thought the bill should be dismissed with costs. Mr. V. C. Esten thought it should be dismissed without costs.

REMARKS ON THE ASSESSMENT AMENDMENT ACT OF 1861.*

The amendment Act of 1861 (22 Vic. chap. 38), respecting the assessment of property in Upper Canada, enacts as follows: "The following words shall be added to the 28th section of the said Act (Consolidated Statutes, chap. 55), and shall hereafter be read as part thereof, namely: Provided always that in assessing vacant ground or ground used as a farm, garden or nursery, and not in immediate demand for building purposes, in such cities, towns, or villages, the value of such vacant or other ground shall be that at which sales of it it can be freely made. And where no sales can be reasonably expected during the current year, the assessors shall value such land as though it was held for farming or gardening purposes, with such percentage added thereto as the situation of the land may reasonably call for. And such vacant land, though surveyed into building lots, if unsold as such, may be entered on the assessment roll as so many acres of the original lot, describing the same by the number of the lot and concession of the township in which the same may have been situated."

The manifold intention of the Act is to alter the principle upon which vacant land in cities and towns has been assessed; any constructon of it, therefore, which enables the assessors to assess practically upon the same principle must be erroneous. The assessment law, as it stood, dealt with all vacant land upon the same footing; section 28 applied to all real property, vacant or built upon: vacant land was to be assessed at its value. The clause above cited from the Amendment Act of 1861, divides vacant land into two classes; that is, it does so in effect, though not in form. One class consists of land of which sales can be reasonably expected during the current year. The other class, of land of which no sale can be reasonably expected during the current year. The first class is to be continued to be assessed upon the old principle, though the scale of value is somewhat differently stated in the two Acts. To the second class an entirely different principle of assessment is applied. The construction put upon the Amendment Act by the Court of Revision practically reduces the two classes into one, ignores the existence of a second class, and reduces to silence that part of the enactment which applies to it. This is a plain violation of the common rule of construction of Acts of Parliament, that the words are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity. (See 13 C. B. 763 and 8 Exch. 860.) In fact, as construed by the Court of Revision, there is no alteration practically in the law at all; the Act of 1861 is construed out of the Statute book. The owner of vacant land is assessed upon the same principle and at the same rate. Before the Amendment Act, as well as after, the value has been taken to be the cash value.

What takes place before the Court of Revision illustrates this. The owner of vacant land claims to belong to what I have called the second class, and that his land should be valued accordingly—he may make out the clearest case to bring himself within the statute, but he is met with the question—what will your land sell for? It is useless for him to say, or to prove that "no sale can be reasonably be expected during the current year." It is pressed upon him that it will sell for something, and he is put upon his oath to say that he would not sell it for such a price, and upon that it is held by the Court that a sale at that price can be reasonably expected during the current year. This is plainly a mere evasion of the statute and a very absurd one, and its absurdity is the more apparent when it is remembered that, (every appellant being dealt with in the same way) the conclusion to which the Court of Revision is necessarily driven is that all the vacant land in the city can be reasonably expected to be sold during the current year: and the absurdity does not stop here, for the same course is repeated year after year, so that it must be assumed that it can be reasonably expected that all the vacant land in the city should change hands by sale every year. To such absurdities are men driven in putting a forced construction, according to their wishes, upon an Act of Parliament, and a still further absurdity is, that if they are consistent and deal with all alike, as I must assume they do, not one foot of the vacant land of the city is assessed upon the principle upon which the statute says a whole class of the vacant land of the city shall be assessed. Still further, suppose even that they were correct in principle, as they apply it to the whole vacant land of the city, the question should be —what would be the worth of the whole of it were it forced to sale during the current year? It is evident, that if it were it would not bring as many shillings as it is assessed at in pounds. This is a fair test, because they proceed upon the assumption as to all, that a sale can be reasonably expected during the current year.

* The foregoing remarks were written by a legal gentleman of high standing, and read to the county judge of York and Peel on the occasion of several appeals recently before him from the Court of Revision in the City of Toronto.

It is impossible that such a construction of the statute can be a sound one. It is open to at least three prominent objections.

It leaves the law in effect as it stood before, notwithstanding the declared purpose of the statute to amend it.

It is absurd in the particulars above pointed out.

It makes a dead letter of an important provision of the statute.

SELECTIONS.

VULGAR LEGAL ERRORS.

In 1838 the vulgar error that an innkeeper might detain the person of his guest until payment of his bill, was exploded by the case of *Sunbolf* v. *Alford*, 3 M. & W. 248.

In England it is a vulgar error, that a surgeon or butcher, from the barbarity of their business, may be challenged as jurors. By a statute of the fifth of Henry the Eighth, surgeons were exempted from attendance upon juries. Perhaps this exemption is the foundation of the error. An instance of this error may be found in a note to Rousseau's *Emile*, p. 137. Rousseau had in that work adduced it as evidence of the humanity of the English laws, that butchers are not received *as witnesses* in matters of life and death; but, in a note to the later editions, he adds, that the English translators of his work had corrected his mistake, and had mentioned the cause of it, viz., that butchers were not admitted *as jurors* in criminal cases!—Retrospective Review, vol. ix. p. 262.

There seems to have been, for a long time, a vulgar error, in supposing that a creditor has the power of preventing the burial of a corpse, by arresting the body for debt. Such a proceeding is not only revolting to the feelings of humanity, but is contrary to every principle of law; so much so, indeed, that any promise, extorted by fear of it from any one of the surviving relatives, is considered wholly invalid. For, in the forcible language of Lord Ellenborough, C. J., "It might as well be said that a promise in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror."—*Jones* v. *Ashburnham*, 4 East, 465.

A prosecution at common law, for this offence, was sustained in the Supreme Judicial Court of Massachusetts, before Chief Justice Parsons, at *nisi prius*, in which there was a conviction, and the parties punished by a fine.—*Commonwealth* v. *Snow*, in the County of Barnstable, cited in D. Davis's Justice, (Heard's Ed.) p. 712. The body of a man was arrested by a civil process, on its way to the burying-place; the party proceeding on a mistaken notion that he was entitled to the body of his debtor after death. By the General Statutes of Massachusetts, it is enacted that "If a sheriff, deputy sheriff, coroner, or constable, takes the body of any deceased person, on mesne process or execution, he shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the jail not exceeding six months."—Gen. Sts. ch. 165, sec. 36.

The following account of the outrage upon Sheridan's remains, will be read with interest:—Sheridaniana, p. 244.

"The remains of Sheridan were removed from Saville Row, to the residence of his kinsmam, in Great George Street, Westminister. There they lay in state, to indulge the longing grief of the few friends who clung to his bleak and shattered fortunes. On the forenoon of the day fixed for their interment, a gentleman dressed in deep mourning entered the house, and requested of the attendant, who watched in the chamber of death, to allow him a last look of his departed friend. He professed to have known the deceased early in life, and to have undertaken a long journey in order to seize a parting glance of his pale features. The agony and earnestness with which the application was urged, lulled the suspicions of the serving-man—if any had arisen in his mind—and, after a slight hesitation, it was assented to. The lid of the coffin was removed, the body unshrouded, and the death-chilled frame revealed to view. The gentleman gazed for some minutes upon it, and then fumbling in his waistcoat pocket, produced a bailiff's "wand," with which he touched the face, and instantly declared, to the horror and alarm of the servant, that he had arrested the corpse in the King's name for a debt of £500. Before the requisite explanations had been gone through, the funeral group had assembled. The circumstance was instantly made known to Mr. Canning, who took Lord Sidmouth aside, and begged his advice and assistance. Lest the delay might mar the progress of the sorrowful train, they generously agreed to discharge the debt; and two checks for £250 each were given over to the bailiff, and accepted by him, Without their timely interference, the procession might have been detained for some hours; and, even in spite of their prompt sympathy and kindness, the multitudes who had congregated in the palace yard could not help murmuring when the stated hour was allowed to elapse so long without any apparent reason."

In Barrington's 'Observations on the more Ancient Statutes,' p. 474, there is the following amusing enumeration of vulgar legal errors:—

"It is difficult," says that very learned judge, "to account for many of the prevailing vulgar errors with regard to what is supposed to be law. Such are that the body of a debtor may be taken in execution after his death; which, however, was practised in Prussia before this present king abolished it by the *Code Fréderique*. Other vulgar errors are, that the old statutes have prohibited the planting of vineyards, or the use of sawing-mills; which last notion I should conceive to have been occasioned by 5 & 6 Edw. VI. cap. xxii., forbidding what are called *gig-mills*, as they were supposed to be prejudicial to the woollen manufacture. There is likewise an act of 23 Eliz. cap. v. which prohibits any *iron mills* within two-and-twenty miles of London, to prevent the increasing dearness of wood for fuel. As for sawing-mills, I cannot find any statute which relates to them; they are, however, established in Scotland, to the very great advantage both of the proprietors and the country.

"It is supposed, likewise, to be penal to open a coal-mine, or to kill a crow within five miles of London; as also to shoot with a wind-gun, or to carry a dark-lanthorn. The first of these I take to arise from a statute of Henry the Seventh, prohibiting the use of a cross-bow; and the other from *Guy Fawkes's dark-lanthron* in the powder-plot. To these vulgar errors may be added the supposing that the king signs the death-warrant (as it is called) for the execution of a criminal; as also, that there is a statute which obliges the owners of asses to crop their ears, lest the length of them should frighten the horses which they meet on the road.

"To these vulgar errors may be perhaps added the notion that a woman's marrying a man under the gallows will save him from the execution. This probally arose from a wife having brought an appeal against the murderer of her husband who, afterwards, repenting the prosecution of her lover, not only forgave the offence, but was willing to marry the appellee. It is also a very prevailing error, that those who are born at sea belong to Stepney parish. I may likewise add to these, that any one may *be put into the Crown-office*, for no cause whatsoever, or the most trifling injury. An ingenious correspondent suggests two additional vulgar errors, 'When a man designs to marry a woman who is in debt, if he take her from the hands of the priest clothed only in her shift, it is supposed that he will not be liable to her engagements.' The second is, 'that there was no land-tax before the reign of William the Third.'"

A writer in *The Retrospective Review*,—Vol. ix. p. 263.—has collected the following list of vulgar errors:—That if a criminal has hung an hour and survives, he cannot afterwards be

executed—That a funeral passing over any place makes a public highway—That a husband has the power of divorcing his wife by selling her in open market with a halter round her neck—That second cousins may not marry, though first cousins may—That it is necessary, in some species of legal process against the king, to go through the fiction of arresting him, which is done by placing a ribbon across the road as if to impede his carriage—That the lord of a manor may shoot over all the lands within his manor—That pounds of butter may be of any number of ounces—That bull beef shall not be sold unless the bull has been baited previously to being killed —That leases are made for the term of 999 years, because a lease of 1000 years would create a freehold—That deeds executed on Sunday are void—That in order to disinherit an heir at law, it is necessary to give him a shilling by the will, for that otherwise he would be entitled to the whole property.—*Monthly Law Reporter.*

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 207).

BAILIFF'S ASSISTANTS.

As before observed, a Deputy is one who acts by the right and in the name of another, having the power to do any act that his principal might do; and although the general rule is that ministerial officers can make a deputy, the Division Court Bailiff does not appear to have any such power.

While the statute expressly authorises the appointment of a Deputy Clerk under certain circumstances and upon certain conditions, it is silent on this head as to Bailiffs, and the presumption is that the intention of the law is to disable them from passing their power to a deputy. And it is to be observed, that the office is one of considerable trust, is held during pleasure, and it must be presumed that the Judge in appointing trusted the Bailiff, and him alone, so that in the case of process directed to him by name or name of office, he alone can execute it. But the ordinary summons is addressed to the party, and it may be said that the reasons against appointing a deputy do not apply at least with the same force. On the other hand, the whole tenor of the statute goes to show that the legislature contemplated service by the Bailiff himself, and looking at the rules it would appear that the board of Judges so construed the law. Then due service lies at the foundation of the Judges' jurisdiction; and although the question, what is due proof of service, rests absolutely and entirely on the discretion of the judge, (*Davis* v. *Walton*, 16 Jur. 954.) the rule would be not to admit service unless by a Bailiff.

The judge *in his discretion* may hold service by a person other than the bailiff to be a good service, the object being to bring the summons to the notice of the defendants, but the bailiff has no *right* to appoint a deputy to effect service.

It is not unusual, in practice, for the Judge to appoint or sanction the appointment of some proper person to serve summonses in cases of emergency, but then the person so appointed is for the occasion and purposes named a bailiff of the Court.

But a Bailiff may have assistants when necessary, in doing the work of his office, under his directions; and in driving away or securing cattle or property seized there seems to be no objection to their employment. And in this sense such assistants are Deputy Bailiffs, that is they would be held in law to be the principal's deputy when doing any particular act under his direction, and it would appear that the word "Deputy," used in the 184th section if applied to Bailiffs, is employed in this sense. The language, however, of that section is "If any officer *or* Bailiff (or his deputy *or* assistant) be assaulted" &c., and "Deputy" would appear to apply to officers other than bailiffs.—"Assistants" to Bailiffs.

Assistant Bailiffs are also recognised in secs. 105, 196, and 197, as "persons acting by Bailiffs' order and in their aid."

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,—Is it not legal and right for clerks of Division Courts to charge for searches, where parties have executions issued on suits over a year old? Say in 1860 A. obtains twenty judgments against twenty different parties, and allows them to lie uncollected. In 1863, A. goes to the clerk and orders out the twenty executions, and the clerk charges A. ten cents for each search. Can there be any doubt but the charge is allowable according to the tariff of fees? The work is performed, and is no part of the labour of issuing the execution. Your opinion will oblige,

Yours,

CLERK 6TH DIV. CT., CO. NORFOLK.

[The tariff expressly allows a fee of ten cents to be charged for "every search for a party to a suit when the proceedings are over a year old;" but we are inclined to think that this cannot be construed to mean as in the case put by our correspondent, that where a plaintiff, after the expiration of a year, orders out executions on his suits, the clerk may charge him with a search in each case. A plaintiff may be fully aware of the position of his suits, and not in need of any information respecting them. The clerk, in order to issue the executions, must, necessarily, refer to his books, and so long as the plain-

tiff asks no information to be derived from such reference, he cannot complain of any extra loss of time or extra work. The clerk is not compelled, then and there, to refer to the suits, and give the plaintiff any information about them, and again have recourse to his books when he wants to make out the executions; all he is required to do is to receive a list of the cases in which executions are to be issued, and to issue them, as usual, at the proper time. If the plaintiff, when ordering executions to issue, makes any enquiry as to the position of certain suits, in respect to which information is then and there given him, the search could, of course, be charged for, even if the clerk, without closing the book at once, issued the execution, and thereby saved himself the necessity of a second reference; but where the plaintiff merely orders execution in certain cases to issue, we do not think the clerk justified in charging for a search.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—Referring you to p. 36, vol. 4, of *Law Journal*, and on the presumption that you will read the paragraph commencing (at 13 lines from bottom of left hand column) with the words, "It is clear," and if, as there stated, one trip only may be charged for, I would beg to inquire if you consider the officer under *any necessity* to make a second trip, having essayed to serve and failed, and if he must go more than once, how many trips you think him bound to make, to satisfy a law that—under your view of it—allows him pay for one only?

Yours, obediently,

Paul Dunn.

Owen Sound, August 11th, 1863.

[It is clear, as we before stated, that a bailiff can only charge mileage where service has been effected; but it is not so clear as to the number of trips he is, in duty, bound to make for the purpose. We do not see how any strict rule could be laid down as a guide in such cases. He is bound to exercise due diligence, and use every reasonable exertion to effect a service. If on his first trip he cannot find the person to be served, he can usually ascertain whether the absence is for the purpose of avoiding service or not. He ought, at least, to try and find this out. In any case, he ought, if possible, without interfering with his other duties, to try a second time before the next sittings of the Court, for which suit entered. If he does not then succeed he may be able, having left the summons at defendant's house or place of abode, to make such an affidavit as may satisfy the Judge that the party is evading service, and that the summons had most probably come to his knowledge. A bailiff has generally to go into the same part of his division more than once between each sittings of the court, and can often make two or three attempts to effect a service without much inconvenience. He may, certainly, in some cases, have much more trouble than he can get paid for, but this cannot be avoided, and any mitigation of the rule allowing mileage only in case of service, would be a far greater evil. The same rule applies to services in the Superior Courts.—Eds. L. J.]

UPPER CANADA REPORTS.

COURT OF ERROR AND APPEAL.

ON AN APPEAL FROM THE COURT OF COMMON PLEAS.

[Before the Hon. Archibald McLean, Chief Justice; the Hon. P. M. Vankoughnet, Chancellor; the Hon. W. H. Draper, C. B. C. J. C. P.; the Hon. V. C. Esten; Hon. V. C. Spragge; Hon. Mr. Justice Hagarty; * the Hon. Mr. Justice Morrison; and the Hon. Mr. Justice Connor. †]

Holcomb v. Hamilton.

Bill of exchange—Joint action—Discharge of one of several defendants.

Held (affirming the judgment of the court below), that where the holder of a bill of exchange or promissory note sues, under the statute, the drawers, acceptors and endorsers, in one action, he may discharge the drawers or endorsers [or accommodation acceptors] after an arrest under a *capias ad satisfaciendum*, without losing his remedies against the other defendants liable in priority to those discharged.

McLean and Draper, C. JJ., dissenting.

This was an appeal by the defendants from a judgment of the court below, in an action wherein Robert Jarvis Hamilton and Milton Davis were plaintiffs, and Samuel T. Holcomb was defendant. The facts of the case are sufficiently stated in the judgment of his Lordship the Chief Justice in disposing of this appeal, and in the report of the judgment in the court below, 8 U. C. L J. 168.

From the judgment there reported, the present appeal was brought, on the grounds, that the judgment given by the court below on the demurrer by the defendant to the second replication to the third plea of the defendant is erroneous and should be reversed, because the action being upon a joint judgment against the defendant and John Macpherson and Samuel Crane, it was not competent to the plaintiffs in another action to set up in reply to the defendant's plea the position in which the said J. Macpherson, S. Crane and the defendant stood with regard to each other on the instrument upon which the judgment now sued upon was recovered; and also, that it is immaterial whether the plaintiffs have received any money or other property on account of the said judgment: the arrest of the said Macpherson, and his discharge by the consent of the plaintiffs operating in law as a discharge of all further remedies on the said judgment.

Galt, Q.C., and *Anderson*, for the appellant.

R. A. Harrison for the respondents.

The cases principally relied on appear in the judgments of their Lordships, and in the report of the case in the court below.

McLean, C. J.—This was an action on a judgment recovered on the 12th day of January, 1858, in the Court of Common Pleas, against the defendant and one John Macpherson and Samuel Crane, for 505*l.* 11*s.* 8*d.*, together with 19*l.* 7*s.* 6*d.* costs of suit, amounting together to 525*l.* 19*s.* 2*d.*; which said judgment, the plaintiffs allege, remains in full force, unreversed and unsatisfied; and the plaintiffs have not obtained any execution or satisfaction for or upon the said judgment; whereby an action hath accrued to the plaintiffs, to demand and have of and from the defendant the said sum of 525*l.* 19*s.* 2*d.*; yet the defendant hath not paid the same, or any part thereof, and the plaintiffs claim £800.

The third plea, which is demurred to, is as follows: "And for a third plea, the defendant says that before action brought, the judgment sued upon in this cause was satisfied in this, that the plaintiffs, after the recovery of the judgment in the declaration mentioned, on or about the first day of July, 1858, caused a writ of capias ad satisfaciendum to be issued out of this honorable court, directed to the sheriff of the United Counties of Frontenac, Lennox and Addington, wherey the said sheriff was commanded to take the body of the said John Macpherson in satisfaction of the said judgment; under and by virtue of which writ the said John Macpherson, one of the defendants in the judgment declared upon in this cause, was arrested and taken, and detained in close custody of the sheriff of the aforesaid United Counties of Frontenac, Lennox & Addington, in satisfaction of the said judgment, and was so detained in close custody of the said sheriff, or on the

* Was absent from the Province when judgment was pronounced.

† Died before judgment was pronounced.

limits of the said United Counties, until he was, by the order and authority of the plaintiffs, discharged from custody by the sheriff of the said United Counties, whereby the said judgment was satisfied.

Demurrer to the third plea, on the following grounds: that the mere arrest and subsequent discharge of one defendant on a writ of capias ad satisfaciendum, is not such a satisfaction and extinction of the judgment as to discharge another defendant from all liability thereon; that it is not shown that by the arrest and discharge of the said John Macpherson the now defendant lost any remedy over against him or any other party to the judgment; and that it does not appear that the said judgment was paid or satisfied as against the now defendant.

The plaintiffs take issue on the pleas of the defendant. And for a second replication to the third plea, the plaintiffs say that the judgment in the declaration mentioned was recovered by the plaintiffs on a bill of exchange drawn by the now defendant upon and accepted by the said John Macpherson and Samuel Crane for the accommodation of the now defendant, and not otherwise; and that the said John Macpherson and Samuel Crane did not, nor did either of them, ever receive any value or consideration whatever, and were in fact only sureties for the now defendant; and that the said debt, for which the said judgment was recovered, was and still is the debt of the now defendant. And the plaintiffs further say, that after the arrest of the said John Macpherson, under a writ of capias ad satisfaciendum, as in the said third plea mentioned, he applied for and obtained the benefit of the limits of the gaol of the said United Counties of Frontenac, Lennox & Addington; and that while he was on the limits of the gaol of the said United Counties thereunder, the plaintiffs consented to the discharge of the said John Macpherson from such limits, which is the discharge from custody referred to in the said plea: and the plaintiffs further say that they did not, nor did either of them, ever receive any money or other property; and that the same is not in any manner, either in whole or in part, paid, satisfied or discharged, as against the now defendant.

Demurrer to this replication, on the grounds: that the action being upon a joint judgment against the defendant and John Macpherson and Samuel Crane, it is not competent to the plaintiffs in this action to set up in reply to the defendant's plea the position in which the said John Macpherson and Samuel Crane and the defendant stood with regard to each other, on the instrument upon which the judgment now sued upon was recovered; and that it is immaterial whether the plaintiffs have ever received any money or other property on account of the said judgment: the arrest of the said Macpherson, and his discharge by the consent of the plaintiffs operating in law as a discharge of all further remedies on the said judgment.

This action, therefore, is brought to recover from the defendant the amount of a *joint* judgment, recovered against him and two others after one of the defendants has been arrested on a *ca. sa.*, and discharged from custody by the plaintiffs.

The defendant pleads the arrest and discharge of his co-defendant in bar of this action, and in the third plea alleges that thereby the plaintiffs' judgment was satisfied. The plaintiffs demur to such plea, on several grounds, the principal of which is that the arrest and subsequent discharge of one defendant is not such a satisfaction and extinction of the judgment as to discharge another defendant from all liability thereon.

The case of *King and another* v. *Hoare* (13 M. & W. 494) strongly supports the plea. It establishes that a judgment (without satisfaction) recovered against one of two *joint* debtors, is a bar to an action against the other, and is pleadable in bar and not in abatement. Then, if one of several joint debtors cannot even be sued after a recovery of judgment against another of such joint debtors, any act of the plaintiff by which, after judgment against all parties liable on a note or other obligation, one of such parties is released from his joint liability, operates in law as a release to all. In the case of *Clarke* v. *Clement and English* (6 T. R. 525) it was held that if a plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake him or take any of the others. In that case, the defendant English having been taken on a *capias ad satisfaciendum* issued against both the defendants, was set at liberty by the plaintiff on an undertaking by him to render himself on a given day if he did not in the meantime pay the debt; on which the defendant Clement moved that the writ of *ca. sa.* should be quashed, and satisfaction entered on the roll. In the argument it was contended that, allowing one defendant to go out of custody in execution on his promise to render himself again, is no satisfaction of plaintiff's debt; and though it might be doubtful that he could be retaken, yet that his being let out of custody was no reason why the other defendant should not be taken; and at all events, that there was no pretence for making the latter part of the rule, as to entering satisfaction on the roll, absolute. After the rule obtained by Clement was disposed of by an order that *he* should not be taken on the writ, the plaintiff sued out a separate execution against English, and arrested him again; on which a rule was obtained to show cause why he should not be discharged out of custody, and the *capias ad satisfaciendum* set aside, and satisfaction entered on the roll on an affidavit disclosing the facts, and also those which appeared on the former application. Cause was shown against that rule, and it was urged that the defendant English having given an undertaking to render himself before the return of the first *ca. sa.*, was estopped from making the objection. In supporting the rule, the cases of *Vigers* v. *Aldrich* (4 Bur. 2482), and *Jacques* v. *Withey* (1 T. R. 557), were cited. The court were of opinion that the plaintiff was wrong on both points, and made the rule absolute. In the last mentioned case, where a prisoner in execution was discharged by the consent of his creditor upon giving a fresh security to satisfy the judgment, which security is afterwards defeated on account of a mere informality, the judgment was considered satisfied, and could not be set off against a demand of the plaintiff.

In a subsequent case—(*Tanner* v. *Hague*, 7 T. R. 420)—the defendant, having been charged in execution at the suit of the plaintiff, was discharged, on his undertaking to pay the debt at a future day. On nonpayment at the day, plaintiff sued out a *fieri facias* against him. A rule was obtained to show cause why the *fi. fa.* and the proceedings on it should not be set aside; to which it was replied in argument that the release of the defendant was conditional, and that as the condition was not performed, the plaintiff had a right to sue out another writ of execution. The court held that several cases cited in support of the application proceeded on the ground that it was considered that the plaintiff received a satisfaction in law by having his debtor in custody in execution, and made the rule absolute.

A much more recent case—*Catlin* v. *Kernot*, (3 Com. B. N. S., 796)—is to the same effect as *Tanner* v. *Hague*. In that case, in which all the former cases were cited, the court held that the discharge of a defendant from custody under a *ca. sa.* operated in law as an absolute satisfaction of a judgment. In delivering judgment in this case, Williams, J., said that the only doubt he entertained was, whether it was compulsory on the court to enter satisfaction on the judgment roll:—"It may be taken, upon the affidavits, that Mr. Catlin consented to the discharge of Mr. Kernot upon an agreement that if he would so consent, Mr. Kernot would abstain from controverting the proceedings under the fiat against him in bankruptcy; and that, notwithstanding he made the agreement, Mr. Kernot did contest the fiat, and ultimately procured it to be superseded. The question is whether, under these circumstances, the discharge of Mr. Kernot from custody operated a satisfaction of the judgment debt? It seems to me to be impossible, upon the authorities, to entertain a doubt; and I think it is impossible to get over the case of *Lambert* v. *Parnel* (15 L. J. Q. B. 55, 10 Jur. 81), where the Court of Queen's Bench ordered satisfaction to be entered in a case precisely like this;—that undoubtedly is in accordance with all the authorities." The rule in that case was, for the plaintiff to show cause why a memorandum of satisfaction should not be entered as to the judgment signed in the case of *Catlin* v. *Kernot*, on the 21st January, 1847, for 546*l.* 16*s.* 1*d.*, and 5*l.* 14*s.* costs, and registered pursuant to the statute 1 & 2 Vic. 110, charging the estate of the defendant, "the debt and costs having been satisfied."

In that case, though the defendant had violated an agreement on which his discharge from custody was obtained, after able argument and full consideration of the circumstances, the court made the rule to enter satisfaction absolute.

The only ground on which that application was made, was that "the debt and costs had been satisfied," though not in any way except by being discharged from the limits.

The facts admitted on the pleadings in this case are, that the judgment was recovered on a bill of exchange, drawn by the defendant on McPherson & Crane, and accepted by them, for the defendant's accommodation, against the defendant and McPherson & Crane; that a *ca. sa.* was sued out upon that judgment, on which Mr. McPherson was arrested; and that while he was a prisoner on the gaol limits, the plaintiff discharged him from custody; and that the plaintiffs have not received any money or other property in payment or satisfaction of their judgment. It appears to me from the cases cited that the arrest and discharge of one of the joint debtors operates in law as a satisfaction of the judgment, and that the plea setting forth the arrest and discharge is good, and the defendant entitled to judgment on the demurrer. I am not aware that there is anything peculiar to distinguish this case from other cases of joint judgments, in which after arrest and discharge from custody the courts have felt themselves bound to order satisfaction to be entered. The suit in which the plaintiffs' judgment was recovered was brought on a bill of exchange against the drawer and acceptors, under the 23rd section of the act of this Province, Con. Stat. U.C. cap. 42, which enacts, "that the holder of any bill of exchange or promissory note may, instead of bringing separate suits against the drawers, makers, endorsers and acceptors of such bill or note, include all or any of the parties thereto in one action, and proceed to judgment and execution in the same manner as though all the defendants were joint contractors." The plaintiffs have availed themselves of that act, and have sued all the parties to the bill of exchange in one action, as though they were joint contractors, though it was not compulsory upon them to do so. If they had brought several actions, as they would have been obliged to do before the passing of the act 18 & 14 Vic. cay. 59, they would have been entitled to disbursements only in one of the suits, and to full costs in the other; but the difference as to the amount of costs to which they would be entitled could not, in suing for so large an amount, have formed any consideration to induce the plaintiffs to adopt the mode of proceeding authorized by the statute. The act, I think, affords a facility in enabling all the parties to a bill or note to be sued in one action; and in that action a judgment against all may be obtained, either jointly, as in this case, or severally, as may be thought desirable by the plaintiff.

The judgment sued on is against all the defendants jointly, and I can discover nothing to distinguish it from all similar judgments, nor can I perceive any reason why it should not be discharged in the same manner. In the second replication to the third plea, the plaintiffs endeavour to show that because the bill on which the judgment is recovered was made by the defendant and accepted by the other defendants for his accommodation, therefore he is not entitled to be discharged by reason of McPherson having been discharged from custody. I do not see that the defendant's position in reference to the original cause of action can in any way affect his position as one of the defendants in a joint judgment. The plaintiffs might have urged the fact stated in their replication, if they had failed to give defendant, as the drawer of the bill notice of its dishonour after acceptance; but after the bill has become merged in the judgment, and all are jointly liable to pay the amount, they cannot, I think, go back and urge such an objection to a discharge from the judgment—a discharge which they, by their own act, have placed within his reach. In my opinion the defendant is entitled to judgment on the demurrer to this replication to the third plea.

The 26th section of chapter 42, Consolidated Statutes of Upper Canada, provides that the rights and responsibilities of the several parties to any bill or note, as between each other, shall remain as though that act had not been passed (saving only the rights of the plaintiff, so far as they may have been determined by the judgment). The rights of the plaintiffs as payees and holders of the bill have been determined by the judgment, and by that the defendants are jointly liable, and cannot be treated as if each could be held independently of the others for the payment of the whole amount.

I quite agree with the judgment of the learned Chief Justice of the Common Pleas, that the defendant is entitled to judgment on both the demurrers.

VANKOUGHNET, C.—I am in favor of affirming the judgment of the court below in this case. I think the Legislature did not intend to place the plaintiff, who proceeded by the course which they at least advised, and, so far as they could, by penalty enforced, in a worse position after judgment recovered against the several parties to a note, than he was in as to them before judgment; that is, that they did not in any way mean to alter his rights in regard to them. The record of the judgment itself shows the relative positions of the several parties to it, and that it was recovered under the statute permitting such form of procedure. No extrinsic evidence for this purpose is required; there is no going behind the record to ascertain it; it is spread out on the face of it, and the way in which a joint judgment and joint execution were obtained there appears; and it seems to me it is but effectuating the intention of the Legislature, and working out the spirit of the act, to hold that upon such a record the parties severally liable are to be treated as though several judgments had been recovered against them, but enforcable by one execution. The plaintiff may, under the act, make all or any of the parties to the note defendants in one suit. He is not, by abandoning several actions against all, compelled to treat all as joint contractors; he may select the maker and one endorser of a note, and sue them together, and bring separate actions against the remaining endorsers, subject only to the penalty of being deprived of costs, but without his rights in or subsequent to such action being affected by the action in which he has joined the others. The judgment is but the cord which binds together the sticks. The defendants are fixed by it so that they cannot dispute their joint liability to the plaintiff thereunder; but each is, as to the character in which he has been made and is so liable, as much an unit as is every stick in the bundle. Section 26 of the Consolidated Statute, chapter 42, which provides that the rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though the act had not been passed, saving only the rights of the plaintiff so far as they may have been determined by the judgment, means, I think, nothing more than this, that the several defendants shall have their recourse, the one against the other, according to their relative liabilities, as though they had been separately sued or called upon to pay, in their several capacities of endorser, drawer, accommodation acceptor, or as the case may be; but that, as regards the plaintiff, their liability to him, as determined by the judgment, shall not be disturbed—that it shall not be open to any of the parties against whom he has recovered judgment, and who may afterwards be compelled to pay, to allege that he became liable on the note only for the plaintiff's accommodation, or that in any other way the plaintiff is liable to him.

DRAPER, C. J., retains the opinion expressed in the court below.

ESTEN, V. C.—I have looked at all the cases that were cited, and have come to the conclusion that the judgment of the court below is right. I think the plaintiff is in the same position as if several judgments had been recovered. There is a merger, no doubt, but a several merger. The intention of the act of Parliament was, not to prejudice the plaintiff; only that there should be one action and one judgment, but not that the parties should stand in any different situation as amongst themselves. The replication here sets up, in effect, that the defendant who was discharged was only a surety, and the now defendant was the principal debtor.

SPRAGGE, V. C.—Upon reading the several clauses of the act which bear upon this question, one is impressed with the conviction that the one object of the Legislature was to enable the holders of bills and notes, and in a sense to compel them, to sue all parties liable to them upon the instrument in one action, without disturbing the rights of the parties as between one another. In the 26th clause, which creates the difficulty, this intention is manifested as strongly as in any other. In express terms it leaves the rights of all parties as they were under the old form of proceeding, with, as I read the clause, one exception expressed "saving only the rights of the plaintiff, so far as they may have

been determined by the judgment;" which I take to mean that the rights of the plaintiff, as determined by the judgment, are to stand as so determined.

One naturally inquires, with what object this "suing" was introduced. A reason may readily be suggested. The plaintiff might fail as to one or more defendants, or as to all. Suppose him to fail as to one, and to succeed as against the others, if the clause had stood "the rights and responsibilities of the several parties to any such bill or note as between each other shall remain the same as though this act had not passed," and had stopped there, there might be room to contend that it enabled the plaintiff to proceed in another action against the defendant as against whom he had failed in the action in which he had joined him with other parties; and literally the words used would cover such a case, but for the provision which excepts the plaintiff's rights so far as they may be determined in the action under the statute. It is not necessary to say that a court would have so adjudicated; the Legislature may have added this provision to obviate a doubt. It is sufficient to show that under circumstances which might arise in working the act, a result might have followed (or the Legislature might have thought so) which it was deemed advisable to provide against.

MORRISON, J., thinks the judgment of the court below was right.

Per Cur.—Appeal dismissed, with costs.*

COMMON PLEAS.

(*Reported by* E. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF ELGIN, AND ROBERT MACARTNEY, ONE, &c.

Mandamus—County court—Order of Judge of—Application for mandamus to compel him to rescind.

A judge of a county court by order stayed the proceedings in a cause until the attorney or his client should give a proper idemnity to the plaintiff against any costs to which he might be liable in consequence of bringing the action in case the plaintiff became nonsuit, &c. The order was afterwards made a rule of court and judgment entered thereon.

Upon a motion on behalf of the attorney to this court for a mandamus to compel the judge below to grant a summons or take other proceedings for rescinding the order.

Held, that the application could not be entertained, as it would be interfering with the jurisdiction of a competent tribunal.

Crombie, applie for a mandamus *nisi* directed to the judge of the County Court of Elgin to grant a summons or take the proceedings for rescinding an order made by him on the 10th November, 1862, in a cause in his court of John Ellison, plaintiff, and Freeman Ellison, defendant, by which the said judge ordered that the proceedings in the said cause be stayed until the attorney or his clients give a proper idemnity to the plaintiff against any costs to which he might be subjected, or be made liable for, in consequence of the bringing of that action, in case the plaintiff become nonsuit, &c., &c., and that if the indeminity were not given within ten days after the service of the order, the writ of summons in the cause was to be set aside with costs to be paid by the attorney to the plaintiff. The indemnity to be such as the plaintiff shall be satisfied with, or as the judge should approve of on a proper notice. On the 5th of January last the order was made a rule of the county court on an *ex parte* application, and afterwards judgment was signed on the order or rule, and execution issued and placed in the sheriff's hands.

DRAPER, C. J.—The leading facts disclosed on this application are that the plaintiff executed a deed of trust dated the 28th of May 1852, making Benjamin Drake and two other persons trustees of his estate. This deed of trust was produced before the judge before the above order was made. It was sworn that Benjamen Drake as one of the trustees, instructed the attorney to bring this action, for money paid by the trustees on account of the said estate to prevent a foreclosure of a mortgage given by the plaintiff and another person to the St. Thomas Building Society, for the purpose of securing the amount of a loan obtained from that society by the defendant, Drake was appointed by his co-trustees to demand and sue for all claims belonging to the said estate.

The deed of trust is not before us, and we do not know that by it the plaintiff gave the trustees authority to collect debts due to his estate. If not, the attorney could derive no authority from the employment by Drake to bind the plaintiff. If Drake and the others were trustees to collect and wind up the estate assigned to them, it does not readily occur to me on what ground the plaintiff could interfere with the action of the trustees, and still less, why the attorney employed by Drake should be deemed an officious intermeddler, and be subjected to the payment of costs to the plaintiff, nor why the trustees should be prevented collecting a debt due to the plaintiff's estate by the action of the plaintiff himself.

I abstain from expressing any opinion as to whether the order is or is not in accordance with law on the actual merits, because a perusal of the trust deed, or a disclosure of further circumstances might change any view I should adopt upon the facts now apparent, there were I should hope, other facts made apparent, to justify the order against which the attorney complains. I feel bound to assume this, as the order is of a different character from any which I have seen in any reported case, where the facts were of a similar character to those above-stated.

This order, is, however, made in a cause over which the county court had jurisdiction. It may be as suggested, that it is in some points an excess of jurisdiction. But this application is wholly unprecedented, and is calling on the court to interfere in a cause pending before a competent jurisdiction, because a step has been taken which is possibly void or irregular, but which, whether void or irregular, cannot in this mode be brought in question.

Mandamus refused.

PRACTICE COURT.

(*Reported by* C. ROBINSON, Esq., *Barrister-at-Law, Reporter to the Court.*)

MOODY V. DOUGALL.

Time for setting down demurrers—Renewing application in Practice Court.

A demurrer was set down by the plaintiff, before the opening of court on the first day of Michaelmas Term, for argument on the second paper day, and afterwards, about twelve on the same day, it was set down by the defendant for argument on the first paper day. During the same term, in Practice Court, a rule to strike out the demurrer entered by defendant was discharged on the ground that the plaintiff's entry was improperly made before the court had met. The court however heard the cause on the day for which it had been entered by the plaintiff, holding that he had a right to set it down before the opening of the court.

A motion in Practice Court *in Easter following* to rescind the discharge of the previous application there, was refused as being contrary to established practice but without costs, as the learned judge who made the first order wished it to be moved against and if possible to be rescinded.

[PRACTICE COURT, E. T., 1863.]

During Easter Term *Morphy* obtained a rule calling on the defendant to shew cause why the rule granted in the Practice Court in this cause on the 21st day of November last should not be rescinded, on the ground that the same was made through misapprehension of the practice of the court, in supposing that the court required demurrers to be set down for argument in court while the court was sitting, and that they could not be set down before the court opened, and why the demurrer books set down for argument by the defendant in this cause should not be struck off the paper, or why the terms of the rule should not be varied, so that defendant should be deprived of the costs of the said rule, and that the plaintiff should be allowed all costs in respect of the demurrer books so set down by him, on the further ground that the said demurrer books of the defendant were so set down for argument by him after the plaintiff had set down his demurrer books for argument.

On obtaining the rule the plaintiffs filed affidavits to the effect that on the first day of Michaelmas Term last the plaintiff after 10 o'clock, a. m., and before the court met, set the demurrers down for argument on the second paper day of the term: that about twelve o'clock, noon, the defendant set the demurrers down for argument on the first paper day of the term: that during the term the plaintiff obtained a rule calling on the defendant to shew cause why the demurrers set down for argument by him should not be struck out of the paper, because they were so set down after the same demurrers

* RICHARDS, J., who was present when judgment was pronounced, said he still retained the opinion expressed by him in the court below, but, not having been present on the argument of the appeal, gave no judgment.—EDS. L. J.

had been set down by the plaintiff: that that rule was discharged, with costs to be costs in the cause, by the learned judge who sat in the Practice Court, on the ground that the proper time to set down demurrers was while the court was actually sitting and not before; that the case was argued on the day for which the plaintiff had set the demurrers down to be heard, the court declining to hear the argument on the day for which the defendant had set them down.

The learned judge who sat in the Practice Court expressed a desire that the rule should be moved against and be rescinded as the full court and all the judges, after considering the matter, thought the plaintiff was regular, and had the right to set down the case before the court actually opened.

During the term *R. A. Harrison* shewed cause, and contended that although the full court might review the decision of a judge in Chambers, yet when the same judge was sitting in the Practice Court his judgment could not be reviewed by the full court, and if not, then it could not be reviewed by another judge sitting in the Practice Court. He referred to Consol. Stats. U. C., ch. 10, sec. 9, as shewing that the decisions of the Practice Court had the same binding effect as those made by the full court; that though the court might during the term perhaps revise or alter a rule granted during the term, it could not do so after a term had elapsed, and the rule had issued. He also objected that even if the power of revision clearly existed, as in case of a judge's order, it would not be exercised, as the application had not been made in the next term after the order or rule complained of was made. He also contended that the materials on which the original rule was moved for ought to be produced on this application. He referred to *Meredith* v. *Gibbons*, 21 L. J. Q. B. 293; *Orchard* v. *Moxies*, 21 L. J. Ex. 79, note; *Collins et al* v. *Johnson*, 16 C. B. 588; Rule of Practice No. 15, Harrison's C. L. P. Act, 59 7 *Notman* v. *Rapelje*, 6 O. S. 560.

Morphy, contra, contended, as to the materials on which the original rule was moved not being produced, that it appeared by affidavit filed on moving this rule that search had been made in the proper office for these papers, and they could not be found; that the learned judge who sat in the Practice Court having himself expressed a desire that the rule should be rescinded, the court ought to exercise the power varying its own rules, particularly as it was in a matter in which costs alone were at stake. He referred to *Nickerson* v. *Shaw*, 7 U. C. Q. B. 541, as shewing that a judge in chambers has authority to alter his own decision, and *a fortiori* the court.

Richards, J.—Without establishing a precedent that would, in my judgment, be very inconvenient, and contrary to the established practice of the courts in England for very many years, I do not think I can make this rule absolute.

The observations of Baron *Parke*, in *Dodson* v. *Scott*, (2 Ex. 458,) seems to me to apply to the case before us. He says, "The first objection is, is it competent for me to entertain this application at all, the objection being that it has been already disposed of in such a way as, according to the established practice of this court, to preclude any further enquiry. Several cases were cited to shew to what extent the courts have gone in laying down the rule, that after an application to them has been made, and has failed on account of defective materials, they will not allow any further enquiry. There is no doubt that such is the established practice of the Caurt of Queen's Bench, as appears from the cases which have been cited, and I presume it to be the practice of the other courts also. The practice appears not to have been first adopted, but sanctioned by a rule of the court Queen's Bench of Hilary Term, 3 Jac. 1, by which it was made highly penal, if a matter had been disposed of in the presence of both parties, to agitate the same matter again, and that upon the principle that where there had been a judgment on the case, it was conducive to the due administration of justice that the matter should not again be agitated. Now there can be no doubt that the courts have gone beyond that part of the rule which requires the matter to have been disposed of in the presence of the counsel of both parties, because they have held a party equally bound when the rule which he has obtained was discharged, although he himself, the pariy obtaining the rule, was never heard." He then refers to several cases, and proceeds, "in all of which the rule was recognised that if there had been an application to the court, and the matter has been disposed of by the court, the parties will not be allowed to re-agitate the same matter."

In *Leggo* v. *Young*, (17 C. B. 549,) the court adhered to the rule and in a note very many authorities are referred to.

In *Orchard* v. *Moxies* (2 E. & B. 206.) where a point in relation to costs was brought before a judge in chambers, he thought the matter in his discretion, and refused the costs. Subsequently the court of Common Pleas decided that the judge had no discretion, that decision being contrary to one made in the exchequer previously. The plaintiff then renewed his application for full costs, which came before the court. Coleridge, J. said, "You have taken the decision of a judge in chambers, and have let two terms pass without disturbing it." It was urged that the delay occurred under the belief that the judge in chambers, according to the decision of the Exchexuer, had a discretion, but that it was since shewn that construction of the statute was disputed, Coleridge, J. added, "Suppose all that was done at chambers had been done here, we should not now hear you." Lord Campbel, C. J., observed "Could the unsuccessful parties in the two cases in the exchequer apply to that court now, or could the party who failed in the Common Pleas take that course, if we should agree in opinion with the court of Exchequer?"

Todd v. *Jeffery*, (7 A. & E. 519), is an authority on most of the points raised in this case. In Trinity Term, 1836, a rule was made absolute in the bail court, by Coleridge, J., to enter a nonsuit. After that term, the plaintiff applied to Coleridge, J., at chambers, for liberty to move the full court to revise his judgment given in the bail court. The learned judge, after taking time to consider, said that, under the circumstances, the plaintiff might have liberty to make such application, if the full court thought proper to entertain it. On arguing the rule *nisi*, Lord Denman, in giving judgment said, "The decisions in the bail court are like decisions here. The court will alter its own rules where there has been a plain misconception. But that is not so here. And where a judge sitting in the bail court has actually decided a case, even a doubt expressed by him cannot justify us in altering his decision after the term in which it was given." Patteson, J., said, "We must for the sake of all concerned in the administration of justice, consider a rule made in the bail court in the same light as if it were made here, and if the rule in question had been made here, we could not alter it after the term in which it was made, unless there had been some palpable mistake."

I do not understand that the misconception referred to by Lord Denman, or the *mistake* by Mr. Justice Patteson, means a misconception or mistaken view as to the law of the case, or of the practice of the court, but rather as to some fact in relation to the form of the rule, or the grounds upon which it was argued;. as in one case, where it was made to appear that the facts, as stated in an affidavit on which the court acted, were false, and the party making the affidavit had been indicted for perjury, and had absconded.

I think on the authority of the decided cases and the reasoning applied to them, to which I assent, that I am precluded from interfering with the rule moved against from want of authority so to do particularly as this rule was moved against in Easter Term, and the one moved against was granted in Michaelmas Term last, and in time to have been moved against in the same term, last Michaelmas Term ending on the 29th of November last.

As, however, the learned judge who ordered the rule in the practice court wished this motion made, and desired if possible that the rule should be made absolute, and as the defendant has insisted on his strict legal right to have the rule discharged, I will discharge this rule without costs.

I do not think allowing the rule moved against to stand will after all be of much practical disadvantage to the plaintiff, as it merely discharges an application to strike out from the paper the demurrer books set down by the defendant. It does not necessarily imply that the master will allow the defendants the costs of setting down the case or of the demurrer books, particularly after the decision of the full court on the subject, and he will no doubt feel quite justified in considering the plaintiff's case as properly set down.

Rule discharged, without costs.

CHANCERY.

(*Reported by* ALEX. GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*)

LAWRASON v. FITZGERALD.

Mortgage—County court—Costs.

The act given to county courts equitable jurisdiction, in relation to mortgages when the sum due does not exceed fifty pounds, does not apply when the defendant is resident out of the jurisdiction.

This was a motion for decree in a foreclosure suit.

Fitzgerald, for the plaintiff, asked that the usual decree might be drawn up.

S. Blake, for the defendants, objected to the decree giving the plaintiff his costs of the suit, as the sum due was shewn to be only £42, and the bill should therefore have been filed in the county court.

Fitzgerald—The act, (16 Vic., ch. 119; Con. Stat., U. C., ch. 15), restricts proceedings in that court to defendants resident within the jurisdiction, for the second section (Con. Stat. sec. 34) provides expressly that "any person seeking equitable relief may enter a claim against any person from which such relief is sought, with the clerk of the county court of the county *within which* such last named person resides." And the orders of this court for the regulation of the practice of the inferior courts do not provide any machinery whereby proceedings can be taken against a person resident out of the jurisdiction.

VANKOUGHNET, C.—Let the usual decree be drawn up; and let an enquiry be made whether a sale or foreclosure will be more beneficial for the infant defendants. And if it shall appear that a sale is proper, order a sale without requiring any deposit.

BELL v. MILLER.

Specific performance of award

The finding of an arbitrator when unimpeached is treated as *res judicata* between the parties to the submission.

This court, when the relief given by the awrd of an arbitrator is of a nature proper to be specifically preformed, will decree that relief, and that too although the court cannot specifically preform some part of the award, which is for the benefit of the plaintiff, but which portion the plaintiff consents to forego.

This was a cause heard before V. C. Spragge, at sitting of the court at Barrie, in April, 1863. An *ex parte* injunction had been granted before the hearing, restraining the negotiation of the promissory notes mentioned in the judgment.

The facts material to the present report appear sufficiently in the judgment.

Fitzgerald for the plaintiff, and the defendant Robert Bell.

Strong, Q. C., and *Osler* for the defendant Miller.

Baker v. *Townsend*, 7 Taunt. 422; *Petch* v. *Conlan*, 7 Dowl. 426; *Lechmere* v. *Carlisle*, 3 P. W. 24.; *Wilcox* v. *Wilcox*, 2 W. & Tud. 345; *Nickels* v. *Hancock*, 7 D. M. & G. 300; *Lewin* v. *Whitly*, 4 Russ. 423; Fry on Spec. Per. 415, Russell on Awards, 118, 483, were referred to by counsel.

SPRAGGE, V. C.—The bill is primarily for the specific performance of an award, and for such relief as necessarily grows out of that which is awarded; and the first point is, whether such relief is of a nature proper for specific performance. It seems to be so. It is to restrain the negotiation of promissory notes, and for security for the re-conveyance of land as awarded; or for a decree for re-conveyance itself.

The award is objected to as unreasonable—as in excess of the power of the arbitrators—and as wanting in finality and certainty, and therefore as not proper for specific performance; but whether proper or not for specific performance it may still be material as a finding of facts between the parties, which they cannot afterwards controvert; and in that sense is *res judicata*. It is so treated in *Taylor* on Evidence, sec. 1565; and *Doe* v. *Rosser* 3 East, 15, is an authority for the position.

At the time of the submission to arbitration it was a matter in controversy who was entitled to the possession of certain lots in the village of Thornbury; David Miller had brought ejectment to recover possession, and the plaintiffs in this suit, together with a tenant of the younger Bell, had filed their bill in this court to stay proceedings at law, upon substantially the same grounds as, apart from the award, are the grounds upon which relief is sought in his suit. The arbitrators awarded compensation to the younger Bell "for the loss of the use and rent of the buildings and lots" in Thornbury, and directed that Miller should pay the costs of the proceedings in ejectment and in this court, thereby adjudging in favour of Bell upon the question of right to the possession of the Thornbury lots, as far at least at is material to this suit. The establishment of that fact is material, upon the objection to the award, that the matter in controversy arose out of an agreement having for its object to defeat creditors, and so not proper for specific performance, being against public policy. If Bell was not to have possession of the lots, their conveyance to him, and the giving a mortage by the elder Bell as security for their re-conveyance, taken in connexion with Miller's indebtness at the time, would afford room for the presumption that it was a scheme to place the Thornbury lots beyond the reach of Miller's creditors; but if the younger Bell was to have the possession, for his own benefit for the ten years, or even for a shorter period, then the conveyance and mortgage and contemporaneous papers may have been only the mode which unskilful laymen adopted for carrying out their agreement; and certainly the elder Bell would be more likely to give a mortgage upon his own property where his son was beneficially interested, than gratuitously to enable a stranger to defraud his creditors. It should, I think, be quit clear, clearer certainly than it is in this case, that the object of the arrangement was to defeat creditors, before the court should oppose its maxim in relation to public policy, to the assertion of a party's equitable right.

It is next contended that the award is both unreasonable and uncertain in directing such security as it requires for the release of the mortgage. It is evidently put in the shape that it is in the award, because the mortgage is made to the son of David Miller, who is a minor, and no doubt at the instance of David Miller himself, so that the difficulty of releasing it is of his own creation, but this difficulty is obviated if the court can direct the actual release of the mortgage. By the evidence in the cause, documentary and otherwise, it is quite clear that the mortgage was given for no other purpose than to secure the re-conveyance of the Thornbury lots, or rather their conveyance to the infant defendant Robert Miller, the appointee of his father. The award directs the conveyance of these lots to the infants, and the plaintiffs submit so to convey them: the object of the mortgage will be answered upon such conveyance being made, and the court can properly decree a contemporaneous release of the mortgaged premises, and a release of the motgage or a vesting order. The father David Miller submits by his answer to join in a release of the Mortgage.

The direction in the award that the Thornbury lots should be conveyed to the infant and not to his father is also complained of; but that as I have said was the agreement, and was so, as I have no donbt, at the instance of the father.

I think there is nothing objectionable in my proceeding in part upon the award, and in part upon the evidence in the cause. The rule that the court will not specifically perform an award unless it can perform the whole of it, must be taken with this qualification, that the plaintiff is at liberty as in the case of any other agreemet, to forego any parts of it that are for his own benefit, a position established in effect in *Martin* v. *Pycroft*, (16 Jur. 1125.) and so plainly reasonable as not to need any case to establish it. He may in this case abandon that part of the award which directs security to be given for the future release of the mortgage; and prove independently that he is entitled to its present discharge.

I think it was within the competence of the arbitrators to award as they did in relation to the costs at law, and in this court; the matters in controversy in both were before them, and involved the question of which party, as being in the wrong, ought to pay the costs.

It seems doubtful whether it was competent to the arbitrators to award payment of the $48 mentioned in their award: I do not see that it was a matter in controversy, and the answer sets up that it had been a claim previously adjudged upon by a court of competent jurisdiction, a division court, adversely to the plaintiff. The award is so small as scarcely to justify a reference as to the facts. I think it will be proper for the plaintiff to abandon that part of the award.

I have abstained from considering whether the younger Bell was or was not entitled to the possession and use of the Thornbury lots—whether the £216 for which notes were given was the price of goods sold; or the price of goods sold, and of such possession and use of lots, because I hold that question adjudicated upon by the arbitators, and no longer open to controversy. I have proceeded upon that point, as established beforehand, in favour of the plaintiff, and I have not thought it proper to consider as a point for consideration whether the amount awarded for compensation for the loss of possession is a reasonable or proper sum or otherwise. The account must be taken upon the footing of that being a proper sum to be allowed against the notes. The plaintiffs are entitled to their costs up to the hearing. Further directions and costs to be reserved, the plaintiff to pay the infant defendant his costs, and to have them over with their own costs against David Miller. I do not see that any costs have been incurred by defendant Robert Bell, and I do not know why he was not made a co-plaintiff.

CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

McLean v. Evans.

Taxation of costs—Service of subpœnas—Witnesses paid by both sides—Witnesses not called.

Semble, that subpœnas being mesne process, under sec. 277 of the C. L. P. A., no fees can be allowed for mileage or service, if not made by the sheriff.

Where witnesses are subpœnaed and paid by both parties to a suit, the successful party is entitled to the costs of such witnesses from the other.

Where witnesses are subpœnaed but not called, the master should decide whether they are necessary or not, and allow or refuse their expenses accordingly.

[Chambers, June, 1868.]

This was an application to revise costs taxed by defendant, the grounds for revision being:

1. That the master has taxed the costs of services of subpœnas made by a person who is not the sheriff or deputy-sheriff or bailiff.

2. That some of the witnesses for the defendant were paid both by plaintiff and defendant, and that the defendant should be required to get his money back from the witnesses, and not be allowed to tax them against the plaintiff; and

3. That the fees of those witnesses who were not examined by the defendant at the trial should not have been taxed: and that the master refused to decide upon the materiality of the witnesses for whom the defendant was claiming an allowance.

Adam Wilson, J.—I think section 277 of the C. L. P. Act determines the first point, because a subpœna is *mesne* process, as the following definition of it from Blackstone's Commentaries clearly shows: "*Mesne* process is such process as issues pending the suit upon some collateral matter, as to summon juries, witnesses, and the like, distinguished from original process which is founded on the writ. Mesne process is also sometimes put in contradistinction to *final process*, or process of *execution*, and then it signifies all such process as intervenes between the beginning and end of a suit." 3 Com. 279.

The section of the C. L. P. Act, applicable to this case, (sec. 277) enacts:—"In the taxation of costs no fees shall be allowed for the mileage or service of writs of summons or other *mesne process*, unless served and sworn in the affidavit of service to have been served by the sheriff, his deputy or bailiff, being a literate person, (or by a coroner, when the sheriff is a party to the suit,) nor unless a return of the sheriff or coroner (*as the case may be*) be endorsed thereon, except in cases as provided in the eighteenth section of this act."

The tariff of costs, which provides for the allowance *to the attorney* for service of writs, &c., when not done by the sheriff, and when taxable to the attorney, has relation to the 18th section of the C. L. P. Act, under which the attorney may, on the default of the sheriff for fifteen days, have service made for him by any literate person (Har. C. L. P. A. 780.)

If any of the services of subpœnas, therefore, were not made by the sheriff, his deputy or bailiff, or are not so sworn to in the affidavit of service, "no fees" (as the statute says) "shall be allowed for the mileage or service in the taxation of costs."

As to the second point, that the master has allowed to the defendant the expenses of those witnesses alleged to have been subpœnaed by both parties and paid by both, the rule appears to be that where the witness is subpœnaed by both parties and paid by both, that party is entitled to his expenses from the other who succeeds in the cause.—*Benson* v. *Schneider*, (7 Taunt. 337,) *Allen* v. *Yoxall*, (1 C. & K. 315.)

As to the third objection, I think there should be a reference to the master, for the master should decide not only whether the judge rejected the witnesses or not, but whether they were necessary or not.

In *Galloway* v. *Keyworth*, (15 C. B. 230,) Jervis, C. J., says, "Where the judge at *nisi prius* rejects a witness, right or wrong, the *master* never allows for his attendance." Again, "If the cause had been tried in the usual course, and the judge had rejected Armstrong's evidence, you could not have had the costs." To which Mr. Atherton, the counsel, assented, saying, "No doubt that is so, whether the decision of the judge is right or wrong." Maule, J., says, "The court does not sit strictly as a Court of Appeal from the decision of the master. Costs of increase are allowed at the discretion of the court, but that discretion is, for convenience sake, exercised through the master. The court has still an original jurisdiction. You may now urge that the expense of the witness' attendance ought to have been allowed, on the ground that he was a material witness." All the judges then *seriatim* concur in this ruling as to the witness' fees, both when rejected by an arbitrator or by a judge.

But the expenses of witnesses will be allowed, though not called at the trial. Ch. Arch. Prac., 11th ed., 512. In *Miller* v. *Thomson*, (4 M. & G. 260,) where a plaintiff did not call a witness because the defendant failed in his plea, yet he was allowed the fees of the witness; and see also *Adamson* v. *Noel*, (2 Ch. 260,) where it is said the court will not review the master's taxation when he has allowed for witnesses who were not called; but this must mean where the master has entertained an objection to their allowance, and has decided that in his opinion they were material. See *Delisser* v. *Towne*, (1 Q. B. 333,) in which it was decided that where the plaintiff does not prove certain assignments of perjury set out in his declaration, he should not be allowed the costs of those witnesses who were summoned to answer a case which it was supposed the defendant would attempt to make out.

The order should then, in my opinion, go for a revision upon the first and third grounds of objection; but as the practice in the master's office has been to allow for such services as have been complained of in the first objection, it would not be right that I should unsettle the practice in this respect. It will be better, therefore, that the defendant should carry his objection to the full court, that it may be more maturely considered there and definitely settled, and I will grant the order only upon the third ground.

Order for revision on the third ground.

Dennison v. Knox.

Writ of Certiorari to County Court—Right of Plaintiff thereto—Mode of Compelling appearance.

Where plaintiff, having sued defendant in a County Court, and after joinder of issues in law, obtained a certiorari for the removal of the cause into the Court of Queen's Bench, had the writ returned; and the defendant, refusing to appear in the Queen's Bench, obtained a summons, calling on defendant to shew cause why he should not enter an appearance in the office of the Clerk of the Crown, or why the plaintiff should not have leave to enter an appearance for him; and on service of a notice upon defendant of having entered such appearance, why plaintiff should not have leave to proceed in the action by filing a declaration, and serving a copy of the same on defendant, his attorney, or agent; or why, in default of defendant entering an appearance, plaintiff should not be at liberty to proceed by filing a declaration, posting up a copy with notice, to plead in eight days, and in default of plea, be at liberty to sign judgment; or why, in default of such appearance, a writ of distringas should not issue to compel such appearance. The summons was discharged.

Quære.—The right of a plaintiff, by writ of certiorari, to remove his own cause to a Superior Court, pending an issue in law, not determined.

[Chambers, July 11, 1868.]

This was a summons calling upon defendant to shew cause why he should not enter an appearance in the office of the Clerk of the Crown; or why plaintiff should not have leave to enter an appearance for him, and on service of a notice upon defendant of having entered such appearance, why plaintiff should not have leave to proceed in the action by filing a declaration, and serving a copy of the same on defendant, his attorney or agent; or why, in default of defendant entering an appearance, plaintiff should not be at liberty to proceed by filing a declaration, posting up a copy with notice to plead in eight days, and in default of a plea, be at liberty to

sign judgment; or why, in default of such appearance, a writ of distringas should not issue to compel such appearance.

From the affidavits and papers, it appeared:—

1. That on 2nd June, 1863, the plaintiff's attorney served the defendant's attorney with a notice entitled in the cause, and in the Queen's Bench, that the plaintiff having sued out of the Queen's Bench a writ of certiorari, directed to the Judge of the County Court of Huron and Bruce, for removing the cause from the County Court into the Queen's Bench, had filed the writ and return with the proper officer at Toronto, and that defendant was required to appear in the said action within ten days, otherwise judgment by default.

2. That this is an action of covenant brought for the recovery of $200 and interest—brought on a covenant in a mortgage made by defendant to plaintiff, in favour of one C. B., as the assignee of the mortgage, and carried on for C. B.'s benefit. That this action was commenced in the County Court of Huron and Bruce, and defendant pleaded a set-off due by plaintiff to defendant, to which plaintiff replied on equitable grounds, an assignment by the mortgagee, with notice to the mortgagor, and his assent thereto, to which replication defendant demurred. That judgment was given for defendant, with leave to plaintiff to amend. That plaintiff amended, and defendant again demurred. That plaintiff obtained a writ of certiorari for the removal of the cause from the County Court to the Queen's Bench, which the Judge returned. That after the return, plaintiff's attorney saw defendant's attorney, who promised that he would, in a few days, send an appearance to Toronto to be entered, but has not done so, and has since refused, and still refuses; and after such refusal he was served with the above notice.

3. Defendant's attorney denies any positive undertaking to appear, stating that after the certiorari issued, plaintiff's attorney proposed to him to let the pleadings stand as they were, to which he replied he would think it over, and let him know in a few days. Plaintiff's attorney then requested him to enter an appearance, and defendant's attorney replied, "he could send it at the same time as the pleadings." That defendant's attorney, on reflection, thought that as he had only been retained by defendant to defend the suit in the County Court, he would require his client's instructions before he entered a defence in this Court (Queen's Bench), and he shortly afterwards informed plaintiff's attorney that he declined entering into the proposed arrangement. That plaintiff's attorney threatened to bring ejectment against defendant on the same mortgage, unless an appearance was entered, and has brought such action.

R. A. Harrison, for summons.

T. Moss, contra.

DRAPER, C. J.—The removing by a plaintiff, by certiorari, of his own cause from the County Court, pending an issue in law not tried, (and possibly pending issues in fact, for the affidavits disclose only that a set-off is pleaded and replied to) is a novel proceeding, —so far as my experience goes—and no instance of a similar course has been brought under my notice.

Conceding (for the sake of argument only) the right of a plaintiff to remove his own cause by certiorari, at any stage, it appears to me to be a course open to grave objections, and to which I should afford no facilities.*

It certainly is not of right, that the plaintiff should obtain a Judge's order in effect to point out to him what course he must now take to get on with his action, or in effect to relieve him of the responsibility of taking a step by forcing the defendant to appear.

It is unusual for the Court or a Judge to compel an appearance, the result of which may expose defendant to loss and expense, when the defendant has no desire to litigate the matters with the plaintiff, but leaves him to pursue his remedy in such mode as the law authorizes.

I do not think the plaintiff makes out a case of an undertaking by defendant's attorney to appear. The request was not made until after the writ of certiorari had been sued out, and when, not improbably, the plaintiff's attorney felt in difficulty as to how he should get on, and the plaintiff's attorney neither took a step, nor forbore taking one in consequence of the alleged undertaking.

If the defendant appears to the certiorari, I do not perceive what remedy he has for his costs in the Court below; he could not, in any way that occurs to me, compel the plaintiff to proceed, though the plaintiff may obtain a procedendo, notwithstanding he issued the certiorari—at least, I see no obstacle to his doing so.

It is obvious that if this course is allowed, it may harrass defendants, and might be used as a mode of appealing from the opinion of a judge before judgment was actually given, instead of following the practice directed by the statute in regard to appeals.

I think no ground is shewn to make my granting the order prayed for as a matter of right; and as a matter of discretion, I feel very clear I ought not, in the absence of authority, to do it.

If the plaintiff's course of proceeding has the sanction of law, he must take whatever step he is advised to carry on his cause. If, by law, he cannot, without some special and discretionary interference of the Court, or a Judge, get the defendant into the Court of Queen's Bench, he must make a much stronger case than his affidavits shew, to entitle himself to this; and I confess I look upon this as an experiment to which I am not inclined to give any encouragement.

I refer to *Edwards* v. *Bowen*, 5 B. & C. 206. *Melsome* v. *Gardener*, Cowp. 116. *Hankey* v. *Grand Trunk Railway Company*, 17 U.C. Q. B. 472. *Kempe* v. *Balne*, 8 Jurist 619. *Gunn* v. *McHenry*, 1 Willa. 277.

Summons discharged with costs.

* See *Helps Lucas*, 8 U. C. L. J., 184.—EDS. L. J.

LYNCH ET AL v. WILSON ET AL.

Staying plaintiff's execution to enable defendants to institute an action and recover judgment against plaintiffs—Power so to do—Circumstances.

An application to delay a plaintiff's proceedings on an execution in order to enable the defendants to institute an action, and to acquire a position in which they may apply to set off a judgment to be recovered by them against plaintiff's judgment is one not founded upon a right given by law, but is an appeal to the equitable powers of the Court.

It is expedient therefore on every such application to consider all the circumstances, to determine whether or not the application rests on an equitable foundation.

Held, that the circumstances of this case did not disclose such an equitable foundation as to entitle defendants to the relief sought;

Quære, the power of the Court or a Judge to delay plaintiff's proceedings in an action, in order to enable defendants to institute an action, and to acquire a position in which they may apply to set off the judgment to be recovered by them against plaintiff's judgment.

Semble, there is no authority for such a position.

(Chambers, July 15, 1863.)

On the 24th June, 1863, a summons was granted by the Chief Justice of Upper Canada calling on plaintiffs to show cause why all proceedings in the cause, or the proceedings on the execution then in the sheriff's hands should not be stayed until after the next fall assizes, or until judgment for the sum of £120. 6*s*. 2*d*. costs, taxed for defendants against plaintiffs be obtained, or until such other time as the Judge in Chambers might order, on the ground that the defendants have a claim against plaintiffs for the said sum for costs taxed against them, and that the estate of the late Connal James Baldwin is insolvent, and unable to pay the debts against the estate in full, and on the ground that if the proceedings are not stayed until defendants obtain judgment and are able to set off this claim against the plaintiff's claim in this cause they are apprehensive they will lose the said claim, and on payment of so much of the judgment as is in excess of the said claim, or so much as the Judge in Chambers may direct.

It appeared from the affidavit filed on both sides,

1st. That the present action (in which judgment has been recovered, and a writ of *fi. fa.* against goods issued and placed in the sheriff's hands on 17th April, 1863,) was brought in the life-time of the intestate for negligence on the part of the defendants as attornies and solicitors of the intestate; that the action was carried on by the plaintiffs after the death of the intestate, and they recovered a verdict for $500; that the execution now in the sheriff's hands is for verdict and costs, amounting to $700 or thereabouts.

2nd. That the demand of the defendants arises out of the following circumstances. The intestate, some years before his death, sold some lands to one Duignan, and employed the defendants to draw a deed to Duignan and a mortgage to be given by Duignan to the intestate to secure £750, the balance of the purchase money, with interest. The deed and mortgage were drawn accordingly, and executed. Duignan without delay registered his deed, but the defendants delayed to register the mortgage for many months, and in the meantime Duignan gave another mortgage on the same lands for about £1500, which was registered, and thus defeated the

intestate's security, as Duignan had become insolvent. After this second mortgage was given, one of the defendants obtained from Duignan a mortgage to the intestate of other landed estate, which was then subject to two other mortgages. On the 12th November, 1857, the same defendant wrote to the intestate reserving an ulterior proposal in reply to a note of the intestate, and proceeding thus "in the meantime, for the benefit of all concerned, "it would be well to take immediate steps against Duignan, which, "of course, will be without prejudice to our respective positions "or rights, as it will be a pity that Duignan should gain time "while we are endeavouring to settle our differences. Please to "advise with some professional person on this subject, and he will "see you do not risk your rights by acceding to this." To which the intestate replied through his solicitors on 26th November, 1857, stating that the solicitors "advise him to comply with the sugges-"tion contained in that letter—that immediate steps should be taken "against Duignan to enforce the payment of the mortgage, it "being distinctly understood that whatever steps may be taken "are not to prejudice the respective positions or rights as between "you and Mr. Baldwin." Upon the receipt of this letter a bill of complaint was filed, at the instance and in the name of the intestate, against Duignan, and eventually a final order of foreclosure was obtained. Communications passed between the intestate and his solicitors, and the present defendants during the progress of that suit, and the intestate made one or more affidavits for the purpose of the suit, but in no instance did he repudiate the authority given by him through his solicitors for the institution and maintenance thereof. No beneficial result to the intestate attended the decree, and the property on which the second mortgage was taken, proved inadequate, as was asserted, to satisfy the previous incumbrances. It was for the costs of this suit in Equity, instituted under the foregoing circumstances, that defendants claimed the right and opportunity to set off.

On the 6th October, 1862, Morrison, J. made an order in the matter of the present defendants as attornies, that the bill or bills of costs, &c., delivered to the plaintiffs as administrators of the of the intestate Baldwin, should be referred to the proper taxing officer of the Court of Chancery to be taxed, and (among other things,) that the defendants in this cause should be restrained from commencing or prosecuting any action or suit touching their demand, pending such reference reserving the right to dispute the retainer of the defendants, and the liability of the intestate and of the plaintiffs as his administrators.

On the 15th June, 1863, the Master in Chancery certified that in pursuance of the order of Morrison, J. he was attended by the solicitors for the present plaintiffs and defendants, and the solicitors for the last named parties having brought in and laid before him a bill of their costs, charges, and disbursements, amounting to £131. 14*s.* 6*d.*, he had taxed the same at £116. 9*s.* 9*d.*, and the costs of taxation £3. 16*s.* 5*d.*, making together £120. 6*s.* 2*d.*, of which the defendants have received nothing.

It was asserted on both sides that the estate of Connal James Baldwin is insolvent, and therefore the defendants represented that unless they could set off this demand against the judgment recovered against them, they will wholly lose it.

On the plaintiffs' side it was shewn that on the seventh January, 1863, they made a deed poll reciting that the estate of the intestate was indebted to Patterson & Harrison in divers large sums of money, and that plaintiffs as administrators had a claim against defendants which was then being prosecuted, and in consideration of such indebtedness they assigned to Paterson & Harrison the said claim, to the extent of Patterson & Harrison's claim for costs and professional services against the estate and the plaintiffs as administrators.

The defendants were notified of this assignment on the 21st January, 1863.

On the 15th June, 1863, Richards, J. made an order in a cause of the Edinburgh Life Assurance Company judgment creditors, and the now defendants, garnishees, that the garnishees should pay to the judgment creditors £25 of the debt due from them to the now plaintiffs.

It was sworn that the plaintiffs had incurred liabilities and expenses in their administration, and that there were no assets except the verdict recovered against the defendants to reimburse them their expenses or to idemnify them against such liabilities, and that the plaintiffs, if sued by the defendants for their bill of costs, intend to resist the claim.

The plaintiffs' attorney also swore that he delayed entering the judgment in this cause in consequence of a conversation with defendants' attorney, from which he was led to believe that the amount would be paid, and promised not to enter the judgment immediately, and that the plaintiff's attorney attended before Mr. Justice Richards when the garnishee order was made, when the now defendant's attorney in answer to a question put, said he supposed the money would have to be paid.

Robert A. Harrison showed cause. He contended that under ordinary circumstances there was no authority in favor of making the summons absolute, and argued that the dictum in 1 Chit. Arch. 9, Ed. 664, was not supported by the cases to which the author referred, *Masterman* v. *Malin*, 7 Bing. 435, *Taylor* v. *Young*, 201. Besides he distinguished those cases by showing that the former was an authority only for "a brief suspension" at the instance of a person whose action was pending and the latter an authority only for set off of costs in the same suit. But he also argued that in this case there were special circumstances, which would render it inequitable to make the summons absolute. First, the assignment by plaintiff of the verdict of which defendants had notice before application (*Miller* v. *Thompson*, 1 U. C. Pra. R. 245; *Standeven* v. *Margatroyd*, 27 L. J. Ex. 425.) Secondly, the right of the administrators to apply assets in payment of personal expenses of administration, and distribution of the balance, if any, according to the priorities of creditors and nature of their claims. (*Gillen* v. *Smithers*, 2 Stark, 328; 2 Williams' Executors, 1683; *Chapman* v. *Derby*, 2 Vern. 117; *Rees* v. *Wallis*, 1 Jur. N. S. 657; *Lombard* v. *Alder*, 17 Beav. 542; *Wardell* v. *Thellusson*, 6 El. & B. 976.)

C. S. Patterson, contra, argued that there was ample authority under ordinary circumstances to support the summons, referring to *Masterman* v. *Malin*, 7 Bing. 435, to show that the application there failed because of the omission to show insolvency, which was not only shown but admitted in this case, and as to the special circumstances, argued that the assignment of verdict passed nothing, and that the administrators did not show judgments unsatisfied in answer to the application. He referred to *Phillipson et al* v. *Caldwell*, 6 Taunt. 176.

Draper, C. J.—This application to delay the plaintiff's proceedings on an execution in order to enable the defendants to institute an action and to acquire a position in which they may apply to set off a judgment to be recovered by them against the plaintiffs judgment, is one, not founded upon a right given by law, but is an appeal to the equitable powers of the Court. It is indispensable, therefore, to consider all the circumstances in order to determine whether the application rests upon an equitable foundation.

It does not appear when the defendants were first in a position to assert their claim, or whether they delayed so doing before the 6th October, 1862, when Morrison, J. referred their bill for taxation. From that date until 15th June, 1863, when the Master made his certificate, they could bring no action. This summons was issued on the 24th June. It is asserted, and not denied, that if the plaintiffs had applied to a judge in Equity, instead of to a Common Law Judge, to refer this bill, which is for proceedings in Chancery only, a trial of the fact of retainer by a jury would not have been necessary, and that the question would have been disposed of at once, or at least without the necessity of awaiting the assizes, and that the plaintiffs ought not therefore to be heard to complain against their proceedings being so long restrained, as it arose from a step taken by themselves. I incline to the defendant's view so far. If there was unnecessary delay on their parts before October last it is not shown.

It may be inferred, and I think fairly, from the case of *Masterman* v. *Malin*, 7 Bingh. 435, that the Court would grant "a brief suspension" of the proceedings on one side to enforce payment of costs, where the other side might, by the determination of a rule then pending, and which the Court expressed their readiness to proceed with at once, become entitled to costs. I find no case which has gone farther than this, and from the observations of counsel it would seem that unless in case of insolvency or other special circumstances even that relief could not be afforded. It is obvious that this is a long way from being an authority in support of the present application.

The language of Gibb, C. J. in *Phillipson* v. *Caldwell*, 6 Taunt. 176, is as far as it goes adverse to the defendants, though not any authority on the point at issue. Nor have I found any case which affords any direct guidance for a decision.

Looking then at the facts, it appears to me that the second mortgage would never have been taken from Duignan, but for the loss of the priority of the first mortgage given by him to the intestate. The jury have in this case determined that such priority was lost by the neglect of the defendants. It may be truly said that by taking this mortgage the intestate had a reasonable prospect of being secured in the payment of Duignan's debt to him, but it does not appear that the intestate was aware of the necessity of this step, nor that he sanctioned it before it was taken, and it is obvious that it was for the defendant's interest to obtain this security, since to whatever extent it proved available, they so far reduced their liability in damages to the plaintiffs for their neglect.

The necessity for the second mortgage arose from the defendants' omission in regard to the first. The necessity for the foreclosure suit arose from the same cause. The costs of that suit are what the defendants first of all seek to obtain judgment for against the intestate's estate, and then to set it off against the plaintiff's judgment for that negligent omission. The special circumstance relied on to support the application is the insolvency of the intestate's estate. It is urged, and if true, as appears to me with irresistible force, that the deficiency in the assets has arisen from defendants' conduct, and the total loss of the debt due by Duignan, that the retainer is fully open to question, that the verdict against the defendants is the only fund out of which the plaintiffs have to pay the expenses of administration for which they are personally liable, and that it would be unjust under the circumstances to relieve the defendants by a proceeding beyond any decided case, and which would occasion loss to innocent parties.

Without reference to the assignment, because I do not feel driven to rely upon it, but preferring the broad ground that the defendants' case is not one which entitles them to the equitable relief asked for. I discharge the summons with costs. See *Young* v. *Gye*, 10 Moore 198; *Johnson* v. *Lakeman*, 2 Dowl. P. C. 646; *Taylor* v. *Cook*, 1 Younge, 201; *O'Hare* v. *Reeves*, 13 Q. B. 659.

Summons discharged with costs.

WARD V. VANCE—THOMPSON, GARNISHEE.

Garnishee proceedings—Service of attaching order and summons to pay over—Death of garnishee before issue of order to pay over—Effect thereof—Amendment nunc pro tunc—Issue as to indebtedness.

Personal service of an attaching order, or summons to pay over issued thereon, is unnecessary, if it can be shewn or can be gathered from the materials before the court that the garnishee had a knowledge of the s rvice.

Where the summons to pay over was argued on one day, and judgment deferred till the next day, when the summons was made absolute (the garnishee having died during the interim) on an application to set aside the order, on the ground that it was made after the proceedings had abated, by reason of the death of the garnishee, leave was given to the judgment creditor to amend his order *nunc pro tunc*, without costs, the delay being the delay of the judge and not of the party.

Quære, should not all orders as well as rules be in practice dated as of the day of argument, and not of the day of delivery of judgment?

The executor of the garnishee having sworn that there was no debt due at the time the order was made, and that there was collusion between the judgment creditor and judgment debtor, which neither of them denied, leave was given to take an issue on payment of costs. (Chambers, July 29, 1863.)

A summons was obtained by the executor of the garnishee, calling upon the judgment creditor and judgment debtor to shew cause why the order made in this matter on the 22nd June last, ordering the garnishee to pay over to the creditor the amount of his indebtedness to the debtor should not be rescinded.

1. Because the summons to shew cause upon which the order was mas made had not been personally served on the garnishee.

2. Because at the time of the making of the order the garnishee was dead.

3. Because nothing was due at the time.

And upon grounds disclosed in the affidavits and papers filed.

The affidavit made by Mr. Brunskill, and referred to in the summons, stated, among other things—that the garnishee died on the 25th June, 1863; that he, Mr. Brunskill, is one of the executors of the deceased; that for about five months before his death the garnishee was chiefly confined to his house, and too unwell to attend to his business; that for some time before the garnishee's death, the deponent resided chiefly at Bradford, and looked after the affairs of the garnishee, and he is well acquainted with the same; that an attaching order was taken out on the 14th April last; that a summons to pay over was taken out on the 16th June; that neither of them was personally served on the garnishee, and from statements made by him to the deponent, he (the deponent) believes the garnishee had no knowledge of the summons having been issued; that a copy of the attaching order was handed to the deponent, but he did not accept service for the garnishee; that the summons of the 16th June he believes was served on J. W. H. Wilson, an attorney, who had occasionally been retained to do business for the garnishee, but who had no authority to accept service of writs or papers requiring personal service; that he (the deponent) on the 22nd of June, having heard of the issue of the summons, and that the judgment creditor was pressing the judge in chambers for an order thereon, despatched a telegram to Messrs. Paterson & Harrison, his solicitors, to see Mr. O'Brien, the agent for the said J. W. H. Wilson, and to repudiate the service, which he believes was accordingly done, and a communication was made to the presiding judge in chambers by Messrs. Paterson & Harrison that the order and summons had never been personally served; that in order to set aside the summons and service on Wilson, an affidavit was drawn up to be sworn by the garnishee, stating that no service had been made upon him, but before the affidavit arrived at Bradford the garnishee was dead; that on the 26th of June the order on the garnishee to pay over was made; that he can say with confidence the garnishee's estate is not indebted to Vance; that the judgment creditor and the judgment debtor are brothers-in-law, and he the deponent believed there was collusion between them.

Robert A. Harrison, for the summons, said he did not rely so much upon a want of personal service, as upon an utter want of service, both of the attaching order and summons to pay over and so contended that the order to pay ought to be rescinded (*Abbey* v. *Dale*, 14 Jur. 1070). This ground he urged as open to him as being a ground 'disclosed in affidavits and papers filed.' He also contended that under any circumstances the summons ought to be made absolute, because of the death of the garnishee, whereby the proceeding had abated at the time the order was made (Con. Stat. U. C., cap. 22, secs. 288, 289, 290). He admitted there was no direct authority in favor of this position, but argued that the order to pay upon which execution might issue was a quasi judgment, and so analogous to an ordinary judgment in an ordinary action, which, if obtained after the death of either plaintiff or defendant, was at common law void (Har. C. L. P. A. 374, note *k*). He argued that the statutes 17 Car. II, cap. 8, and 8 & 9 Will. III, cap. 11 sec. 6, providing for the continuance of proceedings in an action under certain circumstances to judgment, notwithstanding the death of plaintiff or defendant, are inapplicable to garnishee proceedings. Moreover, he submitted that as the garnishee, or rather his legal representative, now really disputed the debt, the order ought, upon that ground at all events, to be rescinded, and an issue directed (Con. Stat. U. C., cap. 22, sec. 291; *Wintle* v. *Williams*, 3 H. & N. 288; *Wise* v. *Birkenshaw*, 8 W. R. 420 S. C. 29 L. J. Ex. 240).

Tilt, contra, contended that the order was good as against the objections raised, and if not, submitted that, under the circumstances, he was entitled to have the order amended and made *nunc pro tunc* (*Miles* v. *Bough*, 3 D. & L. 105; *Lawrence* v. *Hodson*, 1 Y. & J. 368; *Bates* v. *Lockwood*, 1 T. R. 637; *Heathcote* v. *Wynn*, 25 L. T. Rep. 247; *Bryant* v. *Simmons*, 24 L. J. Q. B. 253; *Wright* v. *Mills*, 28 L. J. Ex. 223; *Moor* v. *Roberts*, 27 L. J. C. P. 161; *Lanman* v. *Audley*, 2 M. & W. 535; *Trueman* v. *French*, 21 L. J. C. P. 214; *Wilkins* v. *Casty*, 1 Dowl. N. S. 855; *Griffith* v. *Williams*, 1 C. & J. 47, 2 Saund. 72 *i*.

Harrison in reply contended that if the judgment creditor considered himself entitled to have his order amended *nunc pro tunc*, he should make a substantive application for the purpose, to which cause would be shewn; and that, without amendment, the application must prevail.

ADAM WILSON, J.—I do not think I ought to re-open the question of service, either of the attaching order, or of the summons on the garnishee to shew cause why he should not pay over, as I have already disposed of this point at some length, on the application being made for the final order;* besides, the present proceedings, in my opinion, show no reason why this matter should be renewed.

Ward v. Vance—Thompson, Garnishee, 9 U. C. L. J. 214.

Brunskill's affidavit shews that he himself—and while, it would seem, he was looking after the affairs of the garnishee, during the time the garnishee was confined to the house, and was too unwell to attend to his own business—was served with the attaching order, and, it may be assumed, some short time after its issue on the 16th of April; but he does not say whether he ever informed the garnishee of the fact, although, in the nature of things, it must be assumed he did do so, and more particularly as he does not deny that the garnishee had knowledge of the order and of its service as before stated, while he does say that, from statements made to him by the garnishee, and from his knowledge of the garnishee's affairs, he does believe the garnishee had no knowledge of the summons. And it can scarcely be assumed the deponent, while looking after the affairs of the garnishee, could or would have neglected so serious an affair as the one in question. At any rate he is the one who can the best explain whether he did communicate the receipt of the order or not, and as he does not allege to the contrary, the inference irresistibly is, that he did do what he ought to have done —inform his principal of the receipt of the important paper; or, if he had not done it that he would have disclosed the fact of such non-communication to the garnishee.

The knowledge by the garnishee of these proceedings having been initiated is of some consequence, for a less strict service or authority is required in the future proceedings or services, as would appear from the case of *Bayley* v. *Buckland*, 1 Exch. 6.

Here it is not at all certain but that the garnishee had full and actual knowledge of the fact of there having been a summons upon him to shew cause why he should not pay over, or that, at any rate, he should be presumed to have had such knowledge.

It is true that Brunskill says from his knowledge of the garnishee's affairs, and also from statements made by the garnishee, he believes the garnishee had no knowledge "of the summons having been issued," which is rather an equivocal expression. But it appears that Brunskill, from what he says, heard on the 22nd of June of the issuing of the summons. Now, from whom did he hear this? Was it from the garnishee? It is rather to be presumed it was, because Brunskill telegraphed on that day to Messrs. Paterson & Harrison, his own solicitors, to get them to have the service of the summons repudiated by Mr. Wilson's agent, and it can scarcely be assumed that he did this without the authority of the garnishee. In fact, the very act of Brunskill is made the foundation upon which the present application to set aside the service of the summons rests.

I am not inclined, therefore, to lay much stress upon the idea of there being new facts submitted in the new affidavits at all serviceable to the applicant. On the contrary, I rather think the service of the attaching order is strengthened by Mr. Brunskill's affidavit; for while before I thought the service of that order sustainable chiefly by the latter proceedings then had upon it, I now think it sustainable from the circumstances connected with the present proceedings. Nor have I altered my opinion as to the effect of the appearance of an attorney to except to a service claimed to have been made upon his client.

The first objection, therefore, I do not entertain, rather than overrule it.

The second objection is one which may, perhaps, be entitled to prevail, unless relief can be given; for the order being drawn up after the garnishee's death, can be of no efficacy in such a shape.

It is said the garnishee died after he had been called upon to shew cause why he should not pay the debt, and after the case had been argued and stood for judgment, and that the delay was the act of the judge and not of the party claiming the benefit of the order; that such delay should not prejudice the party but that such relation should be given to the order as it would have had if the delay in question had not occurred. It does seem reasonable that the order should be sustained, if it properly can be so, when the occasion of its not being earlier made was certainly the act of the judge, who required time for consideration as to the judgment to be pronounced, than that all that has been done towards it should be defeated by an objection which *per se* has no special merit in it.

The order of a judge is to be considered, while it stands, as the order of the court, and may be modified and dealt with by the judge precisely as a rule may be dealt with by the court. And I think it is quite clear that upon the particular day when an order is moved for, if the judge is not prepared to give his judgment, and takes time to consider it, if he afterwards grant the order, the order may be drawn up (and, perhaps, in strictness should always be drawn up) as of the day on which it was made (*Egan* v. *Rowley*, 8 Dowl. P. C. 145). This would be to make the order according to the actual fact, and is quite a different thing from giving it a special operation and relation as was sought to be done in *Wilkins* v. *Canty*, 1 Dowl. N. S. 855.

I do not, therefore, think this order is erroneous or void as made after the death of the garnishee; but it is rather to be considered as wrongly dated, and so amendable according to the truth of the case.

Upon the third ground I have no hesitation in granting relief, and permitting the executors of the deceased garnishee to contest the alleged indebtedness to the judgment debtor, considering all the circumstances, and the very strong fact that it is the judgment debtor who is distinctly charged with carrying on these proceedings, and between whom and the plaintiff collusion is attributed, which neither of them has denied.

My opinion then is that I should amend the order as to its date, and that I should discharge the summons so far as relates to the first and second grounds, and that I should make it absolute, if the applicant desire it, upon the third ground upon payment of costs.*

COUNTY COURT.

(In the County Court of the County of Elgin, before His Honor Judge Hughes.)

Ellison v. Ellison.

Action in name of plaintiff without authority—Stay till indemnity given to him.

Where an attorney without the knowledge or consent of plaintiff brought an action in his name, relying upon an assignment of choses in actions from plaintiff to the person for whom the attorney really was acting, and the right of the attorney under the assignment to use plaintiff's name for the purposes of the action was very doubtful, an order was made for the stay of the proceedings until the attorney or his client should give a proper indemnity to the plaintiff against any costs that he might be subjected to or become or be made liable for in consequence of the bringing of the action in case the plaintiff should become nonsuit, or the suit be discontinued, or a verdict be entered for defendant.

(Chambers, 3rd November, 1863.)

This was an action for money paid to defendant's use, as set forth in special endorsement on summons:

"To paid St. Thomas Building Society, for you at your request, £31; interest, £14 8s. 2d.; total, £45 8s. 2d."

Defendant appeared by attorney, and afterwards demanded security for costs from the plaintiffs attorney, which was not given, nor was the demand followed up by any application.

The plaintiff, however, made affidavit that the action was brought without his knowledge, consent or concurrence, and that he never authorised the plaintiff's attorney, nor any other person, to bring the action, nor had he ever been requested by any person to allow an action to be brought in his name against the defendant.

Upon that affidavit a summons was issued calling upon the plaintiff's attorney to shew cause why the writ of summons issued and served in this cause should not be set aside with costs to be paid by him, or why the beneficial plaintiff, whoever he might be, should not pay the costs of that application and give security to the plaintiff against all costs that might by possibility be recovered against or recoverable against the plaintiff, &c., or why further proceedings should not be stayed until the costs of the application be paid and the security given to the plaintiff; because,

1st. The plaintiff never authorised the bringing of the action.

2nd. That the plaintiff had no interest in the action.

Upon the return of that summons *Stanton* shewed cause, and produced a trust deed from plaintiff, and one S. H. Ellison to one Haight, Drake and Duncombe, executed upwards of ten years ago, conveying all the estate of T. & S. H. Ellison, together with their debts then existing, and containing a power of attorney authorising the trustees to collect the debts for the benefit of the estate; he also read the affidavit of B. Drake, one of the trustees, setting forth, 1st. That he, Duncombe, and Haight, by a deed executed 28th May, 1852, were made trustees of the estate of the plaintiff and Samuel Hubbard Ellison. 2nd. That the trust deed had never been revoked. 3rd. That the debt sued for was for

* Applicant declined to take the order upon the terms of payment of costs, and so the summons was afterwards discharged with costs.—Eds. L. J.

money paid by the trustees on account of the estate to the St. Thomas Building Society, and was so paid by them in their capacity of trustees of the said estate, and was necessarily paid by them to the said society to save the estate from loss—on account of a mortgage executed previously to the trust deed by the plaintiff and S. H. Ellison to the said society to secure a loan obtained from them by the defendant, and that he, Drake, was appointed by the other trustees to act as collector for the estate, with authority from them to demand and sue for all claims belonging to the estate. He also read an affidavit of the plaintiff's attorney that about the 4th Oct., 1862, and before the issuing of the writ of summons in this cause, he was instructed by B. Drake, one of the trustees, to commence an action in the name of the plaintiff against the defendant, and upon argument contended that there was no precedent for the application, and that the trust deed shewed sufficient authority for Mr. Macartney, the attorney, to bring the action when authorised by the acting trustee, even in the name of this plaintiff, without using the name of S. H. Ellison, the other party who executed the trust deed.

Horton, contra, contended that a debt due to this plaintiff and S. H. Ellison, jointly, was the only one which was authorised by the trust deed, even by the shewing on the other side—because it was sworn that the mortgage to the Building Society was executed by this plaintiff and S. H. Ellison, jointly, and at all events if the money was paid by the trustees in their capacity as such they were the persons who should sue for it and not J. Ellison, who was no party to the transaction; and that by their own shewing the suit was unauthorised; and as the trustees were no parties to the suit, the attorney was the only person who could be called upon to answer this application. Besides this, the Messrs. Ellison only transferred debts existing at the date of the deed, 28th May, 1852, whereas this suit was brought for money alleged to have been paid by the trustees for the use of the defendant long since the date of the deed.

HUGHES, Co. J.—The cases of *Smith* v. *Turnbull*, 1 Prac. Rep. 88; *Hubart* v. *Phillips*, 18 M. & W. 702; *Doe Davis* v. *Eyton*, 8 B. & Ad. 785; *Doe Hammek* v. *Fillis*, 2 Chit. 170; *Doe Shepherd* v. *Roe*, 2 Chit. 171; *Peckford* v. *Ewington*, 4 Dow. 453; *Shaw* v. *Ormiston*, 2nd Prac. Rep. 152; *Doe Baker* v. *Roe*, 3 Dow. 496; *Newton* v. *Matthews*, 4 Dow. 237, *Coleman* v. *Beidman*, 7 C. B. 872; *Re Henderson* v. *McMahon*, 12 U. C., Q. B., 288; *Hoskens* v. *Phillips*, 16 L. J., Q. B., 339; *Laws* v. *Bott*, 16 M. & W. 300; *Whitehead* v. *Haight*, 2 Dow. 258, are authorities for this application; some of these shew that the application may be made by plaintiff and some by the defendant.

The only question which remains is, whether or not the debt sued for here is one embraced within the deed of trust produced and assigned to Messrs. Drake, Haight and Duncombe, and whether or not sufficient authority to Mr. Macartney for bringing the action in the name of the plaintiff has been shewn.

It is not shewn by the deed itself, for the assignment is a general one of all their existing debts due the co-partnership estate of J. & S. H. Ellison as partners, or to either of them individually.

The affidavit of Mr. Macartney sets forth, that he was instructed by B. Drake, one of the trustees, to commence an action in the name of the plaintiff against the defendant; it would have been explicit if the affidavit had shewn that he was authorised to bring this action for the causes set forth in the special endorsement on the writ. Then Mr. Drake's affidavit does not shew that the debt sued for existed at the time of the assignment, or was assigned or embraced within the general terms of the deed of trust; it sets forth that the suit is for money paid by the trustees on account of the estate to the St. Thomas Building Society, and paid by them in their capacity of trustees; while the special endorsement sets forth a claim for money paid to the St. Thomas Building Society for the Defendant at his request, and it is to be inferred by the plaintiff.

If it were sworn that the debt was clearly one of those assigned I should say the authority for bringing this suit had been made out; as it is, the payment of money by trustees out of the joint estate of the plaintiff and of one S. H. Ellison, by reason of a mortgage made by them for the benefit of the defendant, would not give the plaintiff a chose in action against the defendant, it would be in the trustees themselves if anywhere; at all events it is so doubtful as to make it right that the proceedings should be stayed until Mr. Macartney, or his client, give a proper indemnity to the plaintiff against any costs that he may be subjected to or become, or be made liable for, in consequence of the bringing of this action, in case the plaintiff becomes nonsuit, or the suit be discontinued, or a verdict be entered for the defendant, or otherwise during the course of the cause; because I think the bringing of this suit is unauthorised in so far as the plaintiff is concerned.

The plaintiff would have no claim for an indemnity in any case clearly within the meaning of and covered by the deed of assignment, because he had the opportunity of protecting himself and providing for that at the time the deed was executed; but in a case where the authority is denied on the one hand and made more than doubtful on the other, as in this case, I think he has a right to the indemnity.

If the indemnity be not given in ten days the summons must be made absolute in the first alternative with costs. If the indemnity be given it must be such as the plaintiff will be satisfied with or as I shall, upon its being submitted to me, approve of, upon a proper notice to the plaintiff or his attorney of its being about to be submitted to me. Order accordingly.

QUARTER SESSIONS.

(In the Quarter Sessions of the County of Elgin; His Honor Judge HUGHES, Chairman.)

MILLS, Appellant, v. BROWN, Respondent.

Conviction for selling intoxicating liquors after 7 o'clock on Saturday night, and before 8 o'clock on the Monday morning following, contrary to Con. Stat. U. C., cap. 54, sec. 254.

Held, 1st, that a conviction which did not negative that the persons to whom the sale was made were travellers or ordinary boarders lodging at the place where the liquor was sold, or a requisition for medical purposes, was void.

Held, 2nd, that where the proof must negative the circumstances of exception, the allegations in the instrument of conviction ought to do the same.

(9th June, 1863.)

The conviction set forth, that the appellant "did keep a bar-room open, by an inside door, and dealt out and disposed of intoxicating liquors to sundry persons, to wit, to D. P. and S. D., in a bar-room in the house of the said John Mills, in the village of Iona, in the said county, &c. (being a place where intoxicating liquors are allowed to be sold), on the Sabbath day, and also after the hour of seven o'clock on Saturday night previous to the said Sabbath day, contrary to the form of the statute in such case made and provided."

E. Horton, for the appellant, took exception to the conviction in that it did not show that the parties to whom it is alleged the liquor was sold were not travellers residing at the appellant's inn, or ordinary boarders residing there, or that there was no requisition for medical purposes either from a licensed medical practitioner or a justice of the peace; that a sale to either of these, or under certain circumstances, might be legal; and the conviction ought to have negatived all these circumstances, either of which would have justified the selling; and cited *Shaw* v. *Hespeler*, 16 U. C. Q. B. 104; Blac. Com. 134, 9 Lon. Ed.; and *King* v. *Jukes*, 8 T. R. 542.

Stanton, for respondent, contended that *Shaw* v. *Hespeler* bore out the conviction, and that the words in the conviction, "contrary to the form of the statute," &c., cured the defect, if any there were; and that it was to be inferred that the persons to whom the liquor was sold, contrary to the statute, were not persons in whose favor the statute makes exceptions; and referred to Con. Stat. U. C., cap. 103, secs. 57 to 62.

HUGHES, Co. J.—The case of *Rex* v. *Duman*, 1 Chit. 147, in which a conviction under the Imperial statute 5 Geo. III, cap. 14, for taking fish without the owner's consent, was brought in question, the conviction was held bad, for not stating, as well in the information as in the evidence, that it was without the owner's consent, although there were no words in the statute requiring such consent to be negatived.

In *Seth Turner's* case (9 Q. B. 80), in which a summary conviction under the Imperial Master and Servants Act was adjudicated upon, it was held that the mere allegation that the defendant (a servant employed by the prosecutor under an agreement to serve

as a miner for eleven months) "did absent himself from his master's service, and did thereby neglect to fulfil the conditions of the hiring, contrary to the form of the statute," was insufficient for not negativing a lawful excuse, and it was held bad, because the fact as charged might be consistent with the innocence of the accused, although the statute did not use the words "without lawful excuse," or words of that import.

The case of *King* v. *Jukes*, cited in argument, was quite analagous to the present case. It was a conviction under the Imperial statute 36 Geo. III, cap. 69, secs. 3 & 4; and it was held there that a summary conviction for any offence created by statute must negative every exception contained in the clause creating the offence, and a defect in omitting to do so is not aided by a proviso in the statute that "no conviction for any offence in the act shall be set aside for want of form, or through the mistake of any fact or circumstance, or other matter, provided the material facts alleged were proved;" for it is a material fact that the defendant did not come within any exception in the enacting clause. Lord Kenyon, C. J., said: "This is not an objection of form, but of substance; and the reason is well given in Hawkins (2 Hawk., c. 25, sec. 113), why a conviction should negative all the exceptions in the enacting clause—because the party cannot plead to such a conviction, and can have no remedy against it, but from an exception to some defect appearing on the face of it, and all the proceedings are in a summary manner. Therefore the conviction itself should show that the party accused had not the defence which the act gives to him, if true. The good sense of the thing is in favor of what is said by Hawkins; for being a summary proceeding, and conclusive on the defendant, it ought to have the greatest certainty, on the face of it."

The exception in the Con. Stat. U. C., cap. 54, sec. 254, is in the enacting clause, and the conviction should have set forth that the sale was to persons named therein, they not being then travellers or ordinary boarders lodging at the appellant's inn, or at the place where the liquors are alleged to have been sold; and should also have negatived that the sale was on a requisition for medicinal purposes, signed by a licensed medical practitioner, or by a justice of the peace, produced by the vendee or his agent; and the same rule would apply in making a conviction for permitting or allowing liquors to be drunk in any such place, because the same exceptions apply. Where the proof must negative the circumstances of exception, the allegations in the instrument of conviction ought to do the same. This seems to be the principle established by all the cases to which I have referred.

It was urged in argument by the counsel for the respondent, that the use of the words "contrary to the statute," &c., cures the defect; but it has been decided by the courts in England, in analagous cases, that the statement "contrary to the form of the statute," &c., will not aid, nor would the word "unlawfully." *Fletcher* v. *Calthorp* (6 Q. B. 880) is in point, and was a case wherein a conviction under the Imperial statute 9 Geo. IV, cap. 69, sec. 1, came in question, which statute gives authority for a summary conviction, "if any person shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun, &c., for the purpose or taking or destroying game." The conviction set forth that C. D. "did by night unlawfully enter certain enclosed land, with a net, for the purpose of taking game, to wit, partridges and pheasants, contrary to the form of the statute," &c. It was held bad for not stating the intent to be to take game there, and the court laid down the broad principles applicable to this case:

First, that when a certain act is made punishable by summary conviction, which may be lawful if performed under certain circumstances, these circumstances ought to be negatived in the conviction; and, secondly, that proceedings of this nature, which permit a man to be convicted summarily without trial by his peers, are always construed strictly, and never supplied by intendment of matters which do not appear on the face of them.

It is therefore ordered that the conviction be quashed, with costs.

Per Cur.—Order accordingly.*

* In a case of ———. appellent, and ———, respondent, the Court of Quarter Sessions for York and Peel, Hon. S. B. Harrison presiding, quashed a conviction had under Con. Stat. U. C., cap. 54, sec. 254, upon the same grounds as those held fatal to the conviction in the foregoing case.—Eds. L. J.

PARLIAMENTARY ELECTION CASES.

(*Reported by* Thomas Hodgins, Esq., M.A., LL.B., *Barrister-at-law.*)

Essex Election.

(Committee—The Hon. Oliver Mowat, Q. C., M. P., for South Ontario, *Chairman;* Lewis Wallbridge, Esq., Q. C., M. P., for South Hastings; Geo. H. Simard, Esq., M. P. for Quebec Centre; Theodore Robitaille, Esq., M. P. for Bonaventure; and Joseph Rymal, Esq., M. P. for South Wentworth.)

Held, that, to entitle a minority candidate to the seat, without a scrutiny, notice of the disqualification of the sitting member must be brought home to every elector who voted for the sitting member, by proving that notice was given to each voter individually, or by proving that the notice was up at every polling booth before and during the polling. Evidence indicating general notoriety of disqualification is not sufficient.

Where the whole vote for the sitting member is not attacked, but a scrutiny is demanded, a vote given after notice to the voter of the disqualification of his candidate is struck from the list, as in the case of any other illegal vote.

Quebec, 2nd Session, 7th Parl., 1863.

Mr. Rankin and Mr. O'Connor were the candidates at the last general election for the county of Essex, and Mr. Rankin was returned, having the majority of votes. Mr. O'Connor petitioned against this return, on the ground that Mr. Rankin had not the necessary property qualification, and he claimed to be entitled to the seat without going into a scrutiny. The allegation in the petition as to notice was in these words: That the electors "were duly informed and notified and were otherwise well aware" of the said A. R.'s disqualification, &c., "*inasmuch as the said electors were, and each of them was, duly notified and informed, and they and each of them well knew*," &c., "whereof the votes of the said electors which were recorded for the said A. R., were and each of them was useless, of no effect, and void, and were thrown away, &c. The evidence showed that at meetings of electors, notice was given, that Mr. Rankin could not qualify—that the same statement was made at the hustings, and that two hand bills were distributed.

Mr. Rankin objected that Mr. O'Connor was not himself a duly-qualified candidate, and evidence to this effect was gone into, and the committee decided the point in favor of Mr. O'Connor.

The property on which Mr. Rankin had qualified, was land conveyed to his wife, her heirs and assigns, to her and their sole use forever; and it was argued that both under these words as well as by the operation of the statute respecting married women, Mr. Rankin did not acquire such an interest in the property conveyed as the law required for his qualification. The committee, after full argument, decided in favor of this view; but the point being one of general law, it has not been thought necessary to report the grounds of the decision at length.

There were also some points of practice decided by the committee, which we may report hereafter.

The question was whether, under the circumstances, the minority candidate was entitled to the seat, or whether there should be a new election, was then argued.

The petitioner in person. The law as applicable to this part of the case is laid down in Clerk on Elections, 268; Rogers on Election Law, 224. He cited *Reg. ex rel Richmond* v. *Tegart*, 7 U.C. L. J., 128; *Reg. ex rel Clark* v. *McMullin*, 9 U. C. Q. B., 467, *Reg. ex rel Horney* v. *Scott*, 2 U. C. Chamb. R. 88, cited in 7 U. C. L. J., 128, Warren on Election Law, 257, 259, *Tavistock* case, 2 P. R. & D. 5.

Hodgins (of the Upper Canada bar) for the sitting member. The *Tavistock* case is strongly against the petitioner, as it was there held that notoriety was not sufficient. The cases in favor of notoriety were boroughs or very small constituencies, as *Southwark* (borough) Cliff. 135; *Kirkcudbright*, 1 Lud. 72; *Flintshire*, 1 Peck 526 (only 92 votes polled); *Abingdon*, 1 Doug. 419, &c. The cases in favour of notice to voters were numerous and of great authority, as being the latest decisions. *Newcastle-under-Lyne* (borough), B. & A. 569; *Tavistock* (borough), 2 P. R. & D. 5; *Canterbury* (borough), Cliff. 359; *Leominster* (borough), C. & D. 1; *Fife*, 1 Lud. 455; *Clitheroe*, 2 P. R. & D. 281, borough); *Belfast* (borough), F. & F. 601; *Cork*, K. & O. 392; *Drogheda*, K. & O. 214, see p. 234; *Leominster*, Rog. App. 302; *Wakefield*, B. & A. 273; also see *Penryn*, C. & D. 55; *Cheltenham*, 1 P. R. & D. 236; *St. Albans*, 1 P. R. & D. 277; *2nd Cletheroe*, 2 P. R. & D. 276; *1st Clitheroe*, 2 P. R. & D. 281; *Beverley*, 1 W. & D. In the *1st Stadacona*, M. S. Leg., Council Canada, it was proved that Mr. Huot's disqualification, as member of the Legislative Assembly for a portion of the Division, was known to nine-tenths of the electors, yet a new election was ordered.

The committee deliberated and on a subsequent day the following judgment was read by the learned chairman:

THE CHAIRMAN.—Having decided that Mr. Rankin, the sitting member, did not possess the necessary property qualification, and that Mr. O'Connor, the petitioner, did possess it, the question which remains for us to determine, is in effect, whether there should be a new election, or whether Mr. O'Connor should have the seat though he had a minority of votes?

The rule is clear that if those who vote for a disqualified candidate, do so without having received any notice of the disqualification before giving their votes, or without having received such notice of it as the law applicable to the subject requires, there must be a new election. But if all who voted are proved to have had the necessary notice, all are held to have thrown away their votes, and the candidate of the minority is entitled to the seat without a scrutiny. If some only of those who voted for the disqualified candidate received, or can be proved to have received, the required notice, these votes are upon a scrutiny struck off, like other illegal votes; and if the result of the whole scrutiny is then to place the qualified candidate in a majority, he gets the seat, otherwise a new election takes place. This rule has been recognized and acted upon where the objection was, as here, to the sitting member's want of the property necessary to qualify him. We refer to the *Tavistock* case, 2 P. R. & D. 5 (1853.); *Belfast* case, F. & F. 601 (1838); *Cork* case, K. & O., 391 (1835); and the *Drogheda* case, ib. 213 (1835). There is indeed one class of cases in which neither the decisions nor the text-books agree with one another, as to whether any formal notice is necessary or not. This is where the disqualification is already well known to all the electors, before and at the time they give their votes. The case which a learned judge has suggested of votes in favour of a woman for an office, to which by law a woman is not eligible (vide *Gosling* v. *Veley*, 7 Q. B., 439, per Lord Denman), and the case of votes for a minor, well known to be such, (a case which has actually occurred,) may be referred to as illustrations of this class of cases. But whether in this class of cases, notice of the objection is held to be absolutely essential or not, the practice of modern times at least, appears from the books to be, to give the notice and to rely, not on the notoriety of the disqualification, but on express notice being given of it to the electors before they vote. The *Radnorshire* case, 1 Peck., 494 and notes; the *Drogheda* case (1835) K. & O.211; the 2nd *Horsham* case, (1848) P. R. & D., 240; and the borough of *Peterborough* case (1853) 2. P. R. & D. 287, are amongst the cases which strikingly illustrate this practice.

With reference to the want of uniformity in the decisions of committees and in the statements of text-writers on the point, it is to be observed that, for obvious reasons, the decisions of Election committees on questionable matters are less uniform than those of courts; and the decision of one Election committee in England has not the authority with other Election committees which the decision of one court has with other courts of co-ordinate jurisdiction, especially when there is a right of appeal. Another difficulty in determining points of Election Law arises from the fact that election committees have not usually stated the reasons on which their judgments were based; and it is not always easy to gather with anything like certainty, from the reported facts and arguments of counsel, what the reasons were which influenced the committee. But having given our best attention to all we have met with on the point referred to, we are inclined to think upon the whole, that the weight of Parliamentary authority is in favour of the necessity of notice in most even of the cases in which the fact that creates the disqualification may be notorious without the formal notice. See, amongst other cases, those already mentioned: and also, *Abingdon* 1 Douglas, 429; *Leominster*, 1 Cor. & Dan. 1, and note 12; Heywood on County Elections, 537; Simeon on Elections, 472; Rogers on Elections (9th ed., 1859) 226 note; Clerk on Elections, 267, 268; also 2nd *Clitheroe* case, 2 P. R. & D., 285; *Regina* v. *Councillors of Derby*, 7 A. & E., 419: *Regina* v. *Hiorns*, 7 A. & E. 962; and the 1st *Stadacona* case in Legislative Council (Canada) 1862, MS. The reason for thus requiring notice to be given of a disqualification which is already notorious, is probably in order that the attention of voters may be formally as well as distinctly called to the fact and to its consequences; and that mere inattention or oversight on their part, may not be visited with a penalty designed only for wanton perversity.

This class of cases was referred to in the argument before us as having some bearing on the point we have to decide; and it was urged that the case on which we are adjudicating belongs itself to this class. But where the disqualification is, as in the present case, for want of property, notice of the objection is clearly necessary where the opposing candidate means to claim the seat on the ground of the disqualification. Indeed it is seldom (if ever) possible that a candidate's want of property can be positively known to the electors in the same way as they may positively know, for example, that he holds some disqualifying office, or has been convicted of some disqualifying crime. For he may have no property in one county but he may have property in another. Executions in the hands of one sheriff against him may be returned no goods and no lands: but he may have both goods and lands elsewhere. If not qualified in this respect when he issues his address, or even at the nomination, he may in good faith procure what is necessary before the polling, or even afterwards. Hence notice of this objection has always been held to be indispensible, whatever question there may have been as to its necessity under certain circumstances in other cases.

As to the kind and nature of the notice required, the utmost strictness appears now to be exacted; the giving of a seat to a candidate who had but a minority of the votes, being justly deemed too grave a matter to be done lightly. The best way of giving the notice is laid down to be by serving express notice on every elector individually, before he gives his vote. This it is said may be done, either when he goes to the poll or by delivering to him previously a written or printed statement of the objection.

Another method which some of the text-writers say is sufficient in law, but which is elsewhere spoken of more hesitatingly, and merely as appearing to be sufficient, is by putting up placards at every polling place and at the doors of the polling booths; so that every elector must see the notice when he comes up to vote; and this seems to be regarded as equivalent to personal notice to every individual voter.

The last work we have had access to which treats of the subject is Rogers on Elections. In the 9th edition of that work (1859) the rule is thus stated, p. 226: "Express notice of the disqualification must in all cases be given and strictly proved." On the following page the kind of notice necessary is stated more fully: "Notice of a candidate's disqualification need not be served personally upon every voter in order to render his vote useless, though that is the safest and most desirable course to adopt when it is practicable. It would appear to be sufficient if such notice be affixed in conspicuous places, near the polling place so as to be visible to every elector on coming to vote." In Clerk on Elections (Ed. of 1857) p.167, after giving a form of notice, the author adds the following note: "A notice in this form should be printed on placards and handed to all the electors generally before the poll." At page 225 of the same book there is, however, the following passage: "This disqualification is usually made known by handing to the electors personally and before they come to the poll, a statement regarding it, or by publishing placards and notices upon the walls of the place and the doors of the polling booths.

Mr. Warren, in his work on elections, page 234, refers to three cases in the reports as indicative of the notice required. These cases are the *Cork County* case, K. & O., 406 (1835) where notices apparently written or printed were served on 700 electors in addition to the objection being made known by speeches and hand bills; the *Wakefield* case, B. & A., 319 (1843) in which there was a scrutiny, and not only was public notice of the disqualification given at the hustings and by handbills distributed setting it forth, but a written notice was also given to the individual electors whose votes were successfully objected to; and the *Belfast* case, F. & F. 603, (1838) where before the votes objected to were given, placards had been issued containing notice of the disqualification and posted on the walls of the town and on the Court house where the votes were taken. In all these cases, as Mr. Warren remarks, the notice was held sufficient, and the successful candidate was unseated.

It thus appears that the legal sufficiency of notice by placards posted at all the polling places before and during the election, instead of express notice to every voter individually, is suggested, with greater or less confidence, by the text-writers, and has been maintained by at all events one express decision (*Belfast* case, F. & F. 601 (1838). But it is remarkable that the point does not seem to

be regarded in England as free from doubt; and the practice there appears still to be to give express notice to every individual voter, besides posting notices at the polling places and elsewhere. We may refer to a few cases as illustrative of this practice, since the petitioner here contends that something short even of this kind of notice is sufficient to entitle him to the seat. For example, in the 2nd *Newcastle under Lyne* case (1842) B. & A., 572, a written protest setting forth the objection was given to the returning officer at the election, in the presence and hearing of the candidates; and copies of the protest were posted at the polling booths before and during the polling; yet the petitioner did not rely on the notice thus given, but served several electors with copies of the protest before the polling began; nor did he afterwards attempt to do more before the committee than to get the names of the voters so personally served, struck off on a scrutiny; and it was not until so many were thus struck off as placed the petitioner in a majority, that the committee reported in his favour. So in the case of the *Borough of St. Albans*, 1 P. R. & D. 276 (1851) it appears that, besides delivering a formal written notice to the returning officer, and to the candidate himself, and putting up placards in front of the hustings and on the walls of the buildings immediately adjacent thereto, a similar notice was publicly delivered to each voter as he came to the poll, by persons placed at the entrance of each polling place for this purpose. Again, in the *Tavistock* case (2 P. R. & D. 5), 1853, besides posting on each side of the door of the polling place as well as at other conspicuous places in the borough, notice was given to every elector as he came up to vote, until this course was discontinued by an agreement between the candidates that the notice should not be repeated to each, but that the same should be understood to be given to each elector throughout the election; and even under these strong circumstances, so far does the rule appear to be from being conclusively settled, that counsel thought it worth while to argue (though unsuccessfully) that for want of the express notice to each, the votes were not thrown away.

In the present case it is not contended upon the evidence that express notice was given to every individual voter, nor even that placards setting forth the alleged disqualification were posted at every polling place. But what the petitioner affirms is in effect that notice was given to each and every of the electors; and what the petitioner contends is, that he was not bound to adopt either of the methods of giving notice which we find recommended in the books; that it appears upon the evidence that, through the means which he actually took and otherwise, the fact of his objecting to Mr. Rankin's qualification became generally notorious in the county; and that there is authority for holding the general notoriety of it to be equivalent to proof of express notice to every voter, for the purpose of entitling a minority candidate to the seat without a scrutiny.

Mr. O'Connor certainly did take considerable pains to make his objection notorious; whether his object in this was to entitle himself to the seat in case he should be in a minority, or merely to damp the energies of Mr. Rankin's supporters, is not apparent. Mr. O'Connor and others, in the course of their speeches at the nomination, and at meetings held in every municipality before the election, referred to Mr. Rankin's alleged inability to qualify. They also circulated handbills, in which Mr. Rankin's disqualification was pressed on the attention of the electors; and copies of these handbills were published in a local newspaper. The form of the notices thus given certainly differs greatly from the form which the books recommend a candidate to adopt when his object is to claim the seat should he happen to have but a minority of the votes. Vide Warren on Election Committees (1857) 466; Rogers on Elections (1859) App. 277; Clerk on Elections (1857) App. 167.

There were in fact two printed notices made use of. One was contained in a somewhat vituperative election handbill, which embraces several topics besides Mr. Rankin's inability to qualify. The other notice contained a copy of a written demand which had been made on Mr. Rankin, with a short address to the electors added. It is in these terms: "Rankin's qualification—Again demanded but not put in—The following demand has been made—To Arthur Rankin, Esq.:

"SIR,—As an elector of the county of Essex, I demand that your "qualification as a candidate at the present election be deposited in "the hands of the sheriff (the returning officer) before a vote is "polled. I am aware that you cannot comply with this demand, "but I desire that the electors should not be deceived; and that "they should not lose their votes upon false pretences.

I am, Sir, your obedient servant,
(Signed) R. A. WHYTE.

"Electors, be not deceived, Rankin cannot qualify. He dare not "take the necessary oath with the certainty of a prosecution for "perjury staring him in the face. He will run his chance of going "to Parliament without qualification, and risk another contested "election. Essex does not desire another contested election and "its evil consequences. Rankin's practical joke is nearly played "out."

"July 8th, 1861."

Another contested election is thus stated to be the penalty of voting for Rankin; yet this is the very thing against which Mr. O'Connor is now contending, and which he puts this notice in evidence to prevent. This notice therefore, instead of informing the electors, was evidently calculated to mislead them as to the effect of voting for Rankin; and if the case had depended on the sufficiency of a notice which so entirely departs from every approved form, and is at the same time fitted by the terms in which it is expressed to mislead voters, it would be extremely difficult to maintain its sufficiency, and upon the strength of it to pronounce the virtual disfranchisement of the electors for this Parliament. But assuming the terms of the notice to be sufficient, is the notoriety created by its circulation, and by the other means adopted for this purpose, sufficient to entitle the candidate of the minority to the seat? That is what Mr. O'Connor had to make out.

Notoriety, as a learned writer on this subject observes, is a vague word for practical purposes: and no case in other than election matters was mentioned to us, in which English law allows a notoriety to be created and offered in evidence, as a substitute for the express notice that would otherwise be required. The general rule of law is certainly against admitting notoriety as evidence of notice or of anything else, except in cases of supposed necessity; (Vide Taylor on Evidence. sec. 507, et seq., sec. 1478, Roscoe's Law of Evidence, 26 d. &c.) In fact the word seldom occurs in any book on evidence. It is seldom found in the index of any work on law. Whatever is said of it in English books is commonly to be seen under the head of hearsay. Lord Ellenborough in *Weeks* v. *Sparke* 1 M. & S. 686, said the admission of notoriety or reputation as evidence for any purpose "is somewhat of an anomaly and forms "an exception to the general rules of evidence." Again, "I con-"fess myself unable to understand upon what principle, even in "matters of public right, reputation was ever deemed admissible." Sir John Romilly, the Master of the Rolls, in *Greenslade* v. *Dare*, 1 Jurist N. S. 294, 20 Beavan 290, stated the rule in civil cases in these terms: "Evidence of general reputation is not admissible to prove a fact unless it be such a matter as the boundary of a manor or the like. To admit evidence of general reputation, to fix a defendant with knowledge of a single fact, while that evidence would not be admissible to prove the fact itself, appears to me to be a violation of the first principles which regulate the reception of evidence and the administration of justice."

The tendency, again, of modern legislation, certainly seems rather against than in favour of such general notices as placards even at the polling places would afford. See for example, the Carriers Act (Imperial) 1 Wm. IV. c. 68, s. 74, and the Railway and Canal Traffic Act (Imperial) 17 & 18 Vict. c. 31. sec. 7.

On the other hand, the latest reported case on the very point before us, is distinctly against the sufficiency of this method of giving notice of an alleged want of the necessary property qualification. We refer to the *Beverley* case, decided in 1857 (1 W. & D. 22.) Beverley was an English borough, and it is obvious that an attack on a popular candidate's qualification would naturally become notorious among the electors of a borough more quickly and more easily than in a large and not very densely populated county like Essex. The evidence in the Beverley case showed that Mr. Glover, whose return was petitioned against, had stood for the borough five years before; that, on that occasion he had left £700 of debts unpaid; that a subscription had been got up in the borough to discharge these debts; that at the election now in question he had received a written demand for his qualification; that he had addressed the electors with this written demand in his hand; that

a placard questioning his qualification and reflecting on his moral character had been sent through the post office to a number of the electors; that the receipt of this paper created a considerable sensation in the borough; that a meeting was called for the express purpose of giving Mr. Glover an opportunity of refuting the charges made against him; that Mr. Glover appeared at this meeting and defended himself; that the author of the placard went down to Beverley very shortly after publishing the handbill, with the intention of substantiating the charges contained in it; that he commenced addressing the crowd on the subject; that before he had said many words, the crowd became so irritated that he was alarmed, and we presume did not proceed with his proofs; and that so mnch excitement had been occasioned by the publication of the placard, that some witnesses considered it would have been unsafe and have caused a riot, either to serve notice of the disqualification on the individual electors, or to affix the notice publicly at or near the polling booths, unless this was done during the night.

A stronger case of notoriety could not be established than thus existed in the Beverley case, but the committee declined to seat the minority candidate, and there was a new election.

No opposite decision of an election committee was cited to us by the petitioner, Mr. O'Connor; and from our own reading we think it improbable there has been any such for at least forty years and upwards. Had there been adverse decisions, the latest decision would naturally, and in the absence of strong reasons to the contrary, carry with it the greatest weight: and in estimating the value of old decisions even on points not touched by decisions of subsequent date it is always our duty to remember, in reference to any which were given before 1770, when the Grenville act was passed, that at that time, in the words of a standard writer on the subject, "controverted elections were undoubtedly and confessedly decided by the whole House of Commons, as mere party questions calculated to test the strength of contending factions." It is further to be borne in mind, that, though that act led to a great improvement, as compared with what Lord Grenville called "the abominable prostitution of the House of Commons" in elections, which previously existed, still, in the words of the author already quoted, "partiality and incompetence were very generally complained of in the constitution of committees appointed under the act"; that the evils of the system were still universally recognized and deplored until 1839, when an act was passed establishing a new system; that changes were still found necessary and were made in the years 1841, 1844, and 1848; that it was not until the last of these years that the law was placed on its present footing; and that since that time the constitution of election committees is thought in England to be as satisfactory as any statutory enactments are likely to make it.

It is to be observed then, on the one hand, that since the period of the improvement instituted in 1839, or, indeed for many years before, no single instance has been found in which a committee of the English House of Commons seated a minority candidate without either express notice to the voters individually, or at the least by placards at all the polling places before and during the polling; not a single instance in which a minority candidate was seated on the mere ground of general "notoriety" having been given by him and his friends to the fact that the property qualification of his opponent was objected to; while, on the other hand, the Beverley case, which negatives the sufficiency of such a notice, was decided under what is confessedly the best constitution of Parliamentary Election Committees which has yet been contrived.

We have not yet alluded to the case of the *Queen ex rel. Metcalf* v. *Smart*, 10 U. C., Q. B. 89 (1852) which Mr. O'Connor cited to us in his reply. But that case, if held applicable at all, would prove far more than he contended for, and far more than probably any counsel ever contended for in modern times before an election committee. The case, it is to be observed, was one of a municipal and not a Parliamentary election; and there are many considerations which forbid a decision on the Municipal Law of Upper Canada from being held conclusive in reference to a Parliamentary election (*Vide Bedford case*, F. & F. 436, 3 Lud. 465; *Chippenham cases*, Glanville, 59, 60, &c.) Decisions in such cases do not profess to be based on a review of the decisions of election committees. Indeed the latter, though of weight here, are not regarded as of any authority in municipal or like cases in courts of law, and are seldom if ever cited in such courts. Besides, it is one thing to seat a minority candidate for part of one year in a local council with its limited jurisdiction, and quite another thing to give a minority candidate a seat for perhaps three or four years in the Parliament of the Nation or Province. The case in the Court of Queen's Bench is a sufficient illustration of this difference. That case had reference to an election in the town of Port Hope. By the Municipal Law (as every one knows) a candidate must be assessed in the municipality for a certain amount of real estate: and Mr. Smart, whose election was impeached, was not so assessed. This was mentioned at the election, and the matter was discussed before the polling began, in the hearing of such electors as happened to be present. These circumstances were held notice sufficient to seat one of the minority candidates. The fact that Mr. Smart was not assessed for the necessary amount of real estate, does not appear to have been disputed; and if it had been, any elector could in a few minutes have ascertained the truth by examining the assessment roll, which is by law a public document and open to public inspection. Under all the circumstances, then, the rule laid down by the court of Queen's Bench, as to this notice, may be a sound rule (though we have found no like decision on the Municipal Law of England;) and may be necessary for enforcing the Municipal Law as to the property qualification of a town councillor, and may create little hardship or injustice in such a case. But it is perfectly certain that verbal notice at the nomination is not sufficient in the case of a Parliamentary election. The whole current of Parliamentary practice and authority is against any such notion.

We may add that there seems a disposition on the part of election committees of England, to limit rather than extend the cases in which a minority candidate is seated for want of qualification on the part of a more popular opponent. Thus, in the 2nd *Clitheroe* case, 2 P. R. & D. 286 (1853) the committee unanimously adopted the view—in almost confessed opposition to what they regarded as the Common Law doctrine, as well as to some precedents of cases before election committees—that even where a notice is given in strict accordance with the requirements of the law, still to entitle a minority cnndidate to the seat, the disqualification must be founded on "some positive and definite fact, existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness on the part of the electors, in voting for the disqualified person." The committee concluded their resolution in these terms: they "think it is right to point out that under the administration of the present law, as sanctioned by some precedents, not only may injustice be done to constituencies by being represented by persons whom the majority of electors have deliberately rejected, but also that each individual voter may be placed in a position of hardship and difficulty, if upon the mere assertion of an opposing party that a disqualification exists, the truth or falsehood of which he may have no means of ascertaining, he is to exercise his franchise at the risk of his vote being thrown away, in case, on subsequent investigation, the existence of that disqualification should be established." The disqualification in the case in which these remarks were made, was for bribery and treating at a previous election. But a learned commentator on the case (who argues against the rule it supports) observes with much force, that if the committee took a correct view of the law, "it ought to be applied not only to cases where acts of bribery and treating are alleged as the cause of disqualification, but also in cases where the incapacity is created by want of a sufficient property qualification. Indeed, as the case stands, there is perhaps greater reason for adopting the rule referred in such cases than in many others." As we have already intimated, it it seems sufficient if the candidate has the necessary amonnt of property before he is elected, or before the proclamation is made by the returning officer at the close of the election. Vide Union act sec. 28; Consolidated Statutes 22 Vic., ch. 6, secs. 36 & 37 (English version) *Bristol* case, Simeon, 51; *Leominster*, 1 C. & D. 1; *Bath*, P. & K. 23; *Bath*, K. & O. 27.

It is impossible not to feel with the committee in the 2nd *Clitheroe* case, that the rule respecting the seating of a minority candidate sometimes bears hard and even unjustly upon electors. The principle on which it proceeds, is, that the electors on receiving notice of the disqualification, may start another candidate: *Burke's* case, 1 Doug. 241; *The Queen* v. *Hiorns*, 7 A. & E. 962; *Hawkins* v. *Rex*, 2 Dow's Parl. R. 148; yet no machinery is provided for enabling the electors, in many cases, to ascertain before the election, whether the

objection is well founded or not, and whether therefore it is necessary to start another and less acceptable candidate; and besides, the law gives effect to the objection as to all who vote after having notice of it, though it may then be too late to start another candidate with any possibility of success; and even then most of the electors may have voted and returned to their homes before the objection is disclosed. We certainly can perceive no ground on which we could justify extending such a rule beyond the limits within which it appears to us to be confined to England. Had there been a reasonable doubt as to the true result of the more modern authorities on such a point, (which we do not think there is) our duty as an election committee would seem to be, to lean in favor rather of the rights of electors than of the privileges of those who fail to secure a majority of their votes.

On the whole, therefore, four members of the committee have come to the conclusion, that the petitioner has not shown enough upon the evidence to entitle him to the seat, and that all we can do is to declare the election void. Mr. Robitaille dissents from this decision.

As to costs, the petitioner has succeeded in unseating Mr. Rankin, but has failed, in our judgment, to establish a case entitling us to give the seat to the petitioner. He has thus succeeded in part and failed in part. In such a case we appear, under the statute and the decided cases, to be under the necessity of choosing between making one party pay the whole costs on both sides, or leaving each party to pay his own costs. We think the latter course, under the circumstances of the present case, to be more proper than the former, and we will therefore report that neither the petition nor the opposition to it, has been frivolous or vexatious.

GENERAL CORRESPONDENCE.

Eng. C.L.P.A.—U.C.C.L.P.A.—Schedule B.—Variance—Accidental

KINCARDINE, 31st July, 1863.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—In Harrison's C. L. P. Acts, page 547, it is stated in plea No. 33, "It would be objectionable to use 'did not warrant,' 'did not agree,' or any other appropriate denials." So likewise is it stated in Upper Canada Consolidated Statutes, cap. 22, schd. B, page 272; and in U. C. Statute, 19 Vic. cap. 43, schd. B, page 202. But it would seem that the word "objectionable" is "*un*objectionable" in the English Act from which this is taken. See Bullen & Leake's Prects. 2nd ed. page 587; and Stephen's on Pleading 145 (the only authorities at hand). Can you inform me if it is an intentional alteration, or merely an inadvertent omission or clerical error, and oblige,

Yours truly, W.

[The discrepancy between the words of the schedule of our C. L. P. A. and the schedule of the English C. L. P. A., of which it professes to be a copy, is very remarkable. We cannot think it was designed. We incline rather to the opinion that the variance is accidental. In fact the reading of the very words to which our correspondent adverts, to our mind, establishes the position that the variance was not intended. Thus, "It would be objectionable to use 'did not warrant,' 'did not agree,' or any other *appropriate* denial." If the denials instanced are appropriate, in what respect can it be said they are objectionable? The word "objectionable" should, we are convinced, be read "*un*objectionable," and so the language of our C. L. P. A. schedule be not only consistent with itself, but with the schedule of the English C. L. P. A., of which it is supposed and intended to be a copy. (See Eng. Stat. 15 & 16 Vic. cap. 76, sch. B, No. 37; Finl. C. L. P. A. 320).]—EDS. L. J.

New mode of suppressing tipplers and habitual drunkards.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I send, herewith, a copy of a notice served upon the Inspector of Taverns and Tavern Licenses of this village, which, in its way, is rather a curiosity—not so much on account of its difficult construction and grammar—as that it appears to outstrip the bounds of common sense in an unusual way—and I would ask you to give your opinion as to whether or not it is libellous.

According to this document the trangressors of the By-law are told that "they *will be fined*;" but it is, by no means, promised that they shall receive a trial, either by their peers or otherwise, or that there will be any notice given to them when the fine "*will be*" imposed. It would be a curiosity to see the By-law. If it contains a clause forbidding people to allow others "to be *treated*," does it mean well-treated or ill-treated? You know all the law in the land, and do tell us, Messrs. Editors, if you can explain this, the most extrordinary of all the By-laws, of the different municipal corporations in Upper Canada.

Yours,

Vienna, 1st August, 1863. A SUBSCIBER.

[COPY.]

Reeve's Office,
Vienna, 14th March, 1863.

Mr. George Chute, License Inspector for the village of Vienna:

SIR,—You are hereby authorized to notify the different tavern keepers in the village that if they furnish liquor to any of the parties named in this notice, that they will be fined according to that clause in the By-law forbidding the giving or furnishing, or allowing any other person to give or furnish; or to allow them to be treated by any person, liquor to tiplers or habitual drunkards.

(Here follow the names, in full, of nine residents of Vienna.)

Yours, &c.,

GEORGE SUFFEL, Reeve.

[The above notice has the merit of novelty. We do not remember ever before to have seen or heard of such a proceeding. We omit the names of the individuals whose welfare seems to be so much an object of concern to the Reeve of Vienna, because we think the notice, however well intended, is a libel. All writings which tend to render men ridiculous or contemptible in the relations of private life are libellous.. We should hope that more wisdom and learning have been displayed in the framing of the by-law than of the notice; for if not, it must be a sorry piece of municipal legislation.—EDS. L. J.

Law School—Rules—Information to Students.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I noticed in a late issue of the Journal a list of the books to be read for the *Law Scholarships*, and being anxious to compete for the honors, I beg leave to ask the following questions:

1st. Is it necessary for a student to attend the first year, in order to compete for the second, third or fourth years?

2nd. If he does not attend the first year, is he liable to be examined in the course for that year, in addition to those he presents for?

3rd. Where can I find the rules of the Law School?

By answering the above questions you will oblige a number of the law students in this vicinity, who are anxious to understand the working of the Law School, which, I am informed, is yet in its infancy.

Yours truly,

London, Aug. 12, 1863. LAW STUDENT.

[Having consulted two of the Benchers of the Law Society, we are enabled to answer our correspondent as follows:

1st. It is not necessary for a student to attend the first year in order to compete for the second, third and fourth years.

2nd. If he do not attend the first year, he is not liable to be examined in the course for that year, in addition to those for which he presents himself.

3rd. The rules of the Law School have never been published, and are known only to the Benchers.

Our correspondent will please notice that in the list of books published in the June number of the *Law Journal*, Williams on *Personal* Property, and not Williams on *Real* Property, is the work for students in the first year. The error was corrected in the July number of the Journal.]—EDS. L. J.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet Street, London.

The quarterly number of this able and welcome periodical for August is just received. We have examined it with much interest. It opens with an elaborate and well-written article on the Law of Libel as applied to Public Discussions. This article covers no less than 98 pages of the number. The writer ably reviews the leading cases bearing upon the momentous subject about which he writes, and argues that the ruling in the well-known case of *Campbell* v. *Spottiswoode*, to the effect that the motives of a public writer are not to be questioned, is alike opposed to the current of authority and to the spirit of the law. We look upon this article as a valuable repertory of the law on the vexed topic about which it treats. The second article is a continuation of former articles on the Rights, Disabilities, and Usages of the Ancient English Peasantry. The writer, in this number, treats of the Parliamentary regulation of labour in the fourteenth and fifteenth centuries. In the third article we have some opportune remarks about the proposed amendment of the law relating to the trial of issues involving the consideration of Scientific evidence and the evidence of Experts. The fourth is a learned paper written to show the legal right of any of the United States to secede from the Union, and we must say that several of the positions of the writer are worthy of serious consideration. We should like to see them assailed by some of our American cotemporaries whose interest it is to maintain the contrary and whose aim it is to enforce their views at the point of the bayonet. We cannot help thinking that the whole question is one of pure law and might have been determined without recourse to brute force. If the right to secede exists, there is no rebellion in the assertion of that right. The pity is, that it was deemed necessary to assert the right, supposing it to exist, by violence, and also deemed necessary to resist the assertion of the right in like manner. The solution of the question, whatever may be the result, it is certain will entail upon both parties a fearful bill of costs. The fifth article contains suggestions for the amendment of criminal procedure in several particulars. The writer advocates the appointment of public prosecutors, whose duty it will be not merely to see that the guilty are punished but that the innocent are protected. So far as his views are thus directed the writer has our hearty concurrence and earnest hope that his views ere long will be widely entertained and assume a practical form. In Upper Canada, owing to the appointment of county crown attorneys, we have taken the lead of the mother country in this as well as other measures of law reform. The sixth article is a review of the "Principles of Conveyancing explained and illustrated by concise precedents, by Herbert Lewis, B.A." The review is short, but favorable to the work reviewed. The author appears to be a strong advocate for brevity in legal forms, and we fancy he is not alone in his advocacy. The seventh and last article is the endless topic of Convict Discipline.

TWENTIETH ANNUAL REPORT OF THE SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW. London: McCorquodale & Co., 18 Cardington Street, London, 1863.

This Report shows real progress during the present year. Fourteen general meetings—eleven papers upon subjects of great importance, all of which have been printed and circulated—two reports carefully prepared by committees specially appointed, one of which after careful discussion was adopted by the Society—twenty-seven new members enrolled since the last annual meeting, &c. Lord Brougham is the President of the Society, and among the Vice-Presidents we find the names of the Lord Chancellor, the Lord Chief Justice, the Judge of the High Court of Admiralty, Vice-Chancellor Wood, Mr. Justice Keating, and others of distinction in the legal circles of the mother country. Why not have some such association in Upper Canada? Is it because our legal men are behind those of the mother country in all that pertains to the welfare of our country? We cannot think so. It is because there is not among us one man of sufficient standing disposed to take the lead in the work. Were any good man to lead there would be many followers. We purpose shortly to explain in detail the objects of the Society for promoting the amendment of the Law, and to publish its rules, in the hope that some legal man will be sufficiently alive to the interests of Upper Canada, and sufficiently courageous to take the initiative in forming a similar association among us.

APPOINTMENTS TO OFFICE, &c.

SHERIFFS.

JOSEPH MAUGHAN, Esquire, to be Sheriff of the County of Grey, in the room and stead of George Snider, Esquire, resigned. (Gazetted August 8, 1863.)

NOTARIES PUBLIC.

WILLIAM McPHERSON, of Moore, Esquire, to be a Notary Public in Upper Canada. (Gazetted August 1, 1863.)

JAMES ANDREWS MILLER, of St. Catharines, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 8, 1863.)

CORONERS.

JOSEPH M. TWEEDALE, Esquire, to be Associate Coroner for the County of Middlesex. (Gazetted August 1, 1863.)

NIVEN AGNEW, Esquire, M.D., to be Associate Coroner for the County of Ontario. (Gazetted August 8, 1863.)

TO CORRESPONDENTS.

W.—A SUBSCRIBER—LAW STUDENT.—Under head "General Correspondence."

CLERK 6th DIV. CT. CO. NORFOLK—PAUL DUNN.—Under head "Division Courts."

G. M.—Thanks. You see we have availed ourselves of your services.

DIARY FOR OCTOBER.

1. Thursday .... Clerk of Municipality to deliver Collection Rolls to Collector.
3. Saturday ..... Last day for notice of Trial for York and Peel.
4. SUNDAY ..... *18th Sunday after Trinity.*
5. Monday ...,... County Court and Surrogate Court Term begins.
10. Saturday..... County Court and Surrogate Court Term ends.
11. SUNDAY ..... *19th Sunday after Trinity.*
12. Monday ..... York and Peel Fall Assizes.
18. SUNDAY .... *20th Sunday after Trinity.*
25. SUNDAY .... *21st Sunday after Trinity.*
31. Saturday..... Articles, &c., to be left with Secretary of Law Society.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember the all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

OCTOBER, 1863.

THE UNITED CHURCH OF ENGLAND AND IRELAND IN CANADA.

A large proportion of the people of Canada are members of the Church of England. Other denominations assert that the Church of England possesses privileges in Canada not possessed by them; while there are not wanting members of the Church of England who as sincerely assert that their Church has not equal privileges with those of other denominations.

We purpose, for the benefit of all concerned, briefly to explain the system by which the Church of England is maintained, governed and upheld in this Province.

In England the Church of England is the State Church, of which the Queen is the recognized head, and which is in other respects closely connected with the Crown. In Canada, at one time, some such connection existed.

Canada, formerly, was a French colony. In 1760 it became a British colony, by conquest. On the 10th February, 1763, the definitive treaty of peace between the Kings of Great Britain and France was concluded at Paris. The colony thereupon became subject to the rule of the British Crown, and to the legislative power of the British Parliament. At the time of the conquest, the prevailing religion of the lower or eastern part of the Province was, and still is, the Roman Catholic religion. The upper or western part of the Province was then very thinly populated.

On the 7th October, 1763, George III. issued a proclamation, by which provision was made for the government of the Province, through a Governor-General and Council. Provision was made for the summoning of a General Assembly, so soon as the state and circumstances of the colony would admit thereof. By an ordinance of the Governor and Council, passed on the 17th September, 1776, courts of justice were constituted. But nothing had yet been done towards the summoning of a Parliament. The consequence was a very general agitation throughout the Province. This brought about the passing of the Imperial statute 14 Geo. III. cap. 83. It was passed for the purpose of making more effective provision for the government of the Province. It authorized the King, by warrant under his sign manual, with the advice of the Privy Council, to constitute a Council for the affairs of the Province, to consist of not more than twenty-three nor less than seventeen residents of the Province. To the Governor and Council was committed power to make ordinances for the peace, welfare and good government of the Province. No power to levy taxes, except for the purpose of making roads or erecting and repairing public buildings, was given. No ordinance touching religion was to have any force till approved of by the King. No provision was made for a system of representative government by the election of the people. Increased agitation was the consequence, and the result of this was the passing of the 31st Geo. III. cap. 31, commonly called the Constitutional Act.

By this act the Province, then called Quebec, was divided into two Provinces, called respectively Upper and Lower Canada. Provision was made for the constitution of a Legislative Council, appointed by the Crown, and a Legislative Assembly, elected by the people, in each of the Provinces. Power was given to the King, through the respective Governors of the Provinces, by and with the advice and consent of the Legislative Council and Legislative Assembly of the Provinces, to make laws for the peace, welfare and good government thereof. Whenever any bill, passed by the Legislative Council and Assembly in either Province, should be presented to the Governor-General for the King's assent, the Governor was authorized to declare, according to his discretion (but subject to the provisions of the act, and to such instructions as might from time to time be given in that behalf by the King), that he assented to the bill in His Majesty's name, or that he withheld assent, or that he reserved the bill for the signification of His Majesty's pleasure thereon. Provision was made for the transmission to England of all bills assented to by the Governor, and for the disallowance thereof within two years after the receipt thereof. Bills reserved for the King's pleasure were not to have any force till His Majesty's assent was communicated to the Legislative Council and Assembly.

Provision was made for the preservation of the Roman Catholic Church in all its integrity, with its rich endowments; but as since the conquest the Upper Province had become settled chiefly by Protestants, and as in Lower Canada also many Protestants were resident, provision was made for the support of "a Protestant clergy" in the Provinces. The King was authorized to empower the Governor-General to make out of the Crown lands situate within the Provinces such allotment of lands within the same, "for the support and maintenance of a Protestant clergy," as should bear a due proportion to the amount of such lands as were at any time granted by or under the authority of the Crown. It also enacted that whenever any grant of lands within either of the Provinces should thereafter be made, there should at the same time be made a proportionate allotment of lands "for the above mentioned purpose," and that no such grant should be valid unless the same should contain a specification of the land so allotted—the lands allotted for the support of a Protestant clergy to be, as nearly as the same could be estimated, of one-seventh the value of the land granted for other purposes. Lands thus allotted were called "Clergy Reserves." The King was by the same act empowered to authorize the Governor-General of each Province from time to time, with the advice of his Executive Council, to constitute and erect within every township and parish, parsonages and rectories, "according to the establishment of the Church of England;" and from time to time, by an instrument under the great seal of the Province, to endow every such parsonage or rectory with so much of the lands so allotted as the Governor and Council should deem expedient. The King was also empowered to authorize the Governor-General to present to every parsonage or rectory an incumbent or minister of the Church of England, who should be duly ordained according to the rites of that Church, and from time to time to supply such vacancies as might happen therein. And it was declared that every person so presented to any such parsonage or rectory, should hold and enjoy the same, and all rights, profits and emoluments thereunto belonging or granted, as fully and amply, and in the same manner, and on the same terms and conditions, and liable to the performance of the same duties, as the incumbent of a parsonage or rectory in England.

Lands were afterwards set apart, both in Upper and Lower Canada, for the support of a Protestant clergy. So rectories were established and endowed. In process of time it was discovered that a large proportion of the land so set apart, without a power of sale, would be of little benefit to those for whose benefit it was intended. Power to sell, therefore, was invoked, and that power was given by Imperial statute 7 & 8 Geo. IV. cap. 62. The Governor-General of each Province was authorized to alienate and convey in fee simple, or for any less estate or interest, a part of the Clergy Reserves not exceeding one-fourth of the Reserves within the Provinces. The quantity to be sold in one year in either Province was not to exceed in the whole 100,000 acres; the moneys to accrue therefrom to be paid over to such officer within the Provinces as the King should appoint, and by that officer to be invested in the public funds of Great Britain and Ireland, as the King should from time to time be pleased to direct; the dividends and interest accruing from the funds to be appropriated, applied and disposed of for the improvement of the remaining part of the Clergy Reserves, or otherwise, for the purposes for which the lands were reserved, and for no other purpose.

Under this act, large quantities of the clergy lands were from time to time sold, but still leaving a greater portion unsold and unproductive. The proceeds of the lands sold became a source of dispute between different religious denominations. The lands unsold were found to be stumbling-blocks in the way of improvement of the several townships in which situate. The result was a two-fold agitation—religious denominations contending for a division of the proceeds, and the people contending for the sale of the entire clergy lands. The religious denominations argued that the expression "Protestant clergy" was not by any means restricted to Church of England clergy. The people contended that whether so restricted or not was to them, in a temporal point of view, a matter of indifference, so long as the lands were sold and passed into the hands of men who would by industry improve them, and thus improve the localities in which situate. Both agitations to some extent prevailed. The Provinces of Upper and Lower Canada having been, by the Imperial act 3 & 4 Vic. cap. 35, reunited, the Imperial Legislature, during the same session, passed the 3 & 4 Vic. cap. 78, which authorised the Governor of Canada to alienate and convey all or any of the Clergy Reserves. The same act made provision for the distribution of a large portion of the proceeds, in certain proportions, among the Churches of England and Scotland, and the remainder for purposes of public worship and religious instruction in the Province.

The whole of the lands (excepting those set apart for glebes) were, under the operation of this act, rapidly brought into the market. The proceeds were considerable, and a feeling arose among the people that some portion of the money should be devoted to local improvements and other secular purposes. This feeling grew with such intensity that the Imperial Legislature passed the 16 & 17 Vic. cap. 21, authorizing the Legislature of Canada, from time to time, by any act or acts to be passed for that pur-

pose, subject to certain conditions, to vary or repeal all or any of the provisions of the 3 & 4 Vic. cap. 78, for or concerning the sale, alienation and disposal of the Clergy Reserves, and for or concerning the investment of the proceeds of all sales then made or thereafter to be made, and to make such other provisions for or concerning the sale, alienation or disposal of the Clergy Reserves and investment, as to the Legislature of Canada might seem meet; but that it should not be lawful for the Canadian Legislature to annul, suspend or reduce any of the annual stipends or allowances assigned and given to the clergy of the Churches of England and Scotland, or to any other religious bodies or denominations of Christians in the Province, during the natural lives or incumbencies of the parties then receiving the same, or to appropriate or apply to any other purposes such part of the proceeds as might be requisite for the payment of such stipends and allowances; impliedly authorising the Canadian Legislature to deal with the overplus in such manner as they should deem best.

When it became generally known that the Canadian Legislature was possessed of full authority to deal with the Reserves, the agitation for what was called "the secularization of the Clergy Reserves" became so general and so fierce, that the Canadian Legislature was forced to pass a statute on the subject (18 Vic. cap. 2). The proceeds, under the operation of this statute, were divided into two funds—the one called the Upper Canada Municipalities Fund, and the other the Lower Canada Municipalities Fund. The fund in each section of the Province is made to consist of all moneys arising from the sale of Clergy Reserves in that section of the Province, after deducting therefrom the actual and necessary expenses of sales and management. The annual stipends or allowances preserved by the Imperial act 16 Vic. cap. 21, are made a first charge on the fund. The amount of the fund, in either section of the Province, remaining unexpended on the 31st December in each year, was by that act required to be apportioned equally among the several county and city municipalities in the same section of the Province, in proportion to the population of such municipalities respectively, and to form a part of the general funds of each such municipality. By a subsequent act, so far as the amount of the Upper Canada Municipalities Fund is concerned, after paying off the charges already mentioned, it is required to be yearly divided among the several city, town, incorporated village and township municipalities in Upper Canada, in proportion to the number of rate-payers appearing on the assessment roll of the municipality for the year next before the apportionment (19 & 20 Vic. cap. 16).

One provision of the statute 18 Vic. cap. 2, deserves particular attention. We mean the 3rd section. It recited that it was desirable to remove all semblance of connection between church and state, and to effect an entire and final distribution of all matters, claims and interests arising out of the Clergy Reserves, by as speedy a distribution of their proceeds as might be. It therefore empowered the Governor-General, whenever he might deem it expedient, with the consent of the parties and bodies severally interested, to commute with such parties the annual stipend or allowance already mentioned for the value thereof, to be calculated at the rate of six per cent. per annum upon the probable life of each individual; and in the case of the bodies particularly mentioned, at the actual value of the allowance at the time of the commutation, to be calculated at the same rate. It was also expressly provided, that in case of commutation with either of the said bodies or denominations, it should not be lawful for them to invest the moneys paid for commutation, or any part thereof, in real property of any kind whatsoever, under penalty of forfeiting the same to Her Majesty; and that the said bodies and denominations should lay before the Legislature, whenever called on to do so, a statement of the manner in which the money shall have been invested or appropriated. Commutation shortly afterwards was effected with the parties and bodies interested, including the clergy of the Church of England, in the manner and upon the terms prescribed and directed by this enactment.

Thus it will be seen that the Church of England, like other religious denominations of the Province, is at length thrown upon the exertions of its members for its support. It is true that as yet the glebe lands have been spared to the Church. These, however, are of little support to the general body of the clergy.

We shall now proceed to show in what manner these temporalities of the Church are, under existing law, managed.

The soil and freehold of each church, and of the churchyards and burying grounds attached or belonging thereto, respectively, is vested in the parson or other incumbent thereof for the time being. All pew-holders of a church, whether holding the same by purchase or lease, and all persons holding sittings therein by the same being let to them, and holding a certificate of such sittings, form a vestry. An annual meeting is held, on Monday in Easter week, for the purpose of appointing churchwardens for the ensuing year. No persons are eligible to the office of church warden, except members of the Church, of the full age of twenty-one years, and members of the vestry. The church wardens, during their term of office, are as a corporation to represent the interest of the church, and of the members thereof. It is their duty to sell, lease and rent pews and sittings, upon such terms as may be settled and

appointed at vestry meetings to be held for that purpose. (Stat. U. C. 3 Vic. cap. 74.)

Both in Upper and Lower Canada, associations at an early period were formed for the following among other objects: the encouragement and support of missionaries and clergymen of the United Church of England and Ireland within the dioceses of Quebec and Toronto; for creating a fund towards the augmentation of the stipends of poor clergymen, towards making a provision for those who may be incapacitated by age and infirmity, and for the widows and orphans of the clergy of the Church; for the encouragement of education, and the support of day and Sunday schools in conformity with the principles of the Church; for granting assistance, where it may be necessary, to those who may be preparing for the ministry of the gospel in the Church; for circulating the Holy Scriptures, the Book of Common Prayer, and other good books and tracts; for obtaining and granting aid towards the erection, endowment and maintenance of churches according to the establishment of the said Church in the said respective dioceses; the creation and maintenance of parsonage houses and rectories, and the management of all matters relating to such endowments.

These associations were, by statute 7 Vic. cap. 68, passed by the Legislature on the 9th December, 1843, and assented to by Her Majesty on the 23rd May, 1844, incorporated. The one was styled "The Church Society of the Diocese of Quebec," and the other "The Church Society of the Diocese of Toronto." The respective corporations are authorized from time to time to hold assemblies and meetings, to be called together in such manner and at such times and places as may be directed by the by-laws, rules, and regulations of the same. No constitution, by-law, rule or regulation of either of the Church Societies, nor any abrogation, repeal, change or alteration of the same, is to have any force or effect until sanctioned and confirmed by the Bishop of the diocese for the time being, under his hand.

The Church Societies in each diocese afterwards became patrons to the rectories. This was effected by the Provincial Statute 14 & 15 Vic. cap. 175, which repealed so much of the Imperial Statute 31 Geo. III. cap. 31, as authorized the Governor-General to exercise the right of presentation to rectories, and vested that right in the Church Society of the diocese within which the rectory is situate, or in such other person or persons, bodies politic or corporate, as the Church Society, by any by-law or by-laws to be by them from time to time passed for that purpose, should or might think fit to direct or appoint in that behalf.

The Church Society Act was the first step taken by our Legislature towards having assemblies of Churchmen for the purpose of deliberating on matters appertaining to the welfare of the Church. When all connection between church and state was removed by express declaration of the Legislature, and the success of the Church made to depend in a great measure on the support of its members, it became necessary to affirm the principle of laymen being consulted in matters relating to the Church, and to extend the operation of that principle. Accordingly the Provincial Legislature passed the statute 19 & 20 Vic. cap. 121. It recites that at the time of the passing of the act, doubts existed whether the members of the United Church of England and Ireland in Canada had the power of regulating the affairs of their Church in matters relating to discipline, and necessary to order and good government, and that it was only just such doubts should be removed, in order that members of that Church might be permitted to exercise the same rights of self-government that are enjoyed by other religious communities; and enacts that the Bishops, clergy *and laity* (see 22 Vic. cap. 139, as to mode of election), members of the United Church of England and Ireland in the Province, may meet in their several dioceses, which *are now or may hereafter* be constituted in this Province, and, in such manner and by such proceedings as they shall adopt, frame constitutions and make regulations for enforcing discipline in the Church; for the appointment, deposition, deprivation or removal of any person bearing office therein, of whatever order or degree, any rights of the Crown to the contrary notwithstanding; and for the convenient and orderly management of the property, affairs and interests of the Church in matters relating to and affecting only the said Church and the officers and members thereof, and not in any manner interfering with the rights, privileges or interests of other religious communities, or of any person or persons not being a member or members of the said United Church of England and Ireland; provided that such constitutions and regulations shall apply only to the diocese or dioceses adopting the same. So far, it will be seen, provision is made only for meetings in *the several dioceses*. But the act in the next section proceeds much farther, and enacts that the Bishops, clergy and laity of the United Church of England and Ireland in this Province may meet in general assembly, by such representatives as shall be determined and declared by them in their several dioceses, and in such general assembly frame a constitution and regulations for the general management and good government of the said Church in this Province; provided that nothing in the act contained shall authorize the imposition of any rate or tax upon any person or persons whomsoever, whether belonging to the said Church or not, or the infliction of any punishment, fine or penalty upon any person, other than his suspension or removal from any office in the said Church, or exclusion from the meet-

ings or proceedings of the diocesan or general synods; and provided that nothing in the constitutions or regulations, or any of them, shall be contrary to any law or statute now or hereafter to be in force in this Province.

This act, it will be observed, is of a most sweeping character. The assemblies authorized, so far as members of the United Church of England and Ireland are concerned, are second only to the Legislature. In each diocese an assembly is authorized, having power, among other things, to make regulations for the appointment, deposition, deprivation or removal of *any* person bearing office in the Church, of *whatever order or degree*. This apparently includes not only inferior clergy, but Bishops and all others holding office in the several dioceses of the Church. The right of the Crown to appoint to such offices would thus appear to be transferred to the Synods in the several dioceses. It is worthy of remark that no provision is made for the appointment of persons to office in the Church by the General or Provincial Synod, though the power of removal is in express terms mentioned.

The existence of Church Societies, independent of the Synods, appears to be superfluous. The lesser ought surely to be included in the greater; and the sooner the Church Societies are merged in the Synods, the better for the simple and efficient government of the Church. Too much machinery is sometimes worse than none at all; and under any circumstances, the more simple the machinery, the more likely it is economically to accomplish the object of its creation.

The assemblies authorized in the several dioceses of Canada met and framed constitutions and regulations, in pursuance of the act. As we have neither the inclination nor the space at present to write a treatise on Church government, we cannot give even the substance of these constitutions or regulations. A General or Provincial Synod has also been organized. We must in like manner dismiss its constitution and regulations. It is, however, sincerely to be hoped that members of these Synods, who have the power to alter their constitutions and regulations, will cautiously exercise a power which is antagonistic to anything like permanency. In most deliberative assemblies, there are men who have a passion for law-making and constitution-tinkering. This passion, if not kept under control, is more likely to be mischievous than good. Change, for the mere sake of change, is often disastrous. It would be well to allow the constitutions and regulations of the Synods to simmer down to something like consistency, before suffering them to be hacked and chopped by amateur legislators.

We understand that, notwithstanding the acts to which we have referred, the Crown, on the 9th June, 1860, by letters patent under the seal of Great Britain, appointed the Bishop of Montreal to be Metropolitan of Canada; which patent was afterwards cancelled, and a new patent, dated 12th February, 1862, issued, appointing the same Bishop Metropolitan of Canada, "subject to the rules, regulations and canons that the Provincial Synod may from time to time make in respect thereof." We must say we do not understand on what principle the Crown now issues letters patent either for the appointment of a Metropolitan or of Diocesan Bishops. The appointment of Diocesan Bishops clearly rests, since the 19 & 20 Victoria, chapter 121, with the several Synods. The appointment of a Metropolitan does not seem to be contemplated in any of the acts to which we have referred; and now that all connection between church and state is by declaration of the Legislature removed, the exercise of the power, even if existing in the Imperial Crown, is, to say the least of it, impolitic. The patent, according to the decision of *Long and the Bishop of Capetown*, reported in other columns, must be ineffectual to create any jurisdiction, ecclesiastical or civil, in this colony. We cannot see that the Metropolitan is anything more than President of the Provincial Assembly, and we presume that the appointment of such an officer ought properly to be made from time to time by that Assembly. We imagine that the Imperial authorities, since the decision of *Long and The Bishop of Capetown*, will not repeat the absurdity of sending out to this colony pieces of parchment, having the great seal upon them, which, when here, are, to say the least of them, of questionable validity. Even if such patents be valid for any purpose, we apprehend they may at any time be revoked by the Synods concerned. The power of appointment and the power of revocation should, as a general rule, be vested in the same authority. It is not seemly for the Crown to issue commissions under the great seal, which may at any time, without reference to the Crown, be revoked by an assembly of the Queen's subjects.

It only remains for us to add that the Queen, by proclamation, dated 2nd October, 1857, divided the diocese of Toronto into two dioceses, the westerly one called Huron, and the easterly, Toronto; that the Legislature, in 1858, adopted the division, and incorporated a Church Society in and for the diocese of Huron (22 Vic., cap. 55); that afterwards the Queen, by a like proclamation, dated 28th February, 1862, further divided the diocese of Toronto, or eastern portion of Upper Canada, into two dioceses, the one called Toronto, and the other Ontario; and that the Legislature adopted the division, and incorporated the Synod in and for the diocese of Ontario (25 Vic. cap. 28). The right of presentation to rectories within the latter diocese is, by action of the Synod, vested

in the Bishop for the time being, during his incumbency of office (*Attorney-General* v. *Lauder*, p. 291 of this journal).

We have our doubts as to the validity of Royal proclamations, dividing or subdividing dioceses in this colony. Though loyal to the mother country in all that the Crown has a right to expect from us, we must not forget that we have a constitution of our own, and are so far independent as to be enabled to make our own laws in our own way. The day is gone by for legislation of any kind in Canada through the medium of Royal proclamations issued in Great Britain. We have our own Legislature, and when legislation of that kind is needed, our Legislature should be consulted. Supposing the Imperial Parliament to have the power, it is very clear that the Queen *alone* has not the power. In this colony, so long as the persons interested acquiesce, there can perhaps be no valid objection; but we think that as the Crown appears to have withdrawn from all connection with the Church of England in this colony, the power to divide and subdivide dioceses, if not a legislative one, ought to rest with the Provincial Synod.

IMPORTANT TO MAGISTRATES.

The attention of magistrates is directed to the case of *Switzer* and *McKee*, reported in other columns. The law, as there laid down, is not generally known, and even where known, too much neglected.

JUDGMENTS.

QUEEN'S BENCH.

September 21, 1863.

Present: Draper, C. J.; Morrison, J.

Montgomery v. *Spence*.—Action on covenants contained in a lease. Plea, assignment by defendant, with assent of plaintiff. Demurrer. Judgment for plaintiff on demurrer.

Montgomery v. *Spence*.—Rule *nisi* to enter verdict for defendant or for new trial discharged.

Niagara Falls Bridge Company v. *The Great Western Railway Company*.—Action of covenant for rent; *rei sitæ* half in Canada and half in the United States. Plea, tender of United States "green-backs." Demurrer. *Lex loci contractus* held to govern, and judgment for defendant on demurrer.

Burn v. *Bletcher*.—Replevin for a vessel. Judgment for plaintiff on demurrer to plea to avowry, and defendant entitled to judgment on demurrer to replication.

Hall v. *Duncan*.—Action on a shipping contract. The question was, whether plaintiff had performed his contract. Rule absolute for new trial. Costs to abide the event.

Kennedy v. *Patterson et al.*—Trespass. Rule absolute for new trial.

Gore Bank v. *Cook*.—Rules obtained by judgment creditors discharged with costs, the parties not having availed themselves of leave given by the court to amend in order to bring the proper parties before the court.

Robinson v. *Ellsworth*.—Rule *nisi* for new trial on affidavits discharged with costs.

Torrance v. *Calvin*.—Rule absolute for new trial, costs to be paid in three weeks; otherwise rule discharged.

Grieve v. *Smith*.—Postea to plaintiff for the recovery of $30.

McMurray v. *Ryan*.—Appeal allowed. Rule absolute for new trial in court below.

Hughes v. *Snure*.—Action against the maker and endorsers of a promissory note. Plea of set-off not connected with the note sued on. Judgment for plaintiff on demurrer.

Small v. *Eccles*.—Rule calling on defendant to show cause why he should not on affidavit answer as to such books and documents as may be in his possession relating to the matters in dispute in the cause, discharged with costs, on the ground that it was moved on an affidavit used in Chambers, without it being shown that leave was given to use the affidavit, and it being shown that a summons obtained on that affidavit had been discharged.

Hunter v. *Baptiste*.—Ejectment. Rule absolute for new trial without costs.

Whitney v. *The Northern Railway Company*.—Rule absolute for new trial. Costs to abide the event.

Hall v. *Hill*.—Ejectment for land sold for arrears of taxes. *Held*, that the directions of sec. 125 of Con. Stat. U. C. cap. 55, as to the contents of the treasurer's warrant are *imperative*; and the warrant in this case not being shown to comply with the statute, sale held invalid, and new trial granted, costs to abide the event.

Walker v. *Douglass*.—Action on a promissory note. Rule discharged.

Keenahan v. *Eagleson*.—Action against defendant, an alderman of the city of Ottawa, for not making return of a conviction to next general county sessions for the county of Carleton. *Held*, action maintainable, and rule discharged.

Tate and The City of Toronto.—Priority of attaching creditors declared, and order accordingly.

Perrie v. *Tannahill*. — Amendment of plaintiff's declaration allowed, and rule for new trial discharged.

Marsden v. *Henderson*.—Action for libel and slander. *Held*, that slander of a class such as "wheat buyers," may by evidence be shown to have relation to a particular individual of the class viz: the plaintiff. Rule *nisi* to enter nonsuit or for a new trial discharged.

Holmes v. *McKechin*.—A case of disputed boundary. Rule absolute for new trial. Costs to abide the event.

Crabtree v. *Griffith*.—Action for trespass. Question of lien. Rule absolute for new trial, without costs.

Ward v. *Vance—Thompson, garnishee*.—Issue directed.

Stoke v. *Jones*.—Rule absolute for new trial, without costs.

Kelly v. *Henderson*.—*Held*, that plaintiff having obtained a verdict subject to a reference, which fell through, was irregular in again entering his record for trial without first setting aside the former verdict, and so rule absolute to set aside his proceedings with costs.

Venator v. *Scott*.—Rule absolute for revision of costs by Master.

Ritchey v. *The Toronto Roads*.—Rule *nisi* discharged with costs.

Ramsay v. *Carruthers*.—Rule discharged.

Kelly v. *Molds*.—Rule discharged.

September 26, 1863.

Present: Draper, C. J.; Morrison, J.

Stephens v. *Boolton*.—Rule absolute to increase verdict to £58 18s. Defendants rule discharged.

Buffalo and Lake Huron Railway Co. v. *Hemmingway*.—*Held*, that a judge under the interpleader act has authority to protect an execution creditor, as well as the sheriff as against the execution debtor. Rule discharged.

Knowles et al. v. *Post et al*.—Rule to stand till next term, in order to enable the party who moved it to support it.

Sheldon v. *Sheldon*.—Rule absolute to refer this cause to the referee named in the rule.

Cornwall v. *Gault*.—Postea to defendant.

The Queen v. *McQuerrie*.—Two indictments. Judgment arrested.

Gray v. *Carty*—Rule discharged.

In the matter of McCutchon and the Corporation of the City of Toronto.—Rule absolute to quash sections 5, 6, 7 and 8 of No. 295, Sewerage By-Law of the City of Toronto, and s. 2 of Sewerage By-law No 304, with costs.

Guy v. *Lyon.*—Rule discharged.

Patton v. *Evans.*—Rule discharged.

Grace v. *Walsh.*—Rule for prohibition to go.

Edgar v. *The Canada Oil Company*—Rule for a new trial, the Court declining to accept the burthen of decided difficult questions of fact.

COMMON PLEAS.

September 21, 1863.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON, J.

McCullough v. *McIntee.*—Rule discharged.

Smith v. *Roblin.*—Rule discharged.

Cross v. *Richardson.*—Rule to enter nonsuit made absolute.

The Queen v. *Brown & Street.*—Rule for mandamus discharged without costs.

Chapman v. *Boultbee.*—Rule absolute to enter nonsuit.

Salter v. *McLeod.*—Rule absolute for new trial. Costs to abide the event.

Stoker v. *The Welland Railway Company.*—*Held*, that if a judge at Nisi Prius tells a plaintiff he will nonsuit him on a point of law, plaintiff is not deprived of the right to move against the nonsuit, by the acquiescence of his counsel; but the rule is different where the judge directs a nonsuit for want of evidence. Rule discharged.

Moore v. *Andrews.*—Appeal allowed, and judgment of court below reversed, with leave to plaintiff to move to amend in the court below within two weeks.

Foreman v. *Johnston.*—Rule discharged.

Turner v. *Patterson.*—Rule discharged.

Reynolds v. *Metcalfe.*—Rule discharged.

Young et al v. *Moderwall.*—Judgment for plaintiffs on demurrer, with leave to defendant to amend on payment of costs.

The Queen v. *Huston et al.*—Judgment for plaintiff on demurrer and postea to plaintiff.

McNaught v. *Turnbull.*—Plaintiff entitled to the postea.

Hooker v. *Gamble.*—Rule discharged.

Doran v. *Read.*—Rule discharged. *Quære*, whether, under the operation of the Consolidated Statutes of Upper Canada, a deed executed by husband and wife, the wife being a minor, and therefore unable to consent, is valid to pass the estate and interest of the husband?

Taylor v. *McPherson.*—Rule absolute for new trial, on payment of costs.

In re Walton and the Corporation of Monaghan.—Rule discharged with costs, because application too late.

In re Trustees of the Grammar School of the United Counties of York and Peel.—*Held*, that no obligation rests on County Councils to raise money for grammar school purposes, and therefore rule for mandamus refused.

Brown v. *Riddell.*—Rule absolute for discharge of defendant from custody. Costs to be costs in the cause.

Jacob v. *Henry.*—Rule absolute to enter nonsuit.

September 26, 1863.

Present: RICHARDS, C. J.; ADAM WILSON, J.; JOHN WILSON. J.

Maynard v. *Gamble et al.*—Action against defendants as church wardens of Christ Church, Woodbridge, for the occupation by the clergyman, with their sanction, of a dwelling house at Woodbridge. Plea, never indebted. Verdict for plaintiff. Rule *nisi* to enter nonsuit for a new trial discharged. Adam Wilson, J., dissentiente.

Mein et al v. *Hall.*—Appeal from County Court of County of Peterboro'. No judgment on case as stated. Sent back to County Court.

Gardiner v. *Ford et al.*—Judgment for defendants on demurrer.

Moran v. *Palmer.*—Rule discharged without costs.

Harry v. *Anderson.*—Judgment for defendant on demurrer to the declaration. Leave to apply to amend in two weeks.

In re Springer and Macdonald, one, &c.—Rule discharged with costs.

In re Glass and Macdonald, one, &c.—Rule discharged with costs.

McNab v. *Howland et al.*—Rule absolute for new trial as to both defendants on payment of costs by defendant Fitch.

The Queen v. *The Northern Railway Company.*—Judgment for levy of fine.

The judical Committee of the Privy Council is a tribunal of which so little is commonly known, that a summary of last year's work will be acceptable. The largest part of the business comes from India and the colonies. There were 51 appeals entered in the course of the year—21 of them from India, 13 from the colonies, 2 from the Channel Islands, 13 from the Admiralty Courts, and two from the Ecclesiastical Courts. 48 were heard and determined; and the judgment appealed from was affirmed in 23 instances, reversed in 21, varied in 4. Out of the 19 cases from the colonies determined in the year, the judgment was affirmed in only 5 instances. Costs were given in 38 of the appeals; the taxed costs on one side only are stated to have averaged £267, but the tabular return indicates £336. The year closed with 94 appeals remaining for hearing, 48 of them from India. In the same year 11 applications were lodged for the extention or confirmation of letters patent; one was withdrawn three were dismissed, one was granted.—*Solicitor's Journal.*

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27 VIC., CAP. LXXVI.

An Act to determine the Time at which Letters Patent shall take effect in the Colonies. [28th July, 1863.

Whereas, her Majesty hath, from time to time, caused to be made under the Great Seal of the United Kingdom of Great Britain and Ireland divers letters patent intended to take effect within her Majesty's colonies and possessions beyond the seas: and whereas, doubts are entertained respecting the period at which such letters patent have been taken or may hereafter be taken within such colonies and possessions, and it is expedient that such doubts should be removed: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. *Existing letters patent not to take effect in colonies till published or acted on. Acts done under such letters patent valid.*] No such letters patent heretofore made shall (unless otherwise provided therein or by other lawful authority) be deemed to have taken or shall take effect in any such colony or possession as aforesaid until the same were or shall be publicly made known or acted upon therein: provided that any act or thing heretofore done or purporting to have been done in pursuance or under authority of such letters patent shall be as valid and effectual as if the same letters patent had taken effect at the date of the making thereof.

2. *Future letters patent not to take effect in colony till publication.* No such letters patent hereafter to be made shall

(unless otherwise provided therein or by other lawful authority) take effect in any such colony or possession until the making of the same shall have been signified therein by proclamation or other public notice.

3. *Appointments by letters patent to be void unless published within six or nine months.* Any such letters patent by which any person may be hereafter appointed to any office or employment within any of such colonies or possessions shall (unless otherwise provided therein or by other lawful authority) become null and void in respect of such colony unless the same shall be so signified as aforesaid within the following period: that is to say, within nine calendar months, in case such colony or possession shall be to the eastward of Bengal, in the East Indies, or to the west of Cape Horn, in South America, or in any other case within six months after the making thereof.

4. 9 & 10 *Vict. c.* 91, *repealed.*] The Act, chapter ninety-one of the ninth and tenth years of her Majesty, intituled "An Act to continue certain Patent Commissions until the exhibition of the Commissions revoking them," is hereby repealed.

3. *Period of Act coming into operation.*] This Act shall take effect in each of her Majesty's colonies and possessions so soon as the same shall be proclaimed therein by the officer administering the government thereof.

A DESERTED PARISH.

At the Judges' Chambers on Wednesday, before Mr. Justice Byles, an application was made by Mr. Hardinge Giffard, as counsel for a Mr. Cousin, to remove an order of justices appointing him overseer of a parish, into the Court of Queen's Bench, by writ of *certiorari*, in order that the same might be quashed. There was only one house in the parish, and as there must be two overseers, the order was informal. His Lordship asked, where the parish could be situate? Mr. Giffard said at Upper Eldon. It seemed that there was only one house in the parish, which was near Southampton, and only one inhabitant. The learned counsel said the object was no doubt to form it into a union, but the householder objected. It was just 100 years since a similar attempt had been made, and the parish had not increased. His Lordship granted the writ as prayed to remove the proceedings.—*Law Times, August* 29, 1863.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., *Barrister-at-Law, Reporter to the Court.*)

Donaldson et al., (Defendants,) Appellants, v. Haley, (Plaintiff,) Respondent.

County court—Recording of verdict—Dissent of juryman—Mistrial—Notice of action—Waiver of defects.

On the trial of a cause in the county court it was agreed that a sealed verdict should be handed by the jury to the constable in charge of them, and that they should disperse to meet at the opening of the court on the following morning. When the court opened all the jury answered to their names, the sealed verdict was then opened and read to them, "verdict for the plaintiff $120," and being asked if they confirmed it, said they did so, one answering. The verdict was then recorded, and upon reading it as recorded, one juror said he had only agreed to $100. The judge insisted upon the verdict remaining as recorded, which decision he afterwards upheld in term. Upon appeal to this court, *held*, that as the verdict must be unanimously delivered and recorded in open court, a juror dissenting before such recording rendered the verdict informal.

A defendant after accepting service of an informal notice of action adds the following words, "and agree to accept the same as a sufficient notice of action to me under the statute."

Held, that he could not afterwards rely on a defect therein as a defence to the action.

Appeal from the county court of the county of Wellington.

Pleas by both defendants, not guilty and not possessed.

On the trial in the court below it was agreed that a sealed verdict should be handed by the jury to the constable left in charge of the jury, and that the jury might then disperse to meet at the opening of the court on the following morning. At the opening of the court the jury being called all answered their names in the usual way, the sealed verdict being handed in was opened and read to the jury, and on being asked if that was their verdict, "verdict for plaintiff $120," it was confirmed by them, some one of them answering, the writing was signed by one of them as their foreman, the verdict was then recorded. On the verdict being read as recorded, one of the jurors said he had agreed to $100 only. The other jurors insisted that he had agreed to $120, and concurred in the verdict. The judge directed the verdict to remain as recorded, the verdict being in fact so recorded by the jury, through their foreman, in writing, and confirmed by them.

A rule *nisi* was subsequently obtained for a new trial, which, after argument, was discharged in the court below as against Grindly, and a nonsuit entered as to Donaldson, from which decision the defendants have appealed upon the following grounds:

1.—That the rule for a nonsuit, as to the defendant Grindley, should have been made absolute, as there was no evidence of any interference on his part with the property of the plaintiff, or

2.—That a new trial, or trial *de novo*, should have been granted, the finding endorsed on the record not having been, under the circumstances, a valid verdict.

Anderson, for the appellant, cited *The Queen* v. *Vodden*, 23 L. J. Magistrates' cases, P. 7; *Blenkiron* v. *The Great Central Consumers Company*, 2 F. & F. 437.

Adam Crooks, contra, referred to *Wilson* v. *Leonard*, 3 Beav. 377; Broom's Actions at Law, 226; *Outhwaite* v. *Hudson*, 7 Ex. 380.

Draper, C. J.—It seems by the statement of appeal that both defendants join in it, though a nonsuit has been ordered as to Donaldson, against which the plaintiff does not appeal, and though the reasons of appeal may be considered as applicable only to the case of Grindley.

Assuming the appeal to be on the part of Grindley alone, I think there is no weight in the first reason of appeal, for I agree with the learned judge of the county court that there was ample evidence to go to the jury to sustain the plaintiff's case against him.

There remains only the question of the verdict. The facts are set out in the report of the learned judge of what took place at the trial, and also in his judgment on the rule *nisi*. It was agreed between the parties that the jury should give a sealed verdict. A verdict was delivered sealed to the constable in charge, and the jury dispersed. They all appeared at the opening of the court on the following morning, and were called. "The sealed verdict being handed in was opened and read to the jury, and on being asked if that was their verdict, "verdict for plaintiff $120," it was confirmed by them, some one of them answering. The writing was signed by one of them as their foreman. The verdict was then recorded. On the verdict being read as recorded, one of the jurors said he had agreed to $100 only. The other jurors insisted that he had agreed to $120, and concurred in writing on the verdict. I directed the verdict to remain as recorded, the verdict being in fact so recorded by the jury through their foreman, in writing, and confirmed by them."

In *Regina* v. *Vodden*, 23 L. J., M. C. 7, one of the jury delivered a verdict of not guilty, which was entered by the clerk of the peace on his minutes, and also by the chairman of the quarter sessions on his note book. The prisoner who was indicted for felony was then discharged out of the dock, but others of the jury interfered and said the verdict was guilty. The prisoner was immediately brought back and the jury was again asked and said "guilty," and sentence was thereupon passed. The judges, on a case reserved, held that the original mistake was corrected within a reasonable time. *Pollock*, C. B., said, "I remember the clerk used to say, "gentlemen of the jury hearken to your verdict while" (as?) "the court records it, you say the prisoner is not guilty and that is the verdict of you all." Had this form been adopted it would no doubt have been competent to the jury when so called upon to have corrected the mistake." *Parke, B.*, also observed, "I infer from the case that the ancient form of calling on the jury to hearken to the verdict was abandoned, which is a great error."

In this case there was a sealed verdict, and the jury had separated upon the understanding that they had agreed, because without such understanding they were not at liberty to separate. If all,

instead of one, had signed the verdict, it would have prevented question as to the reality of an agreement in what was written, but even then, when they came into court next morning, they were not absolutely bound by the sealed verdict, which was not, in law, the verdict until confirmed in open court, and might consequently be changed by their unanimously giving some other verdict. Circumstances might arise, which would shew that a juror who consented to a sealed verdict, thereby enabling the jury to separate, and on coming the next day into court retracted his consent, was guilty of a gross contempt and might be treated accordingly, but that cannot alter the established rule that the sealed verdict must be confirmed in open court, as every public verdict must be delivered by the unanimous voice of the jury. I think therefore there has been a miscarriage in recording as the verdict of the jury the verdict of only eleven out of twelve. The noting of the verdict on the back of the record, is not, strictly speaking, the entering the verdict of record, though it is commonly so expressed. Such noting is merely a minute from which the *postea* is made up. The *postea*, added to the preceding entries on the *nisi prius* record, is the proper record of the court of *nisi prius* of the verdict, and is returned to the proper court to be duly entered on its rolls.

Probably the plaintiff will consent to waive the $20 in dispute and may be permitted to take judgment against Grindley for the residue, for I agree in the learned judge's view of the plaintiff's right to recover against him. If this is not done the appeal must be allowed, and the case go down to a second trial against both defendants, and this contingency renders it necessary to express our opinion as to the nonsuit granted to Donaldson, who has joined in the appeal.

The learned judge it appears acted upon the case of *Martins* v. *Upcher*, 6 Jur. 582, in which a notice of action was given to a justice of the peace for an act by him done in the execution of his office, but the place where the act was done was not stated. The court held that the notice was insufficient, and that the defect was not cured by a tender of amends. I can readily understand that, in doubt as to what the decision of the court might be on the sufficiency of the notice, a point which Lord Denman observed then came up for the first time, the magistrate might tender amends, in case the notice was held good, and there is no inconsistency in saying I believe the notice bad, but I tender you amends because I cannot maintain my act. If the plaintiff had accepted the £50 tendered the case would have been at an end. But as his tender was refused, the defendant had a right to resort back to any defence the law gave him, and the want of a sufficient notice was a defence given by statute. To make the plaintiff's argument good, he was driven, as Wightman, J., remarked, to "maintain that a tender of amends dispenses with notice altogether." The present case differs materially. *Quilibet potest renunciare juri pro se introducto.* The defendant Donaldson might have waived any notice and might therefore accept as sufficient and perfect the one served on him, and this he has done, for he does not confine himself to admitting that he had been served with a duplicate original, but he adds, "and agree to accept the same as a sufficient notice of action to me under the statute." To permit him, after this, to object to the sufficiency of the notice, would enable him to commit a fraud. He was not bound to point out defects, he might accept service simply, as service might be proved on him, and waive no right, but he cannot first waive any defect and then rely on a defect as a defence to the action.

Per Cur.—Appeal allowed.

CHANCERY.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

Attorney-General v. Lauder.

Held, that the right of presentation to Rectories in the Diocese of Ontario, in Upper Canada, is vested in the Bishop, for the time being, during his incumbency of office.

(September 3, 1863.)

This was a bill filed by the Attorney-General for an injunction restraining the Rev. Dr. Lauder from exercising the functions of Rector of St. George's Church, in the city of Kingston.

Dr. Lauder had been appointed to the Rectory by the Bishop of Ontario assuming to exercise the right of presentation to Rectories within his diocese, under and pursuant to a by-law in that behalf, of the Synod of the Diocese of Ontario.

To the bill a demurrer was filed for want of equity.

Two questions were presented for adjudication by the bill and demurrer, The first as to the right of the Bishop of Ontario to present to the Rectory while vacant. The second as to the right of the Attorney-General to call in question his act in so doing. Owing to the conclusion at which the learned Chancellor arrived, it became unnecessary to consider the second question.

Adam Crooks, Q. C., and *D. E. Blake*, for the Attorney-General.

Hon. J. Hillyard Cameron, Q. C., and *S. H. Strong, Q. C.*, for the defendant.

Vankoughnet, Chancellor.

By the Act of the 31st Geo. III., ch. 31, power was given to erect certain Rectories, and under that power the Rectory of Kingston was constituted.

By sec. 39 of the same Act, His Majesty was empowered "To authorize the Governor to present to every such Rectory an incumbent or minister of the Church of England, and to supply, from time to time, such vacancies as might happen therein." And it was provided "That every person so presented to such Rectory should hold and enjoy the same, and all rights and profits and emoluments thereto belonging or granted, as fully and amply, and in the same manner, and on the same terms and conditions, and liable to the performance of the same duties, as the incumbent of a Rectory in England."

This right of presentation is, in England, familiarly known as an advowson, and is property. It is expressly recognised as such in terms in the 17th sec. of the Church Temporalities Act of 1841 of this Province. It is given in the books as the most apt illustration of an incorporeal hereditament. It may be conveyed by deed or devise, in whole or in part.

By the Act of the Provincial Legislature of 1852, this right of presentation was vested in, and was to be exercised by the Church Society of the Church of England in the Diocese within which the same was situate, or in such other person or persons, bodies politic or corporate, as such Church Society, by any by-law or by-laws to be by them, from time to time, passed for, that purpose should or might think fit to direct or appoint in that behalf.

The Rectory mentioned in this suit is situate within the Diocese of Ontario, which has been recently erected by letters patent from the Crown. There is no Society known as the Church Society within this Diocese. By the Act of 25 Vic., ch. 36, sec. 1, a body corporate is created under the name of "The Incorporated Synod of the Diocese of Ontario," and "is to have and is invested with the like corporate rights, powers, patronage and privileges, as by any Act or Acts of the Parliament of this Province are conferred on any Church Society incorporated in any Diocese of the United Church of England and Ireland in this Province." And to the said corporation, and the members thereof, the several clauses and provisions of the said Acts are to apply, so far as they are not inconsistent with the Act now in recital. Had a Church Society been erected in the Diocese of Ontario instead of the Incorporated Synod, it was admitted on the argument that the right of presentation would have been in that Society. The words which give to the Synod certain rights, and which I have quoted, are not very happily chosen, and are somewhat open to the criticism to which they have been subjected on the argument of this case. They are not that the Synod shall have all the power that a Church Society would have, and shall stand in the place of such Church Society, or shall have and exercise within the Diocese of Ontario the rights, &c., formerly exercised within the limits thereof by the Church Society of the Diocese of Toronto, but they are that they shall exercise the like powers of any Church Society. What the Legislature meant is obvious enough. They never could have intended that the Church Society of the Diocese of Toronto, within its abridged limits, should continue to exercise jurisdiction in the Diocese of Ontario, and they intended to transfer those powers to the incorporated Synod.

The question is, whether the words used will affect this intent? The first consideration that presents itself to one's mind is, does the Church Society of Toronto shrink with the limits of that Diocese as they may be fixed from time to time? There is nothing in any Act of Parliament that I can find to say so. But the Act of 22nd Vic., ch. 65, incorporating a Church Society for the Dio-

cese of Huron, seems to assume this, and must it not necessarily be the case? The Church Society of the old Diocese of Toronto had no territorial limits assigned to it: it was merely the Church Society of the Diocese. Must it not take up its abode within that Diocese wherever it from time to time lies? Must it not shrink or expand with it? Can it exist out of the Diocese and exercise jurisdiction out of it? I think not, though it may, undoubtedly, hold property out of it, and right of presentation is property. Then if it cannot exercise jurisdiction out of the Diocese of Toronto, and is confined within it, it is not the Church Society of the Diocese of Ontario; and if it be not the Church Society of that Diocese, then there is no Church Society there to exercise any rights or powers as such. If so, the difficulty vanishes, for, when there is no Church Society in or possessing any power in the Diocese, then he right of presentation cannot, of course, be exercised by a Church Society, and therefore the giving to any body corporate or otherwise within the Diocese of Ontario, "the like corporate rights, powers, *patronage* and privileges" conferred on any Church Society can have full effect, and would convey the right of presentation, which is in the strictest sense of the term "*patronage*," and even if these were insufficient, the extension to the Synod "of the several clauses and provisions" of the Acts relating to the Church Society, would convey all the rights and powers which these Societies had. To illustrate what I mean—if illustration be necessary—were certain powers given to the city of Hamilton (which, of course, has no jurisdiction in the city of Toronto) to exercise rights in regard to taxation, or harbour improvements, an Act giving the "like" powers to the city of Toronto would plainly confer the same and the exclusive rights upon that city. But independently of this process of reasoning, I think looking at what seems to me the plain intent and meaning of the Legislature, I ought rather to hold, however doubtful the language employed, that the right of presentation passed to the Synod of Ontario. Even if it could be maintained that the Church Society of the Diocese of Toronto still held the powers and rights which they formerly possessed within the limits of the Diocese of Ontario, yet the Synod of that Diocese is invested with the "like" rights and powers; and having exercised them, I take it the Rectory must be treated as full, and that there is, therefore, no room for the action of the other body.

Difficulties, however, of another kind than those presented here may arise under these various enactments. The Crown is, by statute, deprived of the power of presenting. Suppose no Church Society existed in any new Diocese which may be erected, or no body specially authorised by the legislature to exercise the patronage. Where does it lie? Supposing, as may have happened in this case, that the Church Society, for the time being, exercised the power given to it, and lodged the right of presentation for life in the Bishop of Toronto within whose Diocese Kingston then was? Would he or not still retain the patronage, the Society having, at the time it conferred it the right to dispose of it? These difficulties may require legislative interposition to remove them; but they lead me to the consideration of the by-law under which the Bishop of Ontario has claimed to act. This by-law vests in him the patronage of all rectories during his life or incumbency. I suppose it meant his life *and* incumbency. I have had some doubts whether the legislature intended that the Church Society, or corresponding body, should make such an exclusive disposition of this right. But, on reflection, I do not find anything to limit their exercise of it either in the language of the Act or in the consideration of the public policy which led to it. We have only to read the Act to see that the legislature intended to sever all connection between the Crown, or the Government as representing the public generally, and the Church of England, and to leave to the latter the exclusive management of its own affairs of every description. The Crown surrenders all interference in them and the legislature, and practically says this—the connection between you and the Crown as representing the general public, has been inconvenient and impolitic. We get rid of it. We do not interfere with any rights you have, but we give you the exclusive use of them. We have, or rather the Crown, subject to our right to interfere with and dispose of them, has the patronage of presentation to livings. We think it no longer expedient that the Crown should use it. And we are indifferent how you use it, but to enable you to do so in the manner most acceptable to your community, we place it in the possession of the body recognised by law as your representative and under your control. That body may do with it as it pleases, and we have no further concern in the matter. And it may deal with it by by-law, the usual mode of declaring the corporation will and act.

Taking this view of the statute and treating the right of presentation as a right of property, it seems to me that, however unwise or inexpedient such an exercise of it as has been made in the present case may be, the legislature has given to the corporation the power unconditionally of disposing of the patronage, and that I must, therefore, treat the by-law in that behalf as valid. I do not think it can be repealed, as I think it vests the property, the advowson, in the Bishop for, at least, the period of his incumbency of office.

Demurrer allowed.

CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Thompson v. Crawford et al., Executors of Lundy.

Certificate for full costs—Grounds therefor.

In an action brought on a lease alleged to contain a covenant on the part of the lessor, of which a breach was alleged and damages claimed in respect of the breach, and it was a difficult question of law to determine whether or not the lease contained such a covenant as alleged, although the jury found $140 damages only for plaintiff, the judge who presided at the trial, in the exercise of the discretion given him by Con. Stat. U.C., cap. 22, s. 328, certified that the cause was a fit one to be withdrawn from the County Court and tried in the Court of Common Pleas. [Chambers, March 14, 1863.]

This was an action of covenant, for the recovery of unliquidated damages.

The declaration stated that Francis Lundy, in his life time, by deed dated 3rd April, 1862, demised to the plaintiff lot number 10 in 4th concession east of Hurontario Street, in the township of Chinguacousy, to hold for the term of twelve years from 1st April, 1863, at the annual rental of $700; and that in and by the deed of demise the lessor covenanted with plaintiff that, notwithstanding anything to the contrary, plaintiff should be at liberty to take possession of the demised premises (excepting 30 acres thereof) on 20th October, 1862. Averment that lessor died before 20th October, 1862; that plaintiff, on that day and ever since, had been ready to take possession; and that although defendants, as executors, were requested to cause plaintiff to be allowed to take possession, yet plaintiff was not permitted on or since 20th October, 1862, to take possession, but, on the contrary thereof, the widow of lessor claiming a right to dower was in possession and refused to give plaintiff possession, and he was wholly unable to obtain it.

Defendants pleaded that, notwithstanding anything in the deed to the contrary contained, plaintiff was at liberty to take possession of the demised premises, except said 30 acres, on 20th October, 1862.

The cause was tried at the last January Assizes for the United Counties of York and Peel, before Richards, J.

The plaintiff put in the lease declared upon. It was made in pursuance of the act to facilitate the leasing of lands and tenements. The following covenant was contained therein on the part of the lessor. "The said lessor covenants with the said lessee for quiet enjoyment. And it is hereby agreed between the parties hereto, that the said James Thompson (notwithstanding any thing heretofore to the contrary) shall be at liberty to take possession of the said premises and every part thereof (except thirty acres for crop this fall, reserved to the use of the said lessor), on the 20th day of October next."

It was proved, on the part of plaintiff, that Francis Lundy, the lessor, died in July, 1862, leaving his wife and several children surviving him; that on 20th October, 1862, the plaintiff went to the premises and found Lundy's widow in possession; that he demanded possession of her; that she, insisting on her right to dower, refused; that plaintiff said he would have all or none; that having previously made a verbal request, he served a written notice on defendants on 23rd October, demanding immediate possession of the land and premises demised, except as in the lease excepted, and stating that if possession were not delivered to him within two days after service of the notice, he should deem it a refusal and would proceed at law to recover damages.

Defendants objected that there was no covenant proved such as declared upon; and if there were, that no breach of it was shown, so as to render defendants liable in the action.

The learned Judge thought the objections to plaintiff's recovery well founded, and directed a nonsuit, with leave to plaintiff to move to enter a verdict in his favor, for such sum as the jury might find the plaintiff entitled to recover for not being let into possession on 20th October, 1862.

The jury found $140 for plaintiff.

Plaintiff's counsel made application for a certificate for full costs in the event of his rule to enter verdict for plaintiff for $140 being made absolute, contending that he was entitled to it because of the difficult questions of law which arose in the case.

The learned Judge noted the application.

Afterwards, in Hilary Term last, a rule *nisi* obtained on the part of plaintiff, calling upon defendants to show cause why the nonsuit should not be set aside, and a verdict entered for plaintiff for $140, pursuant to leave reserved, was made absolute.

Robert A. Harrison thereupon renewed his application for a certificate for full costs, citing *Paterson* v. *Snook*, 8 U. C. L. J. 109.

C. McMichael showed cause.

RICHARDS, J.—In this case a verdict for $140 has been found for plaintiff. Mr. Harrison applies for a certificate that the cause is a fit one to be withdrawn from the County Court and brought into the Court of Common Pleas. He rests his application upon the ground that the cause involved difficult questions of law, and so is a fit one to be withdrawn from the County Court. He argues that the questions of law raised were difficult, because, in the first instance, I decided against him, and my decision has been reversed by the Court of Common Pleas. I think he is entitled to the certificate, and shall therefore grant it.

Certificate accordingly.

JOHNSON v. MORLEY, et al, executors of WILLIAM CLOUGHLY, deceased.

Costs—Recovery without a trial—Rule Trinity Term, 24 Victoria—Con. Stat. U. C., cap. 22, sec. 328.

Semble, that the Rule of Trinity Term, 24 Vic., which provides that "In any action of the proper competence of the County or Division Courts respectively, in which final judgment shall be obtained for a plaintiff without a trial, or in which plaintiff shall obtain execution on proceedings, in the nature of a final judgment, no more than County or Division Courts, as the case may be, shall be taxed without a special order of the Court or a Judge, &c.," applies in the case of a cause referred to arbitration by compulsory reference to the whole costs in the action, including the costs of the reference and of the award, and proceedings subsequent thereto, and is not restricted to what may strictly be called the costs of the action.

Held, that under any circumstances, such is the proper construction of the order of reference in this cause, by which "the cause and all matters in dispute therein were referred to arbitration, with power to the abitrator to certify for costs, in the same manner as a judge at Nisi Prius, and that the costs of the cause, award, order and reference, subject to such certificate, should abide the event."

Held, also, that where plaintiff, *without a trial*, recovers, in a Superior Court, an amount wi hin the pecuniary jurisdiction of an inferior tribunal, defendant is not entitled to set off as against the costs of plaintiff, so much of defendant's costs taxed, as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the inferior tribunal, had the action been brought in that tribunal—the 328th section of C. L. P. Act not being applicable to such a case.

(Chambers, August 4, 1863.)

The defendants obtained a summons calling on the plaintiff to shew cause,—

1. Why the Master should not revise his taxation, and tax the plaintiff's bill of costs on the Division Court scale.

2. Why he should not allow to the defendants Superior Court costs of the cause, order of reference and award.

3, And why the plaintiff should not pay the costs of the application, or otherwise, as the Judge might direct.

The affidavits and papers filed, and upon which this summons was drawn up, shewed:

1. That an action was commenced against defendants, on the common counts, for wages, for work, for money lent, and on an account stated, the particulars of demand showing claims amounting to $632.

2. That by a Judge's order of reference, dated the 20th December, 1859, the cause and all matters in dispute therein were referred to arbitration, with power to the arbitrator to certify for costs in the same manner as a Judge at Nisi Prius; and that the costs of the cause, award, order and reference, subject to said certificate, should abide the event.

3. That in January, 1860, an award was made in the plaintiff's favour for £20, but no certificate was granted as to costs.

4. That the Master did, on the 29th of July, 1863, tax the plaintiff's costs at £20 10*s.* 7*d.*, allowing the plaintiff Superior Court costs of the reference order and award, and allowing to her costs on the Division Court scale in the cause, down to the time of the reference.

5. That the Master allowed the defendants their costs in the cause only down to the time of the reference, and did not allow to them any costs of the reference.

The copies of the bills of costs were filed with the papers.

Harman, in shewing cause, objected to the summons; that it did not shew upon what ground a revision was claimed; and that the items objected to or claimed should have been stated; and he cited *Aliven* v. *Furnival*, 2 Dowl., P. C. 49, and *Daniel* v. *Bishop*, McClel., Rep. 61. And also, because it did not appear that the taxation was final, or that the master had made his allocatur, citing *Cleaver* v. *Hargrave*, 2 Dowl., P. C. 589. He mentioned that the rule under which the present taxation was had is the Rule of Trinity Term, 24 Vic. [1860]. He referred to 20 U.C. Q.B., 123, rescinding the former Rule No. 155, in Har. C. L. P. Act 661, and substituting the following in its stead:—"In any action of the proper competence of the County or Division Courts respectively, in which final judgment shall be obtained by a plaintiff without a trial; or in which a plaintiff shall obtain execution on proceedings in the nature of a final judgment; no more than County or Division Court costs, as the case may be, shall be taxed without the special order of the Court or a Judge, but this rule shall not extend to costs in interlocutory proceedings," and contended that the Master had acted rightly in taxing the costs of the cause at the lower scale, and in allowing the plaintiff the full costs at the Superior Court scale, of all the proceedings before the arbitrator, because none but the costs of the cause were within the operation of the rule. He argued that it had been so decided by Mr. Justice Burns in *Fleurynck* v. *Clifton*, according to a note of his judgment in the taxing officers book.* He also referred to the following English decisions:—*Holland* v. *Vincent*, 23 L. J. Exch., 78, S. C. 9, Ex. 274. *Nicholson* v. *Sykes*, 23 L. J. Exch., 193, S. C. 9, Ex. 357.

Magrath, in support of the summons, contended that it did sufficiently appear that the Master had taxed the costs in the cause, and also what the objections were to the taxation. That the costs of the cause include the costs of the reference, referring to *Deer* v. *Kirkhouse*, 20 Law J., Q. B. 195. *MacIntosh* v. *Blyth*, 1 Bing., 269. And whether or not it was unreasonable that in a case within the inferior jurisdiction, where inferior costs only are to be recovered, that the bulk of the costs should be allowed at the Superior Court scale.

ADAM WILSON, J.—The first question is, whether the case has been brought right in form before me; and the next is, whether the Master has determined rightly the mode of taxation.

I am not inclined to reject the application because of the alleged insufficiency of the materials, although the case would certainly have been more complete if the summons had stated the reason why the taxation was complained of, or why a revision should be had, instead of merely stating the facts, and leaving the inferences to be drawn from them.

I think it appears that the Master has taxed the costs sought to be revised. It is so expressly sworn, but a difficulty here presents itself from the wording of the rule, which provides that "in any action of the proper competence of the Division Court, on which the plaintiff shall obtain execution on proceedings, in the nature of a final judgment no more than Division Court costs shall be taxed, &c."

Now, it does not appear that the plaintiff either has obtained, or is desirous of obtaining, execution, although the proceedings may be in the nature of a final judgment, and, no doubt, are so. He may, in strictness, proceed by action, which, although answering the purposes of an execution, is not execution. But as it is not advisable to raise any question upon this at present, I will assume that the taxation is for the purpose of obtaining an execution, and that an execution is the only process which can issue for the recovery of the money.

The reference in this case is under the 158 sec. of the C. L. P. Act, upon which judgment can be entered in the usual manner. Before

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* See 9 U. C. L. J. 211.

the passing of this Act no such judgment could be entered unless a verdict had been taken. And, therefore, before this Act—if without a verdict the cause was referred—the plaintiff was entitled to the full costs of the suit, and of the reference, in case of an award in his favour, however small the sum awarded might be, because there were no restrictions upon his right to full costs—the statute applying to cases where a trial had been had—and the Rule of Court to cases where final judgment was entered;—and neither of such provisions extending to such a case as that which I have mentioned. But, as under the amended law, final judgment may now be given upon an award made in a cause without a trial; and as such a case is brought directly within the operation of the Rule of Court above-mentioned, the only question is, whether the rule does apply only to the costs of the action proper, so as still to leave the costs of the reference and award beyond its operation; or whether it does not include all the costs taxable in the action, however these costs may have been incurred.

The case of *Deer* v. *Kirkhouse*, 20 L. J., Q. B. 195, shows, that where a verdict is taken, subject to a reference of the action to an arbitrator, who is to certify, for whom and for what amount the verdict shall be entered, and the costs of the cause and reference are to abide the event, the costs of the reference are costs in the cause, and follow the legal event of the action.

Holland v. *Vincent*, 23 Law J., Exch. 78, better reported in 9 Exch. 273, shows that the costs of a reference to arbitration are not within the directions to the Masters of the Courts of Hilary Term, 16 Vic., so as to enable them to tax the costs of the reference on the lower scale, when the award is for less than £20. It is to be observed that in this case the costs of the cause were to abide the event; and the costs of the reference and award were to be in the discretion of the arbitrator.

Nicholson v. *Sykes*, 23 L. J., Exch. 193, maintains the preceding case.

The directions referred to are in terms not unlike our rule—that is, the particular direction like our rule, applies to all actions—but the directions are accompanied with schedules of costs, which, by the items are only applicable to actions and proceedings in actions. Our rule has no such restrictive accompaniment, and, no doubt, this is the reason why the Court of Exchequer determined that the directions "do not apply to the costs of reference, but only to the costs of a cause."

The case of *Deer* v. *Kirkhouse* does, excepting in the point of a verdict, expressly apply to this case—for here as there "costs of the cause (award order) and reference" (subject to such certificate) are to abide the event. And I do not think that the verdict makes any substantial difference between the two cases. In each case there is a cause in court, upon which, in each case, a judgment may be entered. The verdict being taken, it is true, makes the award a merely auxiliary proceeding to make that absolute which was before inchoate—the verdict, all the time, being the proceeding which is to be acted upon—but that cannot be held to be the only reason why the costs of the reference are to be considered as costs of the cause. It is more likely that it is the fact of the costs of the reference equally with the costs of the cause, being made to abide the same event of the action which places them on the same footing as to the scale of taxation. In *Tregonings* v. *Attenborough*, 7 Bing. 733, there was a verdict, and the costs of the reference were held to be costs of the cause. In *Thyler* v. *Gordon*, 9 Bing. 570, there were also a verdict, but the costs of the reference were held not to be costs in the cause, because an inquiry, quite independent of the question at issue in the cause, was opened before the arbitrator. It is not, therefore, the verdict which makes the difference. In this case, as in *Deer* v. *Kirkhouse*, the costs of the reference are with the costs in the cause, to abide the event; and it appears to me that if the costs of the cause proper are to be taxed upon the lower scale, all the costs of the cause, including the reference, should be taxed upon the same scale.

I see nothing in the rule to exclude the costs of a reference as part of the proceedings in an action, and to place them on one footing, while the costs of the action proper are placed upon another. And I know of nothing to prevent the Court from regulating the costs of a reference precisely as it may regulate the costs of proceedings carried on by or before itself. References, too, (by consent) are proceedings well known to, and recognised by law as relating to actions pending in the County and Division Courts, with respect to which there are, no doubt, some recognised items of charges adopted to these courts. But, whether this is so or not, can be no reason for giving the higher costs upon any such proceedings, if the rule, as I think it does apply to the whole costs in the action, and not only to what may strictly be called the costs of the action.

But, besides this, I am of opinion the order of reference does of itself conclude this question, for it manifestly treats the whole of these costs as costs in the cause, and as subject to the certificate of the arbitrator in like manner as they are made subject to the general event of the cause.

If I were deciding only on the rule of court, I should not interfere with the discretion which the Master has exercised, acting, as he has done, upon the opinion of the late Mr. Justice Burns, and upon decisions which do seem at first to warrant his views; but have referred the defendants to the full court to settle what the general practice should be; but as I am construing the order of reference rather than the rule, I think I ought, in this respect, to act upon my own opinion: and, therefore, I shall order the Master to revise his taxation, and to allow the plaintiff throughout the general costs (whether strictly in the cause or not) according to the lower scale; and to disallow to the defendants their whole costs in the cause proper which he has taxed to them, and not to allow to them any part of the costs of the reference, because, as this is a taxation under the rule, and not under the statute, there can be no set-off in favour of the defendants.

This is the course which I think should be adopted, according to the best judgment which I can form.

I give no costs upon this application.

Order accordingly.

SHANLEY (Judgment Creditor), MOORE (Judgment Debtor), CORPORATION OF CITY OF LONDON (Garnishees).

C. L. P. Act, s. 238—Garnishee proceedings—Debt due or accruing due—Salary of a physician to a municipal corporation.

A salary payable to the physician of a municipal corporation, who holds his appointment at the will of the municipal corporation, at an annual salary of $400, payable quarterly, is neither a debt due nor accruing due within the meaning of the Common Law Procedure Act, and therefore cannot be attached at the instance of a creditor having an unsatisfied judgment against the physician. [Chambers, August 20, 1863.]

Hector Cameron applied for an order on the summons which he had obtained in this cause, requiring the garnishees to pay over to the judgment creditor.

It appeared by the affidavits filed, that the judgment debtor is the physician for the garnishees, under a by-law appointing him to that office, and that he held such office for many years past, being yearly appointed to it by the Council, in the month of January of each year. That he is allowed a salary of $400 per annum, which is payable in four equal payments, on the first days of January, April, July and October, in each year.

It was urged against the application that as the judgment debtor held his office only during the pleasure of the garnishees, there is that want of permanency in the office which would give the judgment creditor any claim upon the salary of the judgment debtor.

It was also urged against the application, that there was a prior order upon the garnishees to pay another judgment creditor of the present judgment debtor, which had been made by the late Mr. Justice Burns, under which there was still about $300 remaining due to that creditor, and that no other sum would fall due to the judgment debtor, payable by the garnishees, during the present year of office.

Cameron replied, showing by affidavit that the judgment creditor in the other case referred to had received from the garnishees, on account of the order to pay, more than enough to satisfy his whole claim; but that he had voluntarily returned to the judgment debtor about $400, or at all events a larger sum than was yet claimed to be due to that creditor, and therefore he could not claim the further benefit of that order, otherwise it might be maintained as a perpetual bar to every other creditor, and as a fraudulent protection to the judgment debtor.

ADAM WILSON, J.—Our Common Law Procedure Act authorises a judgment creditor, upon making affidavit, among other things, that some third person is indebted to the judgment debtor, to apply to a judge for an order that all debts owing by or accru-

ing from such third person to the judgment debtor shall be attached to answer the judgment (s. 288), and this is precisely the language of the English Common Law Procedure Act (17 & 18 Vic. cap. 125, s. 61).

Under the act, not only debts which are due, but accruing due, or for which the day of payment has not arrived, may be attached; for both are equally debts, the latter being *debitum in presenti*, though *solvendum in futuro*.

A claim which is not yet reduced to a debt (as unliquidated damages) is therefore not attachable, even after verdict but before judgment. (*Jones* v. *Thompson*, El. Bl. & El. 63.)

A superannuation allowance from the East India Company, made in favour of a clerk by a resolution of the company, and not by deed, is not such a debt as can be sued for by the clerk, and therefore it is not attachable; it is said to be a mere gratuity, and not a debt. (*Jones* v. *the East India Company*, 17 C.B. 351.)

In the present case, it is desired to attach a claim which it is said the defendant has upon the city of London, as city physician, for services not yet performed. I cannot see how this is a debt. It is not like the case of money then being *debitum in presenti*—money engaged to be paid on a day yet to come—as money due on a bond, bill or note, or for goods sold or work performed; in all these cases there is the *debitum in presenti*. But how can this be said of salary or wages not yet earned, although they are being earned under an express contract? They are not yet debts, and may never become so. I do not think the object of the Legislature was to levy upon future work or service, by seizing in anticipation and contingency the consideration engaged to be paid for them. What is there to prevent the judgment debtor from releasing, or from being released, by the person with whom he has contracted, from such further or future service? Can it be said that, when such future service is attached, the judgment debtor is bound to go on and perform such service; and that the person with whom he has contracted is bound to keep him in his employment? What, if the judgment debtor will not fulfil his contract? What, if he dies? And what, if the other party will not fulfil his contract, or dies? These considerations, I think, show very clearly that claims of this kind are not of a nature to be attached as debts, and were never intended to have been so by the Legislature.

I must therefore decline to make any order with respect to any allowance or salary dependent upon services not yet performed, and which for aught any of us can tell may never be performed, not only by reason of death or other inevitable occurrence, but by the wilful breach of the agreement by either of the parties, or even by the express and determinate act of the parties to defeat the payment of this claim.

If an order may be granted to attach a salary or wages not yet earned, the next thing will be to claim an order for fees of office not yet accrued, or the amount of a wager not yet determined, or perhaps to attach indefinitely every claim whatever which a party may become entitled to at any period during his lifetime, until the debt is paid. Now although future rights of debtors are operated upon by some statutes, such as the Bankruptcy Acts, it is certainly under very different words from the mere authority to attach debts, which is the language of and the only purpose of this act.

I discharge this summons, but without costs.

Summons discharged without costs.

NELSON v. ROY.

Con. Stat. U. C., cap. 22, s. 5—Tests of Ca. Sa.—Amendment.

Held, 1. That a writ of *ca. sa.* tested in the name of a retired Chief Justice, after his successor has been gazetted, but before acceptance of office by taking the necessary oaths of office, should be tested in the name of his successor.

2. That a writ tested in the name of the retired Chief Justice is an irregularity only.

3. That it may be amended upon payment of costs.

[Chambers, Sept. 4, 1863.]

On 25th July last, Draper, C. J., was gazetted Chief Justice of Upper Canada, in the room and stead of McLean, C. J., resigned.

On the same day, the Honorable Archibald McLean was gazetted President of the Court of Error and Appeal, in the room and stead of the Honorable Sir John B. Robinson, Bart., deceased.

On 10th August last, plaintiff caused defendant to be arrested under a writ of *ca. sa.* sued out of the Court of Queen's Bench, directed to the Sheriff of the county of Lincoln; and tested as follows: "Witness the Honorable Archibald McLean, at Toronto, the tenth day of August, in the year of our Lord one thousand eight hundred and sixty-three."

Defendant was on 14th August last arrested under the writ, and is now a prisoner thereunder in close custody in the common gaol of the county of Lincoln.

Draper, C. J., though gazetted as Chief Justice of Upper Canada before the issue of the *ca. sa.*, was not sworn in till afterwards.

Defendant thereupon obtained a summons, calling on plaintiff to shew cause why the writ of *ca. sa.* and the arrest of the defendant thereunder should not be set aside for irregularity, with costs, on the ground that the writ was tested in the name of the Honorable Archibald McLean, instead of in the name of the Honorable William Henry Draper, C. B., Chief Justice of the Court at the time the writ issued, and why defendant should not be discharged from the close custody in which he is now held under said writ by the Sheriff of the county of Lincoln, and on grounds disclosed in affidavits and papers filed.

The only affidavit filed was that of the attorney for defendant, wherein it was sworn that defendant was a prisoner in close custody by virtue of the *ca. sa.*, a true copy of which was annexed; that under said writ defendant was arrested on 14th August inst., and that the Honorable Archibald McLean was not, on the day said writ of *ca. sa.* issued, the Chief Justice of the Court of Queen's Bench, or the senior Puisne Judge of the said court.

Robert A. Harrison shewed cause. He argued—1. That McLean, C. J., was *de facto* the Chief Justice of the Court of Queen's Bench till his successor, Draper, C. J., took the necessary oaths of office, and so accepted office. 2. That even if not so, the mistake was an irregularity only and ought to be amended. 3. That as the mistake was that of an officer of the court, and not of plaintiff or his attorney, the amendment should be allowed without costs. He cited Con. Stat. U. C., cap. 22, ss. 5, 222; *Keefer* v. *Hanley*, 1 U. C. Pr. 1; *Thorpe* v. *Woalf*, 1 Dowl. P. C. 501; *Ainall* v. *Weatherley*, 3 Dowl. P.C. 464; *Billings* v. *Rapeljie*, 2 U.C. Prac. R. 191; *Ball* v. *King*, 8 U. C. C. P. 474; *Meyers* v. *Rathburn*, Toy. U. C. R. 127; *Wilson* v. *Story*, 3 U.C.L.J. 50; *Plock* v. *Pachicho*, 9 M. & W. 342; *Fisher* v. *Brooks*, 3 U.C.O.S. 143; *Andrews* v. *Page*, Tay. U.C.R. 478.

W. Atkinson supported the summons. He argued—1. That McLean, C. J., could not be deemed Chief Justice of the Court of Queen's Bench after 25th July, for on that day, as "a retired judge," and only as such he was appointed President of the Court of Error and Appeal. 2. That after 25th July, and until Draper, C. J., accepted office, there was no Chief Justice of the Court of Queen's Bench, and so there could not during that interval be any writs of *ca. sa.* 3. That the writ was a nullity, and so could not be amended. 4. That Con. Stat. U. C. cap. 22, s. 222, did not under any circumstances authorize amendments of final process. He cited Con. Stat. U. C. cap. 10, s. 8; cap. 13, s. 3; 1 Chitty's Prac. 11 Edn. p. 761, 765; 2 Ib. p. 1544; *Street* v. *Carter*, 2 Dowl. P.C. 671; *Hodgkinson* v. *Hodgkinson*, ib. 535; *Henderson* v. *Perry*, 3 U.C.Q.B. 252.

MORRISON, J., having consulted Draper, C. J., said he was of opinion that the *ca. sa.* ought to have been tested in the name of Draper, C. J., but that the omission to do so was an irregularity only, and he would therefore allow the writ to be amended. He said he thought it ought to be amended on the usual terms of payment of costs. Order accordingly.

IN THE MATTER OF SMITH & HENDERSON, TWO, &c.

Taxation of costs—Allocatur—Acceptance of money thereunder—Too late afterwards to apply for revision.

Where on 27th June the Master, to whom certain bills of costs had been referred, certified that there was a sum of £30 10s. due by the attorneys to their clients, which sum the clients on 7th July received from the attorneys, under and pursuant to the Master's allocatur, a summons, obtained on 26th August, for a revision of taxation, upon the ground that certain retainers had been improperly allowed by the Master on taxation, was discharged.

[Chambers, Sept. 7, 1863.]

On 2nd March last, Messrs. Smith & Henderson, attorneys, rendered to W. B. Harrison and his sister Caroline Harrison four bills of costs, in all amounting to £110 0s. 8d., giving credit for £30, showing a balance of £80 0s. 8d.

On 18th May last, W. B. Harrison and his sister obtained from a Judge in Chambers the usual order, referring the bills to the Master for taxation, and directing that if upon such reference the Master should find that the said Smith & Henderson have been overpaid, then that they should forthwith refund to the said W. B. Harrison and Caroline his sister the excess, upon the certificate of the Master of the amount thereof.

On 27th June last, the Master, having taxed the bills, certified that he allowed the same at £88 5s. 9d.; that he had taxed the costs of the reference against Smith & Henderson at £18 16s. 3d.; that Smith & Henderson had in their hands moneys of W. B. Harrison and his sister, £110; making in all, £128 16s. 3d.; leaving a balance in favor of Smith & Henderson of £30 10s. 6d.

On 7th July last, the attorney for W. B. Harrison and sister demanded from Smith & Henderson the sum of £30 10s. 6d., found due by them under the Master's certificate, which sum Smith & Henderson at once paid as demanded.

On 26th August last, the attorney for W. B. Harrison and sister, alleging that the Master had improperly allowed, in taxation of the bills, certain sums of money amounting to £15 10s. as retainers to Messrs. Smith & Henderson, obtained a summons calling upon the latter attorneys to shew cause why the taxation should not be reviewed, and why, on the review, the retainers should not be disallowed.

Robert A. Harrison shewed cause, and objected that W. B. Harrison and sister, having acted upon the Master's allocatur by accepting £30 10s. 6d. from Messrs. Smith & Henderson thereunder, were too late afterwards to make application for a revision of taxation. He referred to *Simmons* v. *King*, 2 D. & L. 786; *Pearce* v. *Chaplin*, 9 Q. B. 802; *Tinklar* v. *Helder*, 4 Ex. 187; *Truman* v. *Harris*, 2 B. & C. 801.

M. R. Vankoughnet supported the summons.

MORRISON, J.—I think the objection must prevail, and therefore discharge the summons.

Summons discharged.

COUNTY COURTS.

In the County Court of the United Counties of Leeds and Grenville, before GEORGE MALLOCH, Esq., County Judge.

WILKINSON v. KOKEE, WILKINSON v. HEALY, AND HERRICK v. JOHNSON.

Pleading—Verifying plea to jurisdiction by affidavit—Stat. 4 Anne, Cap. 16, Sec. 11.

These actions were brought against three tavern keepers, under the provisions of the Election Act.

The plaintiff in each case claimed $200, being $100 for keeping open tavern during the polling days in the town of Brockville, during the election of 1863, and $100 for selling liquor during those days.

The declarations contained nine counts:—

1st. Keeping open tavern on 26th and 27th June, 1863.
2nd. Selling spirituous liquors on 26th June.
3rd. Selling fermented liquors on 26th June.
4th. Giving spirituous liquors on 26th June.
5th. Giving fermented liquors on 26th June.
6th, 7th, 8th, and 9th, For committing the same offences on the 27th June respectively.

Claim at end of declaration, $200.

The defendant in each case pleaded to the jurisdiction, having a formal commencement and conclusion, and filed and served plea within four days after declaration served.

The plea was not in either case verified by affidavit, in compliance with the Statute, 4 Anne, cap. 16, sec. 11.

The plaintiff's attorneys waited till the expiration of the regular time for pleading in bar, and then, treating each plea as a nullity, signed judgment in each case as for want of a plea.

The defendants took out a summons in each case, to set aside the judgment with costs.

Herbert McDonald shewed cause, and cited *Lovell* v. *Walker*, 9 M. & W. 298; *Foxwist et al* v. *Tremaine*, 3 Wm. Saunders 210 (notes); *Rex* v. *Grainger*, 3 Burrowes 1,617, 6 Modern Report 146; Bacon's Abridgment, vol. 2, page 397, ("Courts") vol. 6, page 235 ("pleas"); 3 Blackstone's com. 301, (note) 2nd ed.; Bullen and Leak, pre. in pleading 534, (note) 11th ed.; Chitty's Arch. Prac. 900, 902, &c.; Saunders on Pleading, vol 1, page 4 and 5; 3 Chitty on Pleading, 894; and Stephen's Pleading, 43; as well as Stat. 4 Anne, cap. 16, s. 11.

R. F. Steele, contra, (with him *Sherwood*, Q. C.) cited *Ouslow* v. *Booth*, 2 Strange 705; *Hughes* v. *Alvares*, 2 Ld. Raymond 1,409; *Gray* v. *Sidneff*, 3 B. & P., 397.

MALLOCH, Co. J., decided that as the plea in each case, contained only matter of law, the defendant could not in either of the cases verify its truth. He therefore set the judgments aside, but as the point was a new one, only allowed the defendants the costs of the application, in case they eventually succeeded in their defence as to jurisdiction.

In the County Court of the United Counties of Leeds and Grenville, before GEORGE MALLOCH, Esq., County Judge.

FRANCIS v. BEACH, ADMINISTRATOR.

About 3 P. M. on Saturday, 22nd of August, 1863, last day for Service for C. C. plaintiff's attorney wished to serve declaration on defendants attorney. The office door being locked, he threw it and notice to plead through an open window *Held*, to be no service till it reached attorney's hands. Day of month and year of judgment must be entered of record in judgment roll, in body of roll.

A clerk in the office of the plaintiff's attorney went about 3 P.M. on Saturday, to serve a declaration and notice to plead on the defendant's attorney. The office was locked up, whereupon he threw it through the office window. Defendant's attorney subsequently found it there, and accepted service of it as served on Monday. But on the following Monday the plaintiff's attorney signed judgment by default for want of a plea.

E. J. Senkler, jun., obtained a summons to set aside the judgment with costs, on the ground of irregularity. His summons set out seven or eight grounds, but of these only two were argued.

1st. The throwing papers through the office window no service.

2nd. That the only entry in the judgment roll of the date of the judgment, was the marginal statement signed by the clerk, and therefore the rule of court requiring the day of the month and year of every judgment to be entered of record, was not complied with.

Steele shewed cause.

Senkler supported his summons.

MALLOCH, Co. J.—Set aside the judgment with costs, as being irregular—service only counted from Monday.

QUARTER SESSIONS.

In the matter of appeal between SWITZER and MCKEE.

Conviction for assault—Summary jurisdiction—When to be executed—Error apparent.

Held, 1. That at common law magistrates have no summary jurisdiction to try complaints for assaults.
2nd. That the jurisdiction is derived solely from Con. Stat. of Canada, cap. 91, and can only be exercised where prayed under that statute.
3rd. That the prayer for summary jurisdiction should appear on the face of the conviction.
Quære.—Must it appear on the face of the information?

September 15, 1863.

Mary McKee, on 1st June last, laid information before George Graham, Esquire, a Justice of the Peace for the United Counties of York and Peel, charging that James Thomas Switzer did, on Friday, 29th May last, commit an assault upon complainant, by striking her on the head, shoulders, and sides, without any provocation on the part of complainant.

The Justice, on 11th August last, made a conviction, of which the following is a copy:—

"Province of Canada, United Counties of York and Peel, to wit:

"Be it remembered, that on August 11, 1863, at Grahamsville, in the said United Counties of York and Peel, James Thomas Switzer is convicted before the undersigned, one of Her Majesty's Justices of the Peace, in and for the said United Counties, for that he, the said James Thomas Switzer did, on 29th May last, in the township of Albion, commit an assault on Mary McKee, by striking and otherwise abusing the said Mary McKee; and I adjudge the said James Thomas Switzer, for the said offence, to forfeit and pay the sum of fifty cents, to be paid and applied

according to law; and also to pay to the said Mary McKee the sum of seven dollars and fifty cents, for her costs in this behalf; and if the said several sums be not paid forthwith, I adjudge the said James Thomas Switzer to be imprisoned in the common gaol of the said United Counties of York and Peel, for the space of twenty days, unless the said sums, and the costs and charges of conveying the said James Thomas Switzer to the said common gaol shall be sooner paid.

"Given under my hand and seal the day and year first above mentioned, at Grahamsville, in the United Counties of York and Peel aforesaid.

"(Signed) GEORGE GRAHAM, J. P. (L. S.)"

On the same day, Switzer caused notice of his intention to appeal to the next Court of Quarter Sessions for York and Peel, to be duly served.

The appeal came on to be heard on 15th September last, before the Honorable Samuel Bealey Harrison, Chairman of the Court, and others, his fellows.

Robert A. Harrison, for the appellant, argued, among other things, that the conviction was bad for want of jurisdiction, inasmuch as it was not shewn, either on the face of the information, or of the conviction, that the complainant prayed the magistrate to proceed summarily under Con. Stat. of Canada, cap. 91, to hear and determine the offence. He referred to Con. Stat. of Canada, cap. 91, sec. 37. *Westbrook* v. *Callaghan*, 12 U. C. C., P. 616.

John McNab, for the respondent, argued that unless the contrary appeared, it must be presumed that all things were done necessary to give the magistrate jurisdiction, and it rested upon the appellant to shew that the party, complainant, objected to the jurisdiction.

HON. S. B. HARRISON, Chairman.—I can intend nothing in favour of this conviction. Without deciding that the prayer for summary jurisdiction must appear on the face of the information, I am of opinion that it should appear on the face of the conviction. The offence is one of which Justices of the Peace, at common law, have no summary jurisdiction. That jurisdiction is derived solely from the statute, and can only be exercised when prayed under the statute; and it is a clear rule of law that jurisdiction must always appear on the face of proceedings. In my opinion, therefore, the conviction must be quashed, and quashed with costs.

Per Cur.—Conviction quashed, with costs.

ENGLISH REPORTS.

PRIVY COUNCIL.

Present the Right Hon. Lord KINGSDOWN, the DEAN OF THE ARCHES COURT (DR. LUSHINGTON), Sir EDWARD RYAN, and Sir J. T. COLERIDGE.]

THE REV. WILLIAM LONG, Clerk, Appellant, THE RIGHT REV. ROBERT GRAY, LORD BISHOP OF CAPE TOWN, CAPE OF GOOD HOPE, Respondent.

Colonial Church discipline—Bishop—Authority—Incumbent—Synod—Power to convene—Liability to attend—Disobedience—Suspension—Deprivation.

The appellant, a clerk in orders officiating as a minister of the Church of England in a colony, was nominated to a church built and endowed by a private individual residing in the colony. The appellant was not instituted or inducted into his church and benefice, but he received from the bishop of the colony a license to officiate, and have the cure of souls within the district assigned to the church, and took an oath of canonical obedience to the bishop. The bishop, without the authority of the Crown or of the local legislature, convened a Synod in the colony, to be composed partly of clergy and partly of lay delegates elected in the different parishes of the diocese. The appellant was summoned to attend the Synod, and was directed to take steps for the election of a lay delegate in his parish; but he refused to attend the Synod, and neglected to take any steps to forward the election of a delegate; he was consequently cited to appear before the bishop, and for this disobedience he was first suspended, and afterwards deprived of his benefice:—*Held*, (overruling the judgment of the Supreme Court at the Cape of Good Hope),

First, that though the appellant did voluntarily submit himself to the authority of the bishop to such an extent as to enable the bishop to deprive him of his benefice for any lawful cause, yet that the cause for which the appellant was deprived by the bishop was not a lawful cause.

Secondly, that the oath of canonical obedience does not mean that the clergyman will obey all the commands of his bishop, against which there is no law, but that he will obey all such commands as the bishop by law is authorised to impose.

Thirdly, the Church of England, where there is no church established by law, is in the same situation with any other religious body, in no better but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

Fourthly, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

Fifthly, in such cases, the tribunals so constituted are not in any sense courts; they derive no authority from the Crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

[June 24, 1868.]

This was an appeal from a decision of the Supreme Court of the Cape of Good Hope in a suit between the appellant, the Rev. Mr. Long, claiming to be the incumbent of the parish of Mowbray, in that colony, and the respondent the Lord Bishop of Cape Town. Mr. Long, being in possession of the church of the parish of Mowbray, and in receipt of the income attached to the benefice, refused to obey certain orders which the bishop, in what he considered the due exercise of his episcopal authority, thought fit to issue, and for such disobedience the bishop issued against Mr. Long sentences, first of suspension, and afterwards of deprivation. The validity of these sentences, and especially of the last, was the question to be decided by the Court below, which, by a majority of two judges to one, held them to be valid.

The bishopric of Cape Town was founded in the year 1847. At that time the legislative authority in the colony of the Cape of Good Hope was vested in the Crown. There was no State church; all denominations of Christians stood on an equal footing; there were no ecclesiastical courts as distinct from civil courts. The Supreme Court, under the Charter of Justice granted in 1832, had supreme jurisdiction in all causes—civil, criminal, and mixed—arising within the colony, with jurisdiction over all subjects of the Crown, and other persons within the colony.

In this state of things letters-patent were issued by the Crown dated the 25th September, 1847, erecting the colony or settlement of the Cape of Good Hope and its dependencies, and the Island of St. Helena, into a bishop's see and diocese, appointing the respondent Dr. Gray, to be ordained and consecrated bishop of the see, and commanding his Grace the Archbishop of Canterbury to ordain and consecrate him accordingly. The letters-patent purported to empower the bishop to perform all the functions appropriate to the office of a bishop within the diocese of Cape Town, and especially to give institution to benefices; to grant licenses to officiate to all rectors, curates, ministers, and chaplains, in all churches, chapels, and places where divine service should be celebrated according to the rights and liturgy of the Church of England; to visit all rectors, curates, ministers, and chaplains, and priests and deacons in holy orders, of the United Church of England and Ireland, and to cite them before him, or before the officers whom he was authorised to appoint, and to inquire concerning their morals, as well as their behaviour in their several stations and offices. Power was given to the bishop to appoint archdeacons, a vicar-general, official principal, chancellor, commissaries, and other officers; and it was provided that an appeal should be made from sentences of the subordinate officers so to be appointed, to the bishop, and from sentences of the bishop to the Archbishop of Canterbury. No ecclesiastical court was expressly constituted by these letters-patent, nor was power given to the bishop to establish one; and it was declared that they should not extend to repeal, vary, or alter the provisions of any charter whereby ecclesiastical jurisdiction had been given to any court of jurisdiction within the limits of the said diocese.

The letters-patent provided that the Bishop of Cape Town should be subject to the metropolitan see of Canterbury, in the same manner as a bishop of any see within the province of Canterbury, and should take an oath of due obedience to him as metropolitan; and they contained a clause that the bishop might, by an instrument in writing under his hand and seal, addressed to the Archbishop of Canterbury, resign his office; and after acceptance of such resignation by the Archbishop, the bishop was to cease to be Bishop of Cape Town to all intents and purposes. Dr. Gray having been duly consecrated by the Archbishop of Canterbury, and taken the oath prescribed, went out to the Cape to assume the duties of his office, and continued to discharge them till the latter end of the year 1853. At that time it was considered

by the Queen's Government that the then diocese of Cape Town was too extensive for one bishop, and that it would be advisable to divide it and make it into three dioceses, to be called Cape Town, Graham's Town, and Natal. With a view to this arrangement, Dr. Gray, on the 23rd November, 1853, resigned his bishopric into the hands of the Archbishop of Canterbury, by whom the resignation was accepted, and Dr. Gray ceased to be Bishop of Cape Town.

On the 8th December, 1853, new letters-patent were issued, by which certain specified parts of the original diocese of Cape Town were erected into a distinct and separate bishop's sea and diocese, to be called thenceforth the Bishopric of Cape Town, and to this newly constituted bishopric Dr. Gray was appointed, and he was also appointed metropolitan bishop in the colony of the Cape of Good Hope and its dependencies, and the Island of St. Helena. The new letters-patent seem to have been in other respects in the same form with the old. But previously to the issuing of these letters, the Crown had granted a constitution to the colony of the Cape; representative institutions had been founded, and a colonial legislature established.

Mr. Long was officiating in the colony as a minister of the Church of England before any bishop was appointed there. He had been admitted into deacon's orders for the colonies by the Bishop of London in 1844. In the year 1845 he went to Cape Town, and was appointed by the then governor of the colony to be minister of the English Episcopal Church of Graaf-Reinet, his salary being paid partly by the governor, partly by the Society for the Propagation of the Gospel, and partly by his own congregation. There seems to have been no endowment of any kind attached to this church. He had at this time no other authority for discharging the duties of a minister in that church than the holy orders which he had received from the Bishop of London and the appointment of the governor of the colony.

Soon after the arrival of the Bishop of Capetown in the colony in 1848, and while the first letters patent were in force, Mr. Long was ordained priest by the bishop, according to the form and manner of ordaining priests as contained in the Book of Common Prayer; and, on being so ordained, he took the usual oaths prescribed by the laws and usages in force in England, and, amongst others, the oath of canonical obedience to the bishop, by which he engaged to pay to him true and canonical obedience in all things lawful and honest. On this occasion the bishop granted, and Mr. Long accepted, a license from the bishop to officiate and have the cure of souls over the parish and district of Graaf-Reinet, the bishop reserving to himself and successors full power to revoke the license whensoever he or they should see just cause so to do.

In the year 1854, a clergyman of the English Church, named Hoets, built and proposed to endow an episcopal church in the parish of Mowbray, in the colony of Cape Town, and to convey the church to the bishop, upon certain terms agreed upon between them; and by a notarial act in the Dutch form, dated the 2nd June, 1854, Mr. Hoets transferred in full and free property to the bishop and his successors in perpetuity, for ecclesiastical purposes, a piece of land therein described, "with the church which the appearer had lately erected thereon, at his own cost and charge, for the worship of Almighty God according to the liturgy and ritual of the Church of England, situate in the parish of Mowbray."

By a notarial instrument of the same date, to which the bishop and Mr. Hoets were both parties, the conditions on which the grant was made were stated. The first was, that the church should with all convenient speed be consecrated, and should be at all times used and enjoyed by the parishioners of the parish of Mowbray free from any charge. Mr. Hoets covenanted with the bishop to pay a certain salary to the clergyman or incumbent to be appointed and instituted to the spiritual charge of the said church and parish, in manner after mentioned, during the incumbency of the two first incumbents thereof, as and for a provision and endowment towards the stipend of such two first incumbents, and a mortgage was made by Mr. Hoets to the bishop of certain bonds, in order to secure the due payment of the stipend. The bishop, in consideration of the premises, covenanted with Mr. Hoets, that he, the bishop, and his successors would admit, institute, and appoint unto the said endowment, and unto the spiritual charge and care of the said church and parish a clerk, to be presented and nominated by Mr. Hoets (such person being a priest in holy orders of the United Church of England and Ireland, or of any of the colonial churches in communion with the said United Church, and not subject to any spiritual or ecclesiastical censure or other impediment), as the first incumbent of the said church and parish. And so in like manner upon the death, resignation, or removal, for any lawful cause, of the first incumbent, upon the like presentment of Mr. Hoets, to admit institute, and appoint a second incumbent.

On the 3rd June, 1854, Mr. Long and several of the parishioners presented a petition to the respondent, as bishop and ordinary of the diocese, praying him to consecrate the church, and on the 6th June the bishop consecrated it accordingly, and signed an instrument, under his episcopal seal, declaring such consecration, and reserving to himself and his successors, bishops of Cape Town, all ordinary and episcopal jurisdiction, rights, and privileges. On the same day the bishop preached in the parish church, and referred to the appellant as being thenceforth the parish priest. There were, or were supposed to be, some impediments to the institution and induction of the new incumbent in the English form, and no such ceremonies took place; but Mr. Long entered into possession of the benefice, and discharged his parochial duties, receiving from the bishop a license to officiate and have the cure of souls within the parish and district of Mowbray. In this, as in his former license, the bishop reserved power to revoke it if he should see just cause, and Mr. Long, on these occasions, renewed his oath of canonical obedience to the bishop.

In the year 1856, the bishop was of opinion that, for the purpose of settling some scheme of church government which should be binding upon the religious community of which he was the head, it would be desirable to convene a Synod, consisting partly of clergy and partly of laymen, members of the church within his diocese. The measure had been in contemplation, and, indeed, under discussion, for several years before, and different opinions had been entertained both by clergymen and laymen as to its legality and its expediency.

On the 15th November, 1856, the bishop issued a pastoral letter, in which, after stating the reasons which induced him to believe that such a measure was expedient, if not indeed necessary, for the well-being of the church in the colony, and explaining the objects which might, in his opinion, be effected by means of a Synod, the bishop proceeded to declare of what persons the Synod should be composed. These were to be—first, lay delegates, to be elected in the different parishes by adults, being, or at the time of the election declaring themselves to be, members of the Church of England, and of no other religious denomination. Secondly, duly licensed clergy, being in priest's orders. Deacons were to be authorised to attend and speak, but not to vote. Some of the subjects to be brought under the consideration of the Synod were then enumerated, including matters not exclusively of ecclesiastical cognisance; as for instance, the tenure and management of church property; questions relating to the formation and constitution of parishes; difficulties which had presented themselves with regard to marriages, divorces, and sponsors; and, finally, the desirableness, or otherwise, of seeking to obtain the assistance of the Legislature to carry out the objects of the Synod. Mr. Long was summoned by the bishop to attend the Synod, which was appointed to be held at the Cathedral Church in Cape Town on the 21st January, 1857, and he was requested to affix a notice of the intended meeting on his church door, and to take the necessary steps for holding the election of a delegate for his parish. Mr. Long and his parishioners were opposed to this measure. The parishioners held a meeting on the 22nd December, 1856, at which they resolved that no delegate should be elected, and Mr. Long neither attended the Synod himself, nor took any steps to forward the election of a delegate.

No attempt appears to have been made at this time by the bishop to enforce obedience to his summons, but the Synod was held, and was attended, as it appears, by many of the clergy and laity, and various resolutions were passed by them, which were termed, "Acts and Constitutions of the First Synod, held at Cape Town the 21st January, 1857." These regulations provided that a Synod of the clergy should be convened by the bishop once in three years. They provided for the mode of electing delegates from the different parishes, and required that on some Sunday, or other convenient day, during divine service, each minister should give notice of the day and place of meeting for such election in his parish or district, and should cause notice of the same to be fastened to the door of the church or chapel of the parish or district. The clergy and

laity were ordinarily to sit and deliberate together, the bishop presiding, and to vote as one body; but any member of the Synod might demand a vote by orders, in which case no resolutions was to be regarded as adopted by the Synod unless carried by a majority of both orders, and assented to by the bishop. Various rules were made with respect to the formation of parishes, and the institution and induction of clergy; and all presbyters and deacons before institution or induction, or before receiving a license from the bishop, and as a condition of receiving such institution, induction, or license, were to sign a declaration that they would subscribe to all the rules and constitutions enacted by the Synod of the diocese of Cape Town. A consistorial court was appointed for the trial of all offences against the ecclesiastical laws of the diocese, and various provisions, were introduced with respect to the mode in which the trial should be conducted.

The Synod had been convened without any express sanction of the Crown, and no attempt was made to obtain the assistance of the Legislature to carry into effect its objects.

In 1860 the bishop convened a second Synod, to be held on the 17th January, 1861; and on the 1st October, 1860, the bishop addressed a letter to Mr. Long, inclosing a copy of a pastoral letter which he had issued, and also a copy of the printed regulations adopted by the Synod for the election of deputies. The pastoral letter referred to the acts and constitutions of the last Synod, and mentioned as one of the subjects to which the bishop would have to call attention, the constitution of the ecclesiastical court. Mr. Long was of opinion that the convening of this Synod, without the authority either of the Crown or the local legislature, was an unlawful act on the part of the bishop; that the Synod itself was illegal, and its acts of no validity; and he declined, therefore, to take any steps himself for calling a meeting for the election of delegates in his parish, but he handed over the papers to the churchwardens and sidesmen that they might act as they should think proper, informing them at the same time of his own views upon the subject. After some correspondence, Mr. Long refused to give the notice required of the intended election.

On the 27th November, 1860, he was served with a citation signed by the registrar of the diocese, by which he was cited to appear before the bishop on Monday, the 4th of February, 1861, to answer for having neglected and refused to obey the commands and directions of the bishop to give notice of a meeting to be held "in terms of a certain letter addressed and forwarded to you, and dated the 1st October, 1860, with the pastoral issued on the same day and therein inclosed." Certain clergymen, five in number, were named by the bishop to be his assessors, but the bishop offered, if Mr. Long had any personal objection to any of them, to change their names for those of other clergymen who might be resident in the neighbourhood.

On the 4th February, 1861, Mr. Long attended before the bishop and his assessors, and delivered in a letter signed by himself, stating, in respectful terms, the grounds on which he objected to give the required notice, and adding, that if obedience were still required to the bishop's command in that respect, it was impossible for him to pay it. Mr. Long's counsel at the same time handed in a protest signed by them, that no judgment or sentence pronounced by the bishop as the judgment or sentence of any alleged court was in any degree binding on Mr. Long, because no lawful authority was vested in the bishop to hold, by himself or others, any court or courts competent to hear or determine any causes of what kind soever. The court adjourned, as it seems, without hearing evidence; there was no question of fact in issue. The assessors afterwards delivered their opinions in writing to the bishop, and on the 8th February, 1861, the bishop pronounced a sentence suspending Mr. Long from the cure of souls, and the exercise of all ministerial functions and offices for a period of three months, and thenceforward until he should have expressed regret for his past disobedience, and his willingness to render obedience for the future. This sentence was intimated to the churchwardens of the parish, and they were requested to provide a clergyman to perform duty in the church during Mr. Long's suspension. Mr. Long, however, considered the sentence to be a nullity, and he continued to officiate as usual, apparently with the concurrence of the churchwardens.

On the 19th February, 1861, he was served with a citation by order of the bishop to appear before the bishop on Wednesday, the 6th March, to answer for having failed to render due and canonical obedience to the bishops, and for acting in defiance of the laws of the church and authority of the bishop. The citation recited the bishop's order and Mr. Long's disregard of it, and required him to appear and answer for his contempt, and to hear and receive such judgment as the bishop might see right to pronounce, and as the exigency of the case might require or authorise. Mr. Long declined to attend this summons, and on the 6th March a sentence was pronounced by the bishop, which, after reciting the various offences against his authority, of which he considered Mr. Long to have been guilty, concluded in these terms:—

"I, therefore, Robert, by Divine permission, Bishop of Cape Town, do, for these repeated acts of disobedience and contempt, withdraw the license of the Rev. William Long, and do deprive him of his charge and cure of souls in the parish or parochial district of Mowbray, and of all emoluments belonging to the same. And I do, moreover, hereby admonish the said William Long not to officiate again in the said church or parish, and warn him, that if he should do so after this his deprivation, he will render himself still further liable to the censures of the church.

"R. Cape Town.

"Cathedral Vestry, March 6, 1861."

Notice was given of the sentence on the same day to Mr. Long and to the churchwardens of Mowbray, who were required to conform to it; and a gentleman of the name of Hughes was appointed by the bishop to officiate in the church till a new minister was appointed, and to receive one-half of the income.

On the 7th March, Mr. Long and the churchwardens applied to the Supreme Court of the Colony of the Cape of Good Hope for an interdict to restrain the bishop and Mr. Hughes from interfering with him in the performance of his lawful duties as incumbent of the parish of Mowbray, and from disturbing him in the enjoyment of his lawful emoluments as such incumbent. Some further proceedings took place in this matter, but the plaintiffs were required to file a declaration in regular form, for the purpose of trying the important questions in difference.

A suit was accordingly instituted. It was a proceeding of course, in the forms of the Roman-Dutch law; a claim in convention by the original plaintiff, and a defence and claim in reconvention by the defendant; so that, in fact, both parties were plaintiffs, and both defendants. The claim of Mr. Long, after stating the several matters of fact on which he relied, insisted that he was aggrieved by the proceedings of the bishop, and prayed the protection of the Court, and also a declaration of the law by the Court, in conformity with his views on the several points in dispute; and, lastly, that he was entitled of right, and without any license other than his before-mentioned letters of order, and the presentation he had already received from Mr. Hoets, and the approval of such presentation publicly made known by the defendant in June, 1854, to exercise all the lawful functions of minister and incumbent of St. Peter's Church, Mowbray.

The bishop filed an answer and plea in reconvention, by which, as defendant, he pleaded the letters-patent of 1847 and 1853, the license granted by him, and accepted by Mr. Long, as officiating minister, both of Graaff-Reinet and Mowbray; he alleged, that until authorised so to do by the Synod, and until the formation of rectories by the same authority as after mentioned, and until certain rules in that behalf had been framed, he could not give, nor had he in any previous instance given, institution to cure of souls, or induction to benefices, in any other way than by licenses similar to that granted to the plaintiff. He insisted that he cited the plaintiff in accordance with the rules of the Synod, and in exercise of the authority belonging to him as bishop, conveyed to him by the letters-patent; that the sentences were judgments or sentences ecclesiastical or spiritual so issued under the power and authority conveyed to him by the letters-patent, or otherwise of right belonging to him as bishop of the church of which the plaintiff was a priest: and that the plaintiff was, in consequence thereof, removed for lawful cause from the church of Mowbray; and he maintained, in conclusion, that the Court was not entitled to examine the sentence; but that, if it were examined, it ought to be affirmed. This was his defence. In reconvention he prayed, by his second plea, that it might be adjudged that the letters-patent of the 25th September, 1847, and of the 8th December, 1853, are valid in law: and that they confer the rights and powers claimed thereunder, and that ecclesiastical jurisdiction may thereby be lawfully exer-

cised by him. By his last plea he prayed, that the said plaintiff in convention. and the defendant in reconvention, might be restrained by interdict, so long as the sentence of deprivation should continue and remain in force, from occupying, or attempting to occupy, the church of St. Peter's, Mowbray, or otherwise interfering with the duties of the minister of the said church.

On the 15th February, 1862, the Court gave judgment against the plaintiff in convention, and for the plaintiff in reconvention, except as to his second plea in reconvention, and adjudged each party to pay his own costs. This was, in effect, a decision, on all material points, in favour of the bishop.

Sir *Hugh Cairns*, Q. C., *Travers Twiss*, and *F. M. White*, for the appellant, contended, that it was not lawful for any ministers and lay persons to assemble themselves together within the diocese of Cape Town, and make rules, orders, and constitutions, in causes ecclesiastical, without the Queen's authority: that the acts and constitutions of the assembly or Synod held at Cape Town on the 21st January, 1857, were not binding *proprio vigore*, upon the clergy or laity of the Church of England in the diocese of Cape Town, and more especially not upon the appellant and others, who in no way took part in, but dissented from, and protested against, the assembling of such Synod, and the proceedings thereof: that it was *ultra vires* for the respondent, as ordinary, to require the appellant to give effect to the said acts and constitutions, in regard to giving notice touching the election of lay delegates to a Synod: that the alleged refusal or neglect of the appellant to give effect to the said acts and constitutions was not an offence against the laws ecclesiastical, by reason whereof he might be lawfully suspended or deprived; that neither by virtue of the letters-patent granted to the respondent, nor by virtue of any law, canon, or constitution ecclesiastical, was the respondent, as bishop or otherwise, lawfully empowered to hold the said courts, and to pass the said sentences of suspension and deprivation upon the appellant: that if the respondent were empowered by any law, canon, or constitution ecclesiastical, to hold a court, and to bring the appellant to trial before it, yet that the proceedings of the courts actually held by him were void in law, inasmuch as they were not conducted according to the laws ecclesiastical: that such courts are not constituted, nor the proceedings in such courts conducted, according to the rules prescribed by the acts and constitutions of the Synod of Cape Town, of the 21st January, 1857, if such rules have any binding force or validity within the diocese of Cape Town: that neither by his receiving the respondent's license on becoming incumbent of St. Peter's, nor by his previously receiving letters of orders as a priest from the respondent, or otherwise, did the appellant assent to, or enter into any contract to submit to, the jurisdiction claimed and exercised over him by the respondent. They cited 1 Bl. Com. 279; Burn's Eccl. Law, tits. "Ordinary," "Council;" Canons (1603), 12, 14, 37, 40, 101; Cours du Droit Canon (Andre), tit. "Evêque;" 3 Grotius, 250, ed, London (1679); Hericourt's Eccl. Law of France, 32; 14 Rymer's Fœdera, 717; Ordinances of the United Church of Great Britain and Ireland; Ayliffe's Paregon, 433; 1 Stillingfleet's Eccl. Law, 12; Godolph. Rep. ch. 13, sec. 6; Hale's History of the Common Law, 30; stats. 25 Hen. 8, ch. 19; 31 Hen. 8, ch. 9; 13 Eliz. ch. 12; 1 Will. 3, ch. 8; 3 & 4 Vict. ch. 86; *The Bishop of St. David's case* (1 Ld. Raym. 447); and *The Dean of York's case* (2 Q. B. 1).

The Solicitor-General (Sir *R. Palmer*, Q. C.) and *Bullar*, for the respondent, contended that the bishop in the see of Cape Town possessed episcopal authority and jurisdiction, with episcopal powers over his clergy in matters of ecclesiastical discipline: that the appellant submitted himself to the authority and jurisdiction of the bishop; and consented, so far as any consent on his part might be necessary, to be subject to the exercise by him of his episcopal powers: that the exercise by the respondent of his episcopal authority and powers had not been unreasonable or improper; and the propriety of their exercise could be properly determined only on appeal to the Archbishop of Canterbury: that the contumacy of the appellant in continuing to officiate after suspension, without appealing to a higher tribunal, and in refusing to appear at the respondent's citation, rendered it impossible for the respondent to take any other course in the final proceeding before him than that of deprivation. They cited First Epistle to Timothy, ch. 5, ver. 19; Apostolican Canons, 31; 1 Van Espens, 133; 3 Godolph. Rep. 22 Hooker, book 7; Co. Lit. 96, a, tit. "Ordinary;" The Ordination Service; Articles of Religion, 33, 36; Twiss's Apostolical Letters; *Caudry's case* (5 Rep. 15); *The Attorney-General* v. *Welsh* (4 Hare, 572); *The Attorney-General* v. *Murdoch* (7 Hare, 445;) *Dr. Warren's case* (Grindrod's Compendium); *Philips* v. *Bury* (2 T. R. 346); *Daugars* v. *Rivas* (29 Beav. 233); Colonial Act, 1860; *Poole* v. *The Bishop of London* (14 Moo. P. C. 262); *Birch* v. *Wood* (2 Salk. 506); *Price* v. *Pratt* (Bunb. 273); Godolphin, 15; Lyndwood's De Appellationibus; *Middleton* v. *Croft* (2 Str. 1056;) Gibson on Synods, 16; Reformatio Legum, 109; Kennett's Eccl. Synods, 199, 201; Cardwell's Synodolia; *The Dean of Jersey* v. *The Rector of* —— (8 Moo. P. C. 229); *Wilson* v. *McMahl* (3 Phillim. 67); Van der Linden, book 3, part 1, s. 9; *Ex parte Medwin and Hurst* (1 El. & Bl. 609); Hoffman on the Laws of the Church of the United States, 39, 474; *Ewers and Owen's case* (Godb. 432); *Reg.* v. *Millis* (10 Cl. & Fin. 569); Gibson's Codex, 18; 1 Vetus et Nova Ecclesiæ Disciplina, 475, c. 74; Suarez de Legibus, 215, c. 4; *Hutchins* v. *Denziloe and Another* (1 Hagg. Consit. 170); Whately on the Book of Common Prayer; Sharp on the Rubrick; and stats. 1 Eliz. c. 2, s. 3; 14 Car. 2, c. 6; 26 Geo. 3, c. 84: and 1 Vict. c. 45.

Lord KINGSDOWN delivered the judgment of their Lordships.—In the argument at our bar, many questions of great novelty and importance were raised and discussed with remarkable ability. Some of them were considered, and very justly, by the counsel as seriously affecting the well-being of members of the Church of England in the colonies and other dependencies of the Crown. We propose to deal with these questions only so far as may be necessary for the purpose of the present decision, and to abstain, as far as possible, from saying anything which may prejudice cases that may hereafter arise.

It is advisable, in order to make the reasons of our judgment intelligible, to state in some detail the facts as they appear upon the record. [His Lordship then stated the facts of the case, and proceeded]:—The first question which we have to consider is, what authority did the bishop possess under and by virtue of his letters-patent at the time when these sentences were pronounced? The judges below have been unanimous in their opinion—first, that all jurisdiction given to the bishop by the letters-patent of 1847 ceased by the surrender of the bishopric in 1853, and the issue of the new letters-patent; and, secondly, that the letters-patent of 1853, being issued after a constitutional government had been established in the Cape of Good Hope, were ineffectual to create any jurisdiction, ecclesiastical or civil, within the colony, even if it were the intention of the letters-patent to create such jurisdiction, which they think doubtful. In these conclusions we agree.

Dr. Gray had been duly appointed and consecrated a bishop of the Anglican Church in 1847, and such he remained after the resignation of his see; but by such resignation he surrendered all territorial jurisdiction and power of proceeding judicially *in invitos*, so far as such authority depended upon the letters-patent of 1847. These points have not only been decided by the Court below, but have been embodied in their judgment, by which they have expressly rejected the second claim above stated of the lord bishop. But a majority of judges below has held that the defect of coercive jurisdiction under the letters-patent has been supplied by the voluntary submission of Mr. Long, and that he is on that principle bound by the decision of the bishop. This point we have next to consider.

The Church of England, in places where there is no church established by law, is in the same situation with any other religious body, in no better but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.

It may be further laid down, that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.

In such cases the tribunals so constituted are not in any sense courts; they derive no authority from the Crown; they have no

power of their own to enforce their sentences; they must apply for that purpose to the courts established by law, and such courts will give effect to their decisions as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely upon the agreement of the parties.

These are the principles upon which the courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England. They were laid down most distinctly, and acted upon, by Sir L. Shadwell, V. C., and Lord Lyndhurst, in the case of *Dr. Warren*, so much relied on at the bar, and the report of which, in Mr. Grindrod's book, seems to bear every mark of accuracy.

To these principles, which are founded on good sense and justice, and established by the highest authority, we desire strictly to adhere, and we proceed to consider how far the facts of this case bring Mr. Long within their operation.

To what extent, then, did Mr. Long, by the acts to which we have referred, subject himself to the authority of the bishop in temporal matters? With the bishop's authority in spiritual affairs, or Mr. Long's obligations in *foro conscientiæ*, we have not to deal.

We think that the acts of Mr. Long must be construed with reference to the position in which he stood, as a clergyman of the Church of England, towards a lawfully appointed bishop of that church, and to the authority known to belong to that office in England; and we are of opinion, that by taking the oath of canonical obedience to his lordship, and accepting from him a license to officiate, and have the cure of souls, within the parish of Mowbray, subject to revocation for just cause, and by accepting the appointment to the living of Mowbray under a deed which expressly contemplated, as one means of avoidance, the removal of the incumbent for any lawful cause, Mr. Long did voluntary submit himself to the authority of the bishop to such an extent as to enable the bishop to deprive him of his benefice for any lawful cause; that is, for such cause as (having regard to any differences which may arise from the circumstances of the colony) would authorise the deprivation of a clergyman by his bishop in England. We adopt the language of one of the judges of the court below, that, "for the purpose of the contract between the plaintiff and the defendant, we are to take them as having contracted that the laws of the Church of England shall, though only as far as applicable here, govern both."

Is, then, Mr. Long shewn to have been guilty of any offences which, by the laws of the Church of England, would have warrented his suspension and subsequent deprivation? This depends mainly on the point, whether Mr. Long was justified in refusing to take the steps which the bishop required him to take, in order to procure the election of a delegate for the parish of Mowbray to the Synod convened for the 17th January, 1861.

In what manner and by what acts did he contract this obligation? The letters-patent may be laid out of the case; for if the bishop's whole contention in respect of them be conceded, they conferred on him no power of convening a meeting of clergy and laity, to be elected in a certain manner prescribed by him, for the purpose of making laws binding upon churchmen.

A very elaborate argument was entered into at our bar, in order to shew that Diocesan Synods may be lawfully held in England without the license of the Crown, and that the statute with respect to Provincial Synods does not extend to the colonies. It is not necessary to enter into the learning on this subject. It is admitted that Diocesan Synods whether lawful or not, unless with the license of the Crown, have not been in use in England for above two centuries; and Mr. Long, in recognising the authority of the bishop, cannot be held to have acknowledged a right on his part to convene one, and to require his clergy to attend to it. But it is a mistake to treat the assembly convened by the bishop as a Synod at all. It was a meeting of certain persons, both clergy and laity, either selected by the bishop, or to be elected by such persons and in such manner as he had prescribed, and it was a meeting convened, not for the purpose of taking counsel and advising together what might be best for the general good of the society, but for the purpose of agreeing upon certain rules, and establishing, in fact, certain laws, by which all members of the Church of England in the colony, whether they assented to them or not, should be bound. Accordingly the Synod, which actually did meet, passed various acts and constitutions purporting, without the consent either of the Crown or of the colonial legislature, to bind persons not in any manner subject to its control, and to establish courts of justice for some temporal as well as spiritual matters; and, in fact, the Synod assumed powers which only the Legislature could possess. There can be no doubt that such acts were illegal.

Now, Mr. Long was required to give effect, as far as he could, to the constitution of this body, and to take steps, ordered by that body, for convening one of a similar nature. He was furnished with a copy of the acts and constitution of the last Synod, and he was requested to attend carefully to the inclosed printed regulations with regard to the election of delegates. He clearly, therefore, was required to do more than give notice of a meeting, and he could not give the notice at all without himself fixing the time and place at which the meeting was to be held. He was required to do various acts of a formal character, for the purpose of calling into existence a body which he had always refused to recognise, and which he was not bound by any law or duty to acknowledge.

The oath of canonical obedience does not mean that the clergyman will obey all the commands of the bishop against which there is no law, but he will obey all such commands as the bishop by law is authorized to impose; and even if the meaning of the rubric referred to by the bishop in his case were such as he contends for —which we think that it is not—it would not apply to the present case, in which more was required from Mr. Long than merely to publish a notice.

We are, therefore, of opinion that the order of suspension issued by the bishop was one which was not justified by the conduct of Mr. Long, and that the subsequent sentence of deprivation founded upon his disobedience to the order of suspension must fall with it.

It was strongly pressed, both before us and in the court below, that supposing these sentences to be erroneous, Mr. Long had no remedy against them except by appeal to the Archbishop of Canterbury under the provisions of the letters-patent. What authority his Grace might possess under the letters-patent, or otherwise, to entertain such an appeal if it had been presented, it is unnecessary, and we think inexpedient, to discuss. It is sufficient to say no such appeal has been presented, and that the suit in which this appeal is brought respects a temporal right, in which the appellant alleges that he has been injured. It calls for a decision as to the right of property, and involves the question whether Mr. Long has ceased by law to be what in England is termed *cestui que trust* of funds of which the bishop is trustee. Whatever else Mr. Long may by his conduct have done, we cannot hold that he has precluded himself from exercising the power which, under similar circumstances, he would have possessed in England, of resorting to a civil court for the restitution of civil rights, and of thereby giving to such courts jurisdiction to determine questions of an ecclesiastical character essential to their decision. Indeed, in this case the appellant and the respondent have alike found it necessary to call upon the civil court to determine the right of possession of the church of Mowbray.

We think that even if Mr. Long might have appealed to the archbishop, he was not bound to do so; that he was at liberty to resort to the Supreme Court; and that the judges of that Court were justified in examining, and, indeed, under the obligation of examining, the whole matter submitted to them. We, of course, are in the same situation; and after the most anxious consideration have come to the conclusion that the sentence complained of cannot be supported; and, therefore, we must humbly advise her Majesty to reverse it, and to declare that Mr. Long has not been lawfully removed from the church of Mowbray, but remains minister of such church, and entitled to the emoluments belonging to it.

Being of this opinion, we are relieved from the necessity of considering, as a ground of our decision, whether the course adopted by the right reverend respondent in the proceedings against Mr. Long was, in respects, proper, and whether the proceedings themselves, if the bishop be regarded as acting, and entitled to act, with the authority of a visitor sitting in *foro domestico*, were conducted with that attention to the rules of substantial justice and that strict impartiality which are necessary to be observed by all tribunals, however little fettered by forms. Much argument was addressed to us at the bar in this part of the case, and it would not be proper to pass it altogether without notice; and first, with

respect to the suspension, and the constitution of the tribunal for the trial of Mr. Long on the first charge against him.

It cannot be held that all the provisions which would have been applicable to such a case under the Church Discipline Act in England were necessary to be observed in the colony. This was impossible, but care should have been taken to secure, as far as possible, the impartiality and knowledge of a judicial tribunal. Here the bishop was not merely in form, but substantially, the prosecutor, and a prosecutor whose feelings, from motives of public duty, as well as from the heat necessarily generated in the purest minds by a long and eager controversy, were deeply interested in the question. It was, perhaps, necessary that he should preside as the judge before whom the cause was heard, and by whom the cause was heard, and by whom the sentence was pronounced; but he should have procured, as a bishop in England under such circumstances would have done, the advice and assistance, as assessors, of men of legal knowledge and habits, unconnected with the matter in dispute, and have left it to them to frame the decision which he would afterwards pronounce. But instead of adopting this course, he selected as assistants three gentlemen, all clergymen sharing his own opinions on the subject of controversy, and all themselves members of that Synod which Mr. Long was accused of treating as illegal.

Mr. Long was cited for refusing to give the required notice, but the sentence was not grounded entirely on this charge. The protest which he had given in by his counsel against the proceedings was treated as a very grave offence. The bishop, in speaking of it, says—"To put in such a document is virtually to reject episcopacy and the church, and to step on the very confines of schism, if not to have overstepped the line." Mr. Long's conduct at a private meeting with the bishop is discussed, as to which there is great doubt what really took place, and no regular evidence appears to have been produced, or was, in fact, admissible, for it was not to the point in question; and from the language of the bishop in delivering his judgment it may be inferred, that the sentence against Mr. Long was not founded entirely on the only charge which he had been summoned to meet.

The proceedings which led to the subsequent deprivation are open to no less objection than those which resulted in the suspension. The bishop had declared before the first Synod that there were no rules of proceedings for trying ecclesiastical offences, and one of the objects of the Synod was to supply the deficiency. The Synod had established a consistorial court and certain regulations, by which the trials of clergymen and of laymen before such court should be guided.

These regulations had, amongst other things, provided, that no sentence of deprivation should be pronounced by any person whatever, but only by the bishop, with the assistance of the chancellor of the diocese, or, in case there be no such officer, some legal adviser whom he may see fit to appoint. The bishop insisted that Mr. Long was bound by the rules established by this Synod, and must, therefore, it should seem, have considered himself bound by them; and yet, without any regard to these rules, without calling in the assistance of any legal adviser whatever, without any analogy to the course of proceedings in England by which the judgment of impartial persons acquainted with the law is secured, the bishop pronounces sentence of deprivation. On this occasion, as on the former, the sentence seems to have been founded on what are termed repeated acts of disobedience and contempt by Mr. Long, instead of on the single charge which he was called upon by the citation to meet.

We cannot say, therefore, that the proceedings in this case have been conducted in a proper manner, though our judgment rests on the other grounds already stated.

We have been much embarrassed by the question, how we ought to deal with the costs in this case. We do not doubt that the bishop has acted in the conscientious discharge of what he considered to be his public duty, and he has succeeded, at great personal trouble and expense, in bringing this contention in the court below to a favourable issue. On the other hand, it is impossible not to feel that Mr. Long has been subjected to probably not less trouble and expense by a course of proceeding on the part of the bishop which we have been obliged to pronounce not warranted in law.

Feeling the hardship of the case upon the right reverend respondent, we still think that we are bound to award the costs of the suit and of the appeal to the appellant. We cannot, of course, suggest to her Majesty any consideration of what it may be fit to do, at the expense of the public; for this is beyond our province. But it is not beyond our province to observe, that the lord bishop has been involved in the difficulties by which he has been embarrassed in a great measure by the doubtful state of the law, and by the circumstances that he, not without some reason, considered the letters-patent under which he acted to confer on him an authority which, at the time when he acted under them, her Majesty had no authority to grant, and that, either in this or in some other suit, it was important to the interests of the colony generally, and especially of the members of the Church of England within it, that the many questions which have arisen in this case should, as far as possible, be set at rest.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

PEARSALL v. CHAPEN.

1. In an action for ejectment, replevin, trover, assumpsit, or other form for the purpose of recovering back anything, as on the rescission of a contract, the very first thing to be done, after showing that the plaintiff parted with the thing in pursuance of the contract alleged, is to shew that the plaintiff has rescinded the contract by doing or offering to do all that was necessary and reasonably possible to restore the parties to the condition in which they were before the contract, and then to shew that he had good ground to rescind it.
2. Thus, where a sale of land has been induced by the false and fraudulent representations of the vendor, the vendee has no right to recover back the price paid without first tendering a re-conveyance
3. The various meanings of the words void and voidable as used in laws, contracts, decisions and text books discussed and defined.
4. Ratification of fradulent contracts when and how made.
5. It is error to say that a vendee, claiming to rescind or recover back the price paid, is not chargeable with any care of the property in his possession if the sale was fradulent.
6. Account for a rescission provided for by a contract and another for a rescission because of fraud would not be repugnant; but a count for damages for the fraud and one for a rescission would be.
7. The plaintiff may waive the action of tort for deceit and sue in assumpsit for the money which he paid on the contracts, or which defendant has received, under it. But where part of the consideration paid was land and claims against other persons, these cannot be recovered under a count for money had and received, unless, and only so far as the defendant has converted into money. If plaintiff wants more than mere rescission he must sue for damages for the deceits.

Errors to the Common Pleas of Elk County.
Summons in case &c., *J. C. Chapen* v. *Alfred Pearsall.*
The material facts are stated in the opinion *infra.*

Judgment for plaintiff for $1,555 20, whereupon defendant sued out a writ of error.

The opinion of the Court was delivered January 5, 1863, at Philadephia, by

LOWRIE, C. J.—The plaintiff below purchased from the defendant tract of land by a written contract, which was afterwards consummated by payment and conveyance, and the plaintiff alleges that, at the time of the contract, the defendant agreed orally that if the plaintiff did not find the land answering to certain representations, relative to the kind and quantity of timber on it, the defendant would take it back and return the price. The plaintiff sued on this agreement, but as it was made during the existence of the act of 22nd April, 1856, making such oral contracts of no effect, he afterwards changed his ground and added a count for money had and received, and went, as on a recission of the contract for fraud, for the recovery back of the price.

The court instructed the jury that, if the sale was induced by the false and fraudulent representations of the vendor, the plaintiff had a right to recover back the price without first tendering a reconveyance, and this is the first point which we shall discuss. And, as this point appears to have its natural clearness dimmed by a little practical confusion of the different principles that enter into the administration of this kind of cases, we must endeavor to recover this clearness by careful discrimination.

If the court has stated this point correctly, then a defrauded vendee may recover back the price without rescinding the contract and while retaining the title acquired by it; and perhaps without liability to return it, since the vendor cannot allege his own fraud

in order to reclaim it; he may rescind for what he gave and affirm for what he got, and is thus allowed by the law to return injustice for fraud, and invited to learn the art of being duped, as a mode of profitable speculation. We do not so understand the law.

If this be indeed the law of such cases, then the fraud is not corrected, but punished, by this remedy. And the punishment is grossly unjust, because grossly unequal, and it can only be by mere accident that it is at all proportionate to the offence. No matter how small the fraud, it forfeits the whole value contracted for, be it ten or ten thousand dollars. And, if nothing can conform the contract in favour of the defrauder, then the other party may get all he bargained for and afterwards recover back all he gave; in order to make the punishment as severe as possible, he may, knowing of the fraud, wait until he obtains full performance from his adversary, and then set up the fraud as a ground for rescinding the contract for all he paid under it. This is making a person who is guilty of a fraud practically an outlaw for all his interests that are involved in the fraudulent contract. The law does not usually deal thus with any offender. It keeps its temper even in dealing with fraud, and especially in the investigation of its existence and degree.

In an action for ejectment, replevin, trover, assumpsit or other form for the purpose of recovering back anything, as on the recission of a contract, the very first thing to be done, after showing the plaintiff parted with the thing in pursuance of the contract alleged, is to show that the plaintiff has rescinded the contract by doing or offering to do all that is necessary and reasonably possible to restore the parties to the condition in which they were before the contract, and then to show that he had good ground to rescind it. This is the order demanded by the very nature of the action. He is not suing for a recission or to obtain one, but for the results or consequences of a recission, on the ground that he has already exercised his right to rescind, given him by the law. There is hardly a discordant thought in the reports, that these are the essential elements of a recission and of the action founded upon it in cases of fraud. We refer to a very few of them, relating to both real and personal estate, (the rule being the same as to both 8 Met. 337) 8 Barb, Sup. Ct. 9, 22 Pick. 29, 546, 4 Harris 204, 12 Barb. 641, 14 id. 594, 16 id 921, 23 Pick. 283, 8 Met. 550, 5 Cush. 126 8 Wend. 236, 7 Black. 501, 6 Ind. 26, 12 Ill. 336, 15 Mass 319. 38 B. Mon. 172, 25 Verm. 234, 30 id 139, 22 Ala. 249 32, 384. And the same is the usual rule where a contract is rescinded for infancy, 2 Kent 257.

We need not refer to the few sporadic cases that are incompatible with these decisions; but we may say generally that a strong misleading element in them is an undue reliance on the broadest meaning of the ambiguous word *void*, which is so commonly found in laws, contracts, decisions, and text books. Deductions founded on the broadest meaning of this word, would lead to greater errors than are found in the most erroneous cases, while those founded on its narrower meaning seldom err. When we say that any given class of contracts is *void*, let us be sure of the meaning of the word before we undertake to declare all the consequences that follow from its application. Observation of its use will give us its meaning.

It is usually said that fraud in procuring a contract makes it *void*; but in many cases it is said that it makes it only *voidable*, 4 Watts, 88; 12 Pick. 307; 2 id., 191; 6 Grattan, 268; 2 Shep. 364; 1 Dong. (Mich.) 380.

So when a conveyance is in fraud of creditors it is usually called *void*, and the Stat. 13 Eliz. makes it "clearly and utterly void, frustrate and of none effect" as against the creditors; but in many cases the word *voidable* is designedly substituted; 1 Sid. 133; 2 Mass. 279; 2 Met. 339, 28 Mo. 168; 31 Mi. 653; 1 Manning (Mich.) 321. Chancellor Kent, 4 Commen. 517, calls it "voidable not void," and Chief Justice Spencer delivers a very able opinion to prove it so, 18 Johns, 527.

Provisions in leases are very common that, if the tenant shall not, with due promptness, perform his covenants to build, repair, pay rent and such like, the lease shall be *void*, or utterly null and void to all intents and purposes, or expressions of similar import; yet those terms are very often, perhaps generally, held to mean *voidable* and not void; 4 B. and Ad, 664; 6 B. and Cr. 519; 4 and Ald. 401; 6 M. and Setl. 121. And *voidable* is now the usual predicate of contract by infants.

The stat Hen. VI. c. 10, makes certain forms of outlawry *void*, yet they can be annulled only by writ of error; and another makes certain obligations, not taken in a prescribed manner, *void*, yet they must be avoided by plea, 8 Co., 59, p. This means that even nullities may be only *voidable* in the sense that a regular adjudication is necessary to declare them void.

Other statutes make certain alienations by bishops and other ecclesiastics, and certain forms of alienations of entailed estates *void*, absolutely void or utterly void and of no effect to all intents and purposes, yet they are void only as against the official successors or the successors in the title; 8 Co. 59; 60, or, as some would say *voidable*; the word *absolutely* here being used, not as contrasted with *relatively*, but as equivalent to *utterly*.

These instances reveal the general principle that the persons intended to be wronged by a transaction are not bound by it, and also that they are not bound to reject it; they may adopt or confirm it or agree to be bound by it; their consent which, because of the wrong, the law considered as not given, may be given after the wrong becomes known, and then, if given with the deliberation, intelligence and freedom that the law of ratification requires, and in a form adequate to the particular kind of contract, bound equally with the others. They consent to be bound by it if they elect to enforce it, and then they can no longer treat it as a nullity, for that would be to maintain a contradiction or to justify at the same time two repugnant claims; both the nullity and validity of the contract.

Thus he who sues for damages for the fraud affirms the validity of the contract; 2 Shep. 364; 4 Denio, 554; or who knowingly accepts and retains any benefit under it; 7 Serg. and R. 63; 7 Watts. and T. 125; 28 Mo. 168; or who uses the property acquired as his own after the discovery of the fraud; 13 B. Mon. 172; 22 Alap. 249; or who does any positive act forgiving the fraud, or unduly delays claiming back his property or giving up what he received; 20 Barb. 493; 7 Blackf. 501; 4 Harris, 204; or accepts rent accruing after a known forfeiture of the lease; 6 B. & Cr. 519.

But where a conveyance is in fraud of creditors, the act of affirmance must come from them, and they may affirm by accepting dividends, under a fradulent assignment. 2 Barr. 479; 1 Rawle, 171; or by accepting payment of their debt or releasing them, or by advising another to buy under the fraudulent title. But affirmance here is not by becoming a party to the contract, but by putting oneself or others in such a position that one is no longer allowed to assess the wrong done to him. Nor can there be a recission of the contract by the party wronged in this class of cases, because recission can have place only between the parties to the contract and their privies.

A creditor cannot therefore confirm by merely doing nothing after the fraud is discovered. The contract itself must therefore be a nullity as against his rights, though by its performance it may be very far from being a nullity; for if he be not prompt in asserting his rights, it may dispose of all the property so that he can never reach it. It is therefore not absolutely void, but void only in relation to him, in so far as he asserts its nullity in time and form to do it effectively,

Contracts and acts that are absolutely void are contracts to do an illegal act or omit a legal public duty; usually bonds of married women; contracts in a form forbidden by law; official acts of persons having no recognised *de facto or de jure* title to the office; contracts to do an impossible thing, or that leave uncertain the thing to be done, and such like. These are absolutely void, because they have no legal sanction, and establish no legitimate bond or relation between the parties, and even a stranger may raise the objection; 2 Leon. 218; Moore 105. The law cannot enforce that the doing of which would be a wrong to itself or to public order.

To say that contracts tainted with fraud or any other kind of wrong against persons cannot be ratified, is to say that the law does not, as to those, allow men to forgive one another their trespasses, and to strike a great part of the law of ratification from our jurisprudence. Of course when two men make contract in fraud of creditors, neither of them can ratify it, for that would be to forgive their own sins. And so when the contract is in substance

or in essential form, illegal, neither party can ratify it, because the wrong done is against the State, and it only can forgive it. For this sort of wrong there can be no private ratification. A ratification that leaves the vice unpurged and unforgiven is itself null,

There is an inevitable distinction between those contracts which the law or the nature of things forbid to be enforced, and those where the person wronged by them may refuse to be bound, and the infirmity in each class is different, and therefore there is a necessity for different terms to express the two kinds of infirmity. Many have restricted the term *void* to the former class of contracts which are absolutely void, and adopted the term *voidable* as the predicate of the latter class which are only relatively void, though it does not exactly express this conception of the infirmity.

The terms void and voidable, as used in our books, would therefore seem to stand for absolutely or relatively void. That is *absolutely void*, which the law or the nature of things forbids to be enforced at all, and that is *relatively void*, which the law condemns as a wrong to individuals, and refuses to enforce as against them. It is void because absolutely or relatively invalid, or not binding. The French Juris Consults adopts this distinction of absolute and relative nullity.

Acts tainted with an infirmity may very well, and in very correct language, be called by some void, and by others voidable, because, regarded in different aspects, they are both. A contract may, for a time, be voidable as against one and void as against the others, whom it was intended to effect, voidable as against the parties doing wrong, and void as against the person wronged, or *vice versa*, voidable in favour of the person wronged, and void in favour of the wrong-doers; void as not binding to fulfil, and voidable after fulfilment, voidable, in fact, because void or not binding in right. And when the party wronged elects to avoid the act, it becomes binding on neither or rescind as to both. Voidable because one party is bound and the other or some other person is not. Bac. Ab. Tit., void and voidable, 4 Co. 123 b.

It is hardly proper to say that such acts are called voidable, only because the the avoidance does not become efficient and certain without the judgment of a court; for all *valid* rights, as well as all nullities may need this; or because there may be a necessity for a re-conveyance or an entry (where entry or livery is needed to vest or revest title,) or a direct action or bill in equity for a recission; for these are only forms in the process by which the nullity is adjudicated. The judgment does not annul the contract but declares or decides that it *is* null, that it has no inherent vice that renders it not binding, not obligatory, void. In this sense it is voidable, or avoidable, because void; just as a good contract is available or enforceable, because valid; and therefore void is not an improper term for such vicious contracts.

Yet, such a contract is not so void, when only relatively void, are to vitiate a title under it, as against a *bona fide* purchaser for value and without notice; or as to prevent the party intended to be injured by it renouncing the privilege which the law allows him of rejecting altogether, or from ratifying it and thus making it his own; and not so void as to make the wrong-doing party a trespasser for acting upon it, or as to be inconvenience or obstruction to the party seeking to be restored to his rights, especially if it has been in whole or in part performed, or as to need any other or further consideration than that which he is to receive or may retain under the contract by adopting it.

I have made the foregoing remarks with the hope of rendering some aid in resolving the confusion that prevails on this subject, and now I have to add the hope that they will be received with such caution as not to add to that confusion. Much of what I have said is needed in the further consideration of this case, and will aid in the next trial of it.

From the authorities above cited, it is apparent that the court was in error, in saying that the plaintiff was not chargeable with any care of the property in his possession if the sale was fradulent. Many of the cases show that he cannot rescind the contract unless he is able, without inevitable accident, to restore the property received in a condition reasonably approximate to that in which he received it, that is, allowing for the wear and tear, that are consistent with reasonable care, and that happen before the discovery of the fraud.

All the counts added by amendment to the declaration go for nothing, except that for money had and received, and we do not see that it is so repugnant to the special count as to forbid its allowance. The special count claims for a recission provided for by a contract, and the other for a recission because of the fraud, and this is something like a suit on a note, with a cautionary count for goods sold and delivered, being the consideration of the note, so that failing in the note, the party may claim for the goods given for it. We cannot say that this is wrong. One count for damages for the fraud and one for a recission *would* be repugnant; 4 Bos. and P. 351.

Nor was it erroneous in the court to say that the plaintiff may waive the action of tort for the deceit, and sue in assumpsit for the money which he paid on the contract, or which the defendant has received under it. But part of the consideration paid in this case was land and claims against other persons, and these cannot be recovered under a count for money had and received, unless, and only so far as the defendant had converted them into money. If he wants more than mere recission, he must sue for damages for the deceit. Recission is the act of rejecting a contract and all its consequences, and its nature is not changed by the intensity of causes that justify it, any more than the nature of a sale is changed by the magnitude of its consideration. If it were otherwise, these terms would be incapable of definition.

And many of the authorities referred to show that the court was also in error in saying that if the contract is tainted with fraud, it is incapable of confirmation or ratification without a new consideration. Ratification is, in general, the adoption of a previously formed contract notwithstanding a vice that rendered it relatively void; and by the very nature of the act of ratification, confirmation or affirmance (all these terms are in use to express the same thing) the party confirming becomes a party to the contract, he that was not bound becomes bound by it, and entitled to all the proper benefits of it, he accepts the consideration of the contract as a sufficient consideration for adopting it, and usually this quite enough to support the ratification. A mere ratification cannot, of course, correct any defect in the terms of the contract. If it is in its very terms invalid for want of consideration or for any other defect a mere ratification can add nothing to its binding force.

We are not convinced that there is any other error in the case. Judgment reversed and a new trial awarded.—*Legal Journal.*

GENERAL CORRESPONDENCE.

Law Students—Method of Examination explained.

To the Editors of the Law Journal.

Gentlemen,—As the *Law Journal* has long been the Court of Appeal for law students in their difficulties, I am tempted, although reluctant to give so much trouble, to ask its assistance in the following matter.

The large number of gentlemen who were refused certificates of fitness at the last examination (fourteen out of twenty-two applicants) would seem to suggest that there had been some change in the method of examining; or otherwise, that great indifference had been exhibited by gentlemen, in preparing themselves for the examination.

Under these circumstances, my request is that you will kindly, for the benefit of students (myself among the number) residing out of Toronto, state through the columns of the *Law Journal* what the present method is, in both the written and oral branches of the examination, and by what rules (if any) it is now decided whether the applicant shall pass.

It is rumored that the examination is much more strict than formerly, and that a new system of deciding upon the merit of each candidate to a certificate has been adopted.

Yours respectfully,

London, Aug. 31, 1863. Student-at-Law.

[The system adopted by the examiners is a very simple one. A maximum value—say 10 marks—is attached to each question in the printed paper. If ten questions, then the maximum on the whole paper would be 100 marks. If a question be only half answered, then the candidate receives only 5 marks for it, and so a greater or less number of marks in proportion to the merits of his answer. If upon the whole paper—say of ten questions—he has less marks than 50, or one half the maximum, he is not required to undergo an oral examination, and is in fact rejected. The real test is the paper examination. The oral examination is designed to detect and expose "cramming." The standard of examination, it will be thus seen, is not a severe one; and we are assured that it was not more so than usual during last term. —Eds. L. J.

Law Student—Articles—Date thereof.

To the Editors of the Law Journal.

Hamilton, 8th September, 1863.

Gentlemen,—Among the many questions you have kindly answered through the medium of your valuable journal, in reference to Articles of Clerkship, I have not noticed any which cover my case, viz.:—

My articles are dated on the 24th of October—the day upon which I began to serve under them—but through some oversight they were not executed until the 18th of November following, though I continued to serve under them from the date. The question is, will my time count from the date of the articles, or from the date of execution? If I was not serving under them from the day of the date, the time would evidently only count from date of execution, but as I was serving under them from date, I think the time should count from date of articles. There is this further difficulty: If my time only counts from date of execution, the five years will expire within the 14 days before term. If they operate from date, they run clear of the 14 days. Your answer to the above question, in your next issue, will greatly oblige

A Law Student.

[Your time will only count from the time the articles were executed. This is evident from the wording of the statute. It is necessary to state the date of execution in the affidavit, and this is for the purpose of showing when the students' time commenced to run.—Eds. L. J.]

Law Students—Articles expiring within fourteen days of Term—Remedy.

To the Editors of the Law Journal.

Kingston, September 19th, 1863.

Gentlemen,—An article in the last number of the *Law Journal* caused much disappointment to a great many students of the law—I mean that with regard to the necessity of articled clerks leaving their articles with the Secretary fourteen days before the term, in which they seek admission—by which a great many hard-working young men lose a term, when they can ill afford to do so. To many, therefore, the news you published in the issue before the last, namely, that the Benchers had dispensed with this necessity—was very welcome, and a great many nice things were said about the Benchers. You may imagine, therefore, the vexation that was felt when you were obliged, in your last number, to contradict this welcome news. As you remark, it is exceedingly hard that students, who seldom know anything about law terms before they commence their studies, should, after industriously working through their term of service, find themselves obliged to lose three months, merely because their articles expire four or five days before term, instead of fourteen.

Suffering under what, I can assure you, is a serious grievance, we naturally ask—why fourteen days? The answer is: The statute requires it. That is all very well; but the statute does not require that the period of service should have expired before the articles are left with the Secretary. What reason is there why all students should not share the boon granted to those who were articled before 1859,—viz., to file their articles fourteen days before term, with an affidavit of due service up to that time, and then serve the few remaining days, and make another affidavit of due service during those days? By this simple means the statute would be complied with, and a great substantial benefit conferred on a large number of hard-working young men.

Thanks are due to you, Gentlemen, for the liberality with which you have advocated the interests of law students, who regard your journal as a friend in need. Its suggestions have been adopted, in more than one instance, by the legislature, and can be distinctly traced upon our statute books. So, in this case, it is to be hoped they will be listened to by the Benchers, who are held in the highest admiration and esteem by the law students throughout the country.

Yours, truly, A Law Student.

[We hope that the Legislature will, during the present Session, interfere and remedy that which appears to us to be an arbitrary exaction without a corresponding benefit. In case such a bill be introduced, those students who stand in need of its provisions, should bring to bear upon such members of the Legislature as they can influence, all the influence in their power.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. Naef v. Mutters.

Summons, writ of—Order to proceed as if personal service had been affected—Common Law Procedure Act, 1852, *s.* 17.

A judge's order to proceed as if personal service had been effected under the 17th section of the Common Law Procedure Act, 1852, will not be set aside when it is shewn that the defendant carried on business in England when the writ was issued, though it is doubtful he was then actually in England.

In the matter of the arbitration between Swayne and Bovill, and White and Ponsford.

Award—Summary remedy to enforce—Set off, effect of.

If, upon a rule to pay money under an award, it appears from the affidavits in answer that there are reasonable and *bonâ fide*

grounds for believing that the party called upon to pay has set off to a larger amount, the court will not grant its summary remedy, but will leave the applicant to his remedy by action.

AMOS AND ANOTHER v. SMITH.

Bond—Surety—Cestui que trust—Statute of Limitations—Part payment or satisfaction of interest—Acknowledgment.

A bond given by a surety to a trustee under a marriage settlement, to secure payment of principal and interest to the husband.

Held to have been kept alive by receipts for interest, given by the wife, the *cestui que trust* and her husband, the co-obligor, although no money passed or was ever paid for such interest.

EX. *In re* THE SHERIFF OF ESSEX.

TERRELL v. FISHER, SAME v. SAME, SAME v. SAME.

Practice—Execution—Sheriff—Liability to attachment—Non-Execution of writs—Delay of execution.

The sheriff is not justified in delaying the execution of writs, whether of *ca. sa.* or *fi. fa.*, for the purpose of enabling the judgment debtor to carry on his business (even though the sheriff *bonâ fide* believes that by so doing he may the better enable the debtor to raise the money) and his doing so renders him liable to attachment.

EX. LEWIS v. PEACEY.

Apprentice—Absenting—Deed—Breach of covenant—Damage.

In an action on an apprenticeship deed against the father, the breaches being that the son absented himself, and that the defendant harboured him "a long time," the deed not having been cancelled.

Held, that the plaintiff could only recover damages for the absence up to the time of the writ issued.

EX. CURLEWIS v. BROAD.

Attorney and client—Service of process—Omission of indorsement—Liability to action.

The attorney retained to prosecute an action, and the person employed as process server, are liable to be sued by the client for damage caused through neglect in omitting to make the indorsement of service.

EX. BAYLEY v. GRIFFITHS.

Practice—Interrogatories—Plea of composition—Replication of fraud.

On a composition deed the plaintiff, having replied fraud, was allowed to deliver interrogatories to the defendant, tending to disprove the *bona fides* of the deed, and show it colourable.

EX. LACHERARME v. THE QUARTZ MINING COMPANY.

Practice—Inspection of documents—Interrogatories as to custody—Attachment—Public company—Liability of directors or officers.

In an action against a public company, an order for inspection of documents having been obtained, first against the company, and then against a director, and a rule for an attachment having been afterwards granted against the director for not obeying the order.

Held, that an affidavit, on his part, merely denying that at the time of the original order, and since then, the documents were not in his custody, possession, nor power, was not sufficient, and he was bound to state, so far as he could, all that he knew or believed of the custody of the documents in question, so as to enable the court to judge how far his non-production of it was excusable.

Q. B. DAVIES AND ANOTHER v. PRICE.

Arbitration — Submission — Authority of arbitrators — Waiver of, objection to.

Plaintiff and defendant were parties to a lease, containing a stipulation that any dispute respecting the construction of the lease, or any other matter connected with it should be referred to the arbitration of two persons, appointed by the parties, and their umpire. Disputes arising respecting the construction of a clause in the lease, and as to what damages, if any, the plaintiff was entitled to recover by reason of an alleged breach by the defendant of the covenant contained in such lease, according to the construction put upon it by the plaintiff, the plaintiff gave the defendant notice of his appointment of an arbitrator to determine such differences in dispute, in reply to which the defendant gave the plaintiff notice of his appointment of a person "to be arbitrator on his behalf, upon all differences of construction, but not otherwise of the lease." Upon the reference, the arbitrators decided in favour of the construction contended for by the plaintiff, and proceeded to consider the question of damages, the defendant objecting that he had no authority to do so, but continuing, under protest, to attend meetings, when the question was gone into, and cross-examining witnesses upon it. The arbitrators made their award, giving £2000 damages to the plaintiff. In an action upon the award, founded on an alleged submission pursuant to the indenture to determine the difference in dispute.

Held, that the arbitrators had exceeded their authority in awarding damages, and

Semble, that the defendant, having objected to their entertaining such question, did not waive his objections by attending subsequent meetings under protest; but that, at all events, the action founded upon the original submission, and not upon some new implied submission, could not be supported.

EX. FISH v. TINDAL.

Practice—Judgment—Satisfaction—Entry of, on registry.

The court, or a judge, will compel a plaintiff who has received satisfaction of his judgment, to execute the proper satisfaction process, in order to have the entries of it on the registers duly vacated. And when the judgment is vacated, the entries of it are, in effect, vacated.

C. P. BAILEY v. STEVENS.

Easement—Right appurtenant to land.

There cannot be a right appurtenant to the land of A. to take a profit on the land of B., which right is wholly unconnected with the enjoyment of the land of A.

EX. LONG v. BRAY.

EX PARTE WRIGHT.

Sheriff—Extortion—Interpleader—Possession money.

When a judge, in an interpleader summons, has ordered that the claimant, as a condition of relief, shall pay possession-money, the claim of an overcharge is not extortion within the statute, but a ground for relief on taxation of costs.

EX. SWAN v. THE NORTH BRITISH AUSTRALIAN COMPANY.

Mandamus to joint stock company—Registry of shares—Forged transfers.

The owner of shares in two companies having sent his broker transfers, in blank, for the purpose of transferring the shares in one company, and the broker having fraudulently retained some of them, and filled them up with the names and numbers of the shares in the other company (of which he had stolen the certificate for the purpose) and sold and transferred them, the court were equally divided as to whether the owner was entitled to recover them from the company.

EX. DUMERGUE v. RAMSEY.

Landlord and tenant—Fixtures—Execution creditor.

On a demise of a music hall, with a covenant by the tenant at the end of the term, to deliver up all things which, during the term, should be fixed or fastened to or upon the premises, and with a proviso that in case of an execution, &c., the demise should determine, and the landlord might re-enter.

Held, that chandeliers and seats, which could be detatched by merely unscrewing, without any injury to the premises, were tenant's fixtures, which could be seized by the sheriff under a *fi. fa.* against him, and to which the landlord could not entitle himself under the proviso by a re-entry after the seizure. But, *quære* whether gas pipes, or such seats or fittings as were meant for permanent use, as parcel of the premises, could be so taken.

Semble, that they could not.

EX. BUSH v. BRAVER.

Mandamus—Action of—Remedy against commissioners under local Act—Statute of limitations.

An action of mandamus under the Common Law Procedure Act, 1854, s. 68, is not maintainable against the clerk to commissioners under the local Act, for work, &c., done for them, where it is not alleged, and it does not appear that they became indebted as such commissioners, or otherwise than personally indebted; or that the work, &c., was in execution of the local Act, or that they would have power to levy rates for payment, so that there is any charge on the rates. And even if such an action is maintainable in such a case, it is barred by the Statute of Limitations when six years have elapsed since they became indebted.

EX. WOODS v. THEIDMAN.

Contract—Authority to accept against bill of lading—Forgery.

A customer of a bank having desired them to procure to be accepted bills of exchange, which a correspondent of his would draw against bills of lading he should send, and the bank having got their agents to accept the bills of exchange on a document which was sent to them as, and purported to be, the bill of lading referred to, but which was, in fact, a forgery—no goods having been shipped, and the transaction being a fraud on the part of the customer's correspondent.

Held, that they were entitled to recover from their customer the amount they had paid in respect of the bills of exchange.

CHANCERY.

V. C. S. IN RE REYNOLDS.

Practice—Order for costs—Attachment—Clerical error.

Where an order, directing a solicitor's bill of costs to be taxed, goes on to direct payment of what shall be found due within twenty-one days from the date of the certificate, no further order for payment is necessary and no subpœna for costs need be sued out. It is sufficient in order to found an attachment to serve a copy of the order properly endorsed, and a copy of the taxing master's certificate, on the party thereby certified to be liable to pay; and the circumstance that the party to receive it is a corporation makes no difference if they, under their common seal, authorize any one to receive. But if the copy of the taxing master's certificate which is served be not a true copy, however slight the error, the attachment will be discharged with costs.

M. R. EDGE v. BUMFORD.

Bill of exchange—Destruction by drawer—Bill for payment against acceptor—Jurisdiction.

Where A. drew a bill in his own favor on B., who accepted it, and A. then handed the bill to C. for value, but without indorsing it, and C. returned it to A. for indorsement, who, instead of indorsing it destroyed it, and afterwards became bankrupt:

Held, that a bill would not lie by C. against B., the acceptor, for payment of the amount of the bill, there being no privity between them.

M. R. MIGNAM v. PARRY.

Construction—Antenuptial articles—Postnuptial settlement—Lost instrument—Recital.

The terms of a postnuptial settlement, which purported to carry into effect antenuptial articles, were different from those which were recited to have been contained in such antenuptial articles. The antenuptial articles were lost, and no evidence could be adduced as to their terms, except the recital in the settlement.

Held, that in order to rectify a post nuptial settlement by antenuptial articles, the terms of the latter must be proved, and that in the absence of the articles the court must assume that the recital was incorrect, and must carry into effect the provisions of the settlement.

M. R. EVANS v. WYATT.

Settlement—Construction—Implied covenant—Representation.

By a settlement the settlor, after reciting that he was entitled to £7000, part of a distributive share in a certain estate, which was in course of administration in this court, and that it had been agreed that he should settle £5000, part thereof, for the consideration therein mentioned, assigned to the trustees £5000, part of such sum of £7000, upon certain trusts. The settlor died, and the distributive share in the estate under administration did not realize so much as £5,000.

Held, that the settlement did not amount to a representation to settle £5000 at all events, and that the estate of the settlor was not liable to make up the deficiency between the sum realized and the £5000.

V.C.W. RE THE PHŒNIX FIRE INSURANCE COMPANY, BURGESS & STOCK'S CASE.

Joint Stock Company—Extension of business—Power to bind shareholders—Policy—Return of premiums.

A joint stock company, established as a life assurance company, has no power to extend its business to marine insurance by resolutions to that effect, and the shareholders cannot be bound to an illegal course of proceeding by the receipt of circulars announcing the extension, even though the circulars are accompanied by a dividend, the result of such extension, the directors having no power to change their course of business in any mode less formal than a fresh deed of settlement signed by all the shareholders.

But although holders of policies thus illegally granted cannot recover upon them against the company under the Winding-up Act, they are entitled to a return of the premiums paid by them.

V. C. S. WETHERELL v. WETHERELL.

Will—Construction—Gift by implication—Widow's election.

A will contained a bequest in the following terms:—"My will is that the annual interest only of all the residue of my property, of whatsoever kind, &c., shall be divided into as many equal parts or shares as there may be children living and begotten of the body of T. N. W., of, &c., on the body of his present wife, share and share alike, as each of the said children come of age; and in case any one of the said children shall die without any children of their own lawfully begotten, then in that case his or her share of the said annual interest shall devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue comes into the hands of the grandchildren and great-grandchildren of the said T. N. W. and of his wife L. W."

The testator then gave to his wife an annuity of £28, on condition of her making no claim whatever upon the residue of his property; but if she made and persisted in any claim upon the residue of his property after his decease, the annuity should not be paid. And his will was that all casual property reverting to his estate, whether of leasehold or copyhold property or mortgages, policies of life assurance, ground rent, &c., that should fall in or be advisable to call in, should, as soon as the amount thereof was obtained, be immediately invested, and the interest received for the aforesaid children.

Held, that children living at testator's death were entitled to the annual interest as tenants in common for life, with remainder to the grandchildren *per stirpes*, as tenants in common as to realty, in fee as to personalty absolutely; shares of children dying without issue to go over, subject to same limitation as original shares; and that the widow was not put to her election between dower and the annuity.

V. C. K. BULL v. JONES.

Will—Construction—Gift of corpus with dividends and accumulations—Vesting—Gift over.

A testatrix leaves a leasehold house and furniture and personal estate to trustees upon trust, to sell, and convert, and invest in the three per cent. consols, and stand possessed of the proceeds on certain trusts, and as to the residue of the consols in trust as to one moiety, and of the dividends thereof to pay the same dividends as

and when received to her daughter E. M. for her separate use, without power of anticipation for her life, and after her decease upon trust as to the said moiety and dividends and accumulations thereof, until it shall be payable and distributable, to pay the same to the children of E. M. who should survive her, sons at twenty-one, and daughters at twenty-one or marriage, with benefit of accruer and survivorship, with a gift in precisely similar terms to her daughter M. E. and her children of the other moiety. And in case, at the decease of either of her said daughters, there should be no child or children who should have lived to attain a vested interest, then that moiety and the dividends and accumulations should be held in trust for the other of her said daughters and her children as before given. And if, before the death of the survivor of her said daughters, there should be no child or children of either of her said daughters, who should have lived to attain a vested interest, then the entirety of the two moieties and the dividends and accumulations to her nephews and nieces absolutely. E. M. having died after the will, but in her mother's lifetime, the testatrix, by a codicil, refers to that fact, declaring that the moiety, the gift of which had so elapsed, should go to her surviving daughter in the same manner as it would to E. M. if she had lived; and there was a gift to the only child of the deceased daughter for maintenance. The surviving daughter died, leaving six children, and the trustees paid the fund into court.

Held, that the event had not happened, under which the nephews and nieces would take by virtue of the gift over: that the interest of the grandchildren was not vested, but their shares must be directed to accumulate until the grandchild attained twenty-one.

L. J. HARTLEY V. SMITH.

Will—Directions as to care of children.

A testator, by his will and codicil, having expressed his wish that his deceased wife's sister should take charge of his children, and the guardian of her children having objected to her doing so:

Held, that unless a case were made against the propriety of the children remaining in charge of the party named in the will, the court would give effect to the directions of the testator.

V. C. K. SANDS V. SODEN.

Parent and child—Promise by letter—Obligation—Settlement.

A marriage being in contemplation, W. and S., the fathers of the parties, write to each other stating what they intend to do, and referring to there being a settlement. The marriage takes place some months after, and the settlement is executed in the Scotch form, containing no specific reference to the letters, except certain expressions which the framers of it in their affidavit state were intended as such reference, the letters not being made the subject of a covenant, out of delicacy to W., the father of the lady. W. by his will leaves certain property and a share in the residue to his married daughters; but subsequently, having transferred a sum of stock to the trustees of the settlement in question, by a codicil revokes these bequests, considering, as he expresses it, that he has done all he can be expected or required to do. On W.'s death, leaving considerable personal property, dissatisfaction is expressed on the ground that the promises in the letter written by W. in contemplation of the marriage have not been carried out; and a bill is filed praying that the parties taking under the settlement may be declared entitled to a share in W.'s estate, according to such promises.

Held, that the letter of W. was only a proposition of something to be afterwards carried out by a settlement; and as that instrument contained no recital of the letter, the expressions used in it, and in the will of W., were not sufficient to bind his estate; and that the bill must be dismissed with costs.

V. C. W. RE THE NATIONAL ALLIANCE ASSURANCE COMPANY. ASHWORTH'S CASE.

Assignor and assignee—Chose in action—Set-off.

Assignees of a chose in action take it, subject to any right of set-off which may be enforced against the assignor.

A. assigned to B. a debt due from the company of which he was director, for fees. Calls were made, and the company was subsequently wound up, and a compromise was made by the official manager, by which A. was released from all liability on his relinquishing all claims against the company.

Held, that B., who, although he had given notice of the assignment, had not sued for the debt before the calls were made, was bound by the compromise under which the official manager had set off the debt against A.'s liability for calls.

V. C. S. BAMFORD V. CREASY.

Breach of covenant—Forfeiture—Relief in equity—Terms.

In peculiar circumstances the court will relieve against forfeiture for breach of covenant to repair.

A landlord brought his action of ejectment, assigning breaches of covenant to pay rent, and to keep insured and in good repair. He recovered judgment by default, and entered into possession of the demised premises. The circumstances of the case were peculiar. On bill filed by the tenant, the court granted relief on terms.

V. C, W. STANLEY V. STANLEY.

Will—Issue—Parol evidence—False demonstratio.

Although the court will not grant an issue, nor admit parol evidence for the purpose of negativing or explaining the effect of words (which limit the effect of the devise) admittedly contained in the will at the time of execution, but alleged to have been inserted by mistake, it is at liberty in such a case to construe the will upon the whole scope and spirit of the instrument, taking into account the surrounding external circumstances of the property, and the knowledge possessed by the testator at the time of making his will; and where such external circumstances, as applied to the whole instrument, afford conclusive evidence that the actual letter of the will does not express the intention of the testator, then and then only can the court reject qualifying words of limitation, treating the plaintiff's indicated devise as unaffected by a defective addition.

V. C. S. KNIERIM V. SCHMAUSS, KOHLER V. KOHLER, FORNOFF V. SCHMIDT, BAUER V. BAUER.

Practice—Application to come in and prove after decree—Bill of review.

Where it is desired to obtain a rehearing, or have a decree or order altered, the proper course is by bill of review.

A decision of the court below, which was affirmed by the House of Lords, decided that certain persons were entitled to a fund as next of kin of an intestate, and the fund was paid into court to the credit of certain causes. Subsequently a petition in the cause was presented, praying that the petitioner might come in and establish her claim as next of kin, and that until she had had an opportunity of doing so the fund might not be dealt with. Petition dismissed with costs.

M. R. BARRY V. STEVENS.

Principal and agent—Bill for account—Author and publisher—Remedy at law—Jurisdiction.

Although this court has jurisdiction to entertain a bill for an account by a principal against an agent, it will not do so when the claim is a mere money demand, which may be perfectly well ascertained at law.

Semble, this court will entertain a suit instituted by an author against his publisher for an account, when the latter refuses to render an account altogether; but if such publisher renders an account showing a certain balance due from the author, for which he brings an action, this court will not, in the absence of fraud or mis-statement, allow a suit to be instituted by the author praying an account and an injunction, but will leave the question to be determined at law.

REVIEWS.

THE GENERAL ORDERS AND STATUTES RELATING TO THE PRACTICE, PLEADING AND JURISDICTION OF THE COURT OF CHANCERY FOR UPPER CANADA, with copious notes compiled from English and Canadian Decisions and a Book of Forms. By Richard Snelling, LL.B., student-at-law, and Frederick J. Jones, solicitor. Toronto: Henry Rowsell, Law Bookseller and Publisher, 1863.

In our July issue, we gave a cursory notice of this valuable work, and we think the profession may now be congratulated upon having before it that which it has so long needed, the

orders of the Court of Chancery in a consolidated form, with exhaustive notes upon each, dealing with upwards of 3,000 cases, and reducing this mass of decisions to a shape conformable to modern practice, rendered easy of reference by a very elaborate index. When we last noticed this work it was incomplete. It is now finished. The book is divided into three parts. Part the first, contains all the orders of the Court of Chancery, now in force, in a chronological as well as a consolidated form —the orders of the Court of Error and Appeal—and the orders rules and regulations of the Privy Council. To these orders have been appended, thoroughly exhaustive notes of English and Canadian decisions, and the notes themselves contain some clever dissertations on the subjects suggested by different sections of the orders, for instance, on the practice on "Security for Costs," pp. 5—10, on "Production of Documents," pp. 100–104, on "Receivers," pp. 169–175. A portion of the latter note we give at length:—

"A receiver duly appointed by the court is, from the moment of his appointment, to be considered as an officer of the court itself. He will be protected by it in the proper discharge of the necessary duties of his office, the possession of the receiver not being permitted to be disturbed without the special leave of the court; (*Brooks* v. *Greathed*, 1 J. & W. 178; *Angel* v. *Smith*, 9 Ves. 335;) and it will be considered as a contempt of court if any such interference takes place. (*Broad* v. *Wickham*, 4 Sim. 511; *Johnes* v. *Claughton*, Jac. 573.) The reason for this is explained by Lord Eldon in *Angel* v. *Smith*, *supra*. Even a receiver appointed to get in property, part of which he finds in the possession of another receiver, should not take proceedings to deprive the latter of such possession without the authority of the court. (*Ward* v. *Smith*, 6 Hare, 312; *Tink* v. *Rundle*, 10 Bea. 318.)

The general objects sought by the appointment of a receiver, are to provide for the safety of property, pending litigation, and until the hearing of the cause; (*Tullett* v. *Armstrong*, 1 Keen, 428;) or, during the minority of infants, to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or persons having immediate but partial interests therein. A defendant seeking to appoint a receiver before decree must file a cross bill. (*Grote* v. *Bury*, 1 W. R. 92.)

A receiver cannot be appointed before decree on the motion of a defendant, even though he be the co-executor of the plaintiff, and the bill charges that a receiver is necessary; (*Robinson* v. *Hadley*, 11 Bea. 614;) nor at the hearing, on the application of the defendant, unless prayed for by the bill. (*Barlow* v. *Gains*, 8 Bea. 329.)

A receiver will, in a proper case, be granted before answer; *Duckworth* v. *Traford*, 18 Ves. 283; *Aberdeen* v. *Chitty*, 3 Y. & C. Ex. 379;) and in case of urgency at the earliest institution of the suit; (*Meaden* v. *Sealey*, 6 Hare, 620; *Hart* v. *Tulk*, 6 Hare, 611; *Tanfield* v. *Irvine*, 2 Russ. 149;) and leave to serve notice of motion therefor will be given. Where the defendant sought to, and absconded for the purpose of avoiding service, a receiver was appointed on an *ex parte* motion for that purpose; (*Dowling* v. *Hudson*, 14 Bea. 423, where all the authorities are cited.) Otherwise, if the defendant has not absconded. (*Caillard* v. *Caillard*, 25 Bea. 512.)

As already stated a receiver may be appointed *before* answer, on motion and notice where fraud or danger to the property is apprehended, the affidavits of the respondent on shewing cause having been considered as tantamount to an answer for this purpose. (*Jervis* v. *White*, 6 Ves. 739.) It is unusual, however, to move for a receiver before answer; but in strong cases it has often been done. (*Vaun* v. *Barnett*, 2 Bro. C. C. 158; *Dawson* v. *Yates*, 1 Bea. 301; *Lloyd* v. *Passingham*, 16 Ves. 59; *Duckworth* v. *Trafford*, *supra*; *Metcalfe* v. *Pulvertoft*, 1 V. & B. 180; *Davis* v. *The Duke of Marlborough*, 2 Sw. 108; *Woodyatt* v. *Gresley*, 8 Sim. 180; *Tanfield* v. *Irvine*, 2 Rus. 149; *Meaden* v. *Sealey*, 6 Hare, 620.) Where, however, facts not founded on allegations in the bill are introduced into affidavits in support of an application for a receiver, the court will disregard them. (*Dawson* v. *Yates*, 1 Bea. 301.)

At any time *after* answer, if a sufficient case is made by the bill, and sufficient admissions contained in the answer, (*Boddington* v. *Woodley*, 8 Sim. 167,) an application for a receiver will be entertained. (*Lancashire* v. *Lancashire*, 9 Bea. 120.) In *Hiles* v. *Moore*, 15 Bea. 175, a receiver was appointed *after* decree on the petition of a defendant against his co-defendant, the application having been supported by the plaintiff, and a receiver having been specially prayed for in the bill. See also *Barlow* v. *Gains*, 8 Bea. 329; *Edgecumbe* v. *Carpenter*, 1 Bea. 171.

A receiver though not specially prayed for by the bill, may be appointed at the hearing; (*Osborne* v. *Harvey*, 1 Y. & C. Ch. 116;) or after decree; (*Bowman* v. *Bell*, 14 Sim. 392; *Brooker* v. *Brooker*, 3 Sm. & G. 475; *Cooke* v. *Gwyn*, 3 Atk. 690; but see *Fallows* v. *Lord Dillon*, 1 W. R. 101;) but not before decree. (*Pear* v. *Clegg*, 9 W. R. 216; 3 L. T. N. S. 648.)

It may be considered and stated as a general rule, that a receiver will not be appointed where the rights, as between the plaintiff and defendant, are doubtful, if the defendant has obtained the legal estate without fraud, and no case of danger as to the security it alleged. (*Lancashire* v. *Lancashire*, 9 Bea. 120.) Nor will the court interfere to take possession of property from a party who has it under a legal title, except in cases of presumed fraud or waste, (*Smith* v. *Collyer*, 8 Ves. 89,) and in these cases it proceeds against the legal title with reluctance, compelled by judicial necessity, the effect of fraud, clearly proved, combined with imminent danger to the property, if the possession should not be taken under the care of the court. (*Woodyatt* v. *Gresley*, 8 Sim. 180; *Mordaunt* v. *Hooper*, Amb. 311; *Stilwill* v. *Wilkins*, Jac. 280; *Huguenin* v. *Baseley*, 13 Ves. 105.)

The application, that a receiver may be appointed, must be made to the court; (*Grote* v. *Bing*, 9 Hare, App. i.;) unless to supply the vacant place of a receiver already appointed when, it seems, it may be made in Chambers. (*Blackborough* v. *Ravenhill*, 16 Jur. 1085; 20 L. T. 88.) A party to the suit may, by special leave, be appointed a receiver. (*Davis* v. *Barret*, 13 L. J. Ch. 304.)

The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree. (*Owen* v. *Homan*, 3 M. & G. 378.)

The court will sometimes grant a receiver *pendente lite*. (*Whitworth* v. *Whyddon*, 2 M. & G. 52.)

The note on the "Master's Office," pp. 184–205, is most complete, as also is that on "Costs," pp. 218–225.

Part the second, contains the book of forms of proceedings—and in this the authors have exercised excellent discretion as to the selection of the precedents they have introduced into their work, and have succeeded in confining within a moderate compass, a selection of forms, which will be found of great use to the practitioner in the conduct of a cause. To these forms have been appended very copious notes and observations—together with references to those parts of the practice and orders to which they are adapted. The index under the title "Forms," is so complete that the particular precedent can be found without any difficulty, while the several subjects of the index also contain references to the forms.

Part the third, contains all the statutes relating to the practice and jurisdiction of the Court of Chancery. These statutes have been collected from the mass of enactments contained in our statute book, the repealed clauses carefully expunged, and the reprint, we might say the consolidation, is most perfect.

The authors' note on the jurisdiction of the Court of Chancery, pp. 475–504, will be found of great value to the profession. Under the several heads of equitable jurisdiction they have digested, (not so far as we can learn from the head notes, but form apparently a most correct appreciation of each case) every reported case which is to be found in the nine volumes of Grant's Chancery Reports, and those of this journal. So that the practioner sees at a glance, in a digested and chronological form, all the decisions which have been recorded in the Court of Chancery under the several heads of its statutory jurisdiction.

The arrangement of the work is good, and the work itself will be found to be a convenient and trustworthy guide to chan-

cery practice—a text book to the student and a *vade mecum* to the practioner.

The thanks of the profession are due to Messrs. Snelling and Jones, who certainly have succeeded in doing much to systematize the practice of the Court of Chancery, to bring much order out of confusion, and to have conferred upon practitioners and suitors a great and lasting benefit. We do the authors only simple justice when we say they have produced a careful, clever, and able treatise, useful both to the legal student and practitioner.

The work is a credit to Canada. We may well be proud that we have among us, men capable of compiling so valuable a work, and a publisher able to send forth a work which so far as its typographical execution is concerned, would reflect credit on any law publisher in the Old World.

The Westminster Review, July, 1863. New York: Leonard Scott & Co., is received.

This number is the commencement of a new volume. It opens with a paper on The Growth of Christianity, which is attributed rather to accidental circumstances than to Divine origin. The writer contends that Christianity was the representative religion of the period, gradually embodying prevailing beliefs, or giving expression to the unuttered thoughts of men or stimulating their minds with some alluring imagination. In a word, he contends it was only a popular reform working with popular organs, and that its victory lay partly in its own strength, partly in the weakness of antagonistic religions, and partly in its own inherent imperfection. The second paper is a review of Eugene Sue's work, the Rival Races, and neither the author nor the translator receive much commendation; it is said that the English is generally bald, and frequently so wanting in idiom, that it reads like a school exercise. Stuart Mills' new work on Utilitarianism is next reviewed. This work is said to have been thrown off with great apparent ease, and yet to be full of subtle power, and in many places illumined by passages of clear and manly eloquence. Gamesters and Gaming Purses is the title of the fourth paper. The writer argues that to extirpate from the human breast a taste for gaming is impossible. While his facts are interesting, his arguments are cogent. The next paper is on Marriages of Consanguinity. The writer runs counter to the almost universally prevailing idea that such marriages are hurtful, and endeavours to establish that the idea rests rather on a kind of superstition than on really scientific considerations. The remaining papers are upon Saint Simon and his Disciples; The Naturalist on the River Amazon; Louis Blanc's History of the French Revolution; Poland; and Lancashire.

The Edinburgh Review, July, 1863.

This number is also the commencement of a new volume. It opens with a review of Mark Napier's Memorials and Letters, illustrative of the Life and Times of John Graham, of Claverhouse, Viscount Dundee. The author is severely handled. The work is described as a violent partisan pamphlet in three volumes. A wish is expressed that the "Memorials" may speedily go down to the depths of forgetfulness, leaving, when they disappear, a few of the letters which they contain floating on the surface; for so long as the "Memorials" are remembered, it is said, they will be a reproach to the author and the polite literature of the nineteenth century. Rev. John B. Pratt, the author of a work called "The Druids Illustrated," is in the next paper more politely but not less severely handled than Mr. Mark Napier. The milk of human kindness begins to flow in the next paper, wherein Mr. James Ferguson, who has recently published a History of the Modern Styles of Architecture, is much praised. The author, it is said, has traced, and worthily traced, the history of architecture in every country in the world, from its crude infancy through the several stages of its greatness and decay. Louis Blanc's History of the French Revolution is the subject of the next paper. The author is described as a man of eloquence, but of error. His work is not looked upon by its reviewer with much favor, but nothing very harsh is said either of him or of it. In the next paper, which is a critique on the late Sir George Cornewall Lewis' Dialogue on the Best Form of Government, well deserved praise is conferred upon the author, who for many years was a contributor to the *Edinburgh Review*, and who himself for some time superintended its issue. It is said of the deceased Baronet, that his pursuit of literature was free of the smallest taint of low or sordid motives; but that he did not on account of his love of letters abandon the path of politics, nor did that ruling passion impair his influence in Parliament or in the Cabinet. The remaining papers are devoted to Xavier Raymond on the Navies of France and England; the Sources of the Nile; and The Scots in France: the French in Scotland; and Lyell on the Antiquity of Man.

Godey's Lady's Book (Philadelphia: Louis A. Godey) for September is received. The embellishments of this number are, as usual, all that can be desired. The first is a line engraving of landscape and figures, called the "Happy Party." The second is a double extension colored fashion plate, containing five figures of great beauty. The third, which is an engraving on wood, is a humorous plate, containing two figures, and called "Raising a Beard." There are besides two plates, each representing the latest style of Riding Dress; front and back view, two plates, each representing a Dinner Dress; a plate representing a Morning Robe; and other plates of lesser importance.

APPOINTMENTS TO OFFICE, &c.

JUDGES.

The Honorable JOSEPH CURRAN MORRISON, heretofore a Puisné Judge of the Court of Common Pleas for Upper Canada, to be a Puisné Judge of the Court of Queen's Bench for Upper Canada. (Gazetted August 29, 1863.)

The Honorable ADAM WILSON, heretofore a Puisné Judge of the Court of Queen's Bench for Upper Canada, to be a Puisné Judge of the Court of Common Pleas for Upper Canada. (Gazetted August 29, 1863.)

CORONERS.

ROBERT A. CORBETT, Esquire, M. D., and CHARLES McDONALD CAMERON Esquire, M.D., Associate Coroners, United Counties of Northumberland and Durham. (Gazetted September 12, 1863.)

WARREN H. BLAKE, Esquire, M. D., and JAMES MOON SALMON, Esquire, M. D., Associate Coroners, County of Norfolk. (Gazetted September 12, 1863.)

ARCHIBALD A. RIDDLE, Esquire, M. D., Associate Coroner, City of Toronto. (Gazetted September 12, 1863.)

FREDERICK MORSON, Esquire, M. D., Associate Coroner, County of Lincoln. (Gazetted September 12, 1863.)

LEWIS J. GRUNDY, Esquire, and LAWRENCE McLAUGHLIN, M. D., Associate Coroners, County of Elgin. (Gazetted September 19, 1863.)

WESTON L. HERRIMAN, Esquire, M. D., Associate Coroner, United Counties of Northumberland and Durham. (Gazetted September 19, 1863.)

NOTARIES PUBLIC.

HOLLAND VINTON SANDERS, of Port Hope, Esquire, to be a Notary Public in Upper Canada. (Gazetted August 29, 1863.)

ALFRED RYLEY, of Manvers, Esquire, to be a Notary Public in Upper Canada (Gazetted August 29, 1863.)

JOHN J. B. FLINT, of Belleville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 29, 1863.)

WILLIAM AMBROSE, of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 19, 1863.)

WALTER R. MACDONALD, of Hamilton, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 19, 1863.)

CLERKS OF COUNTY COURTS.

FRANCIS ANDREW BERNARD CLENCH, Esquire, to be Clerk of the County Court in and for the County of Lincoln, in the room and stead of Johnson Clench, Esquire, deceased. (Gazetted September 12, 1863.)

TO CORRESPONDENTS.

"Student at Law"—"A Law Student"—"A Law Student," under General Correspondence.

DIARY FOR NOVEMBER.

1. SUNDAY ..... *22nd Sunday after Trinity.*
8. SUNDAY ..... *23rd Sunday after Trinity.*
11. Wednesday.. Last day for service for County Court.
15. SUNDAY .... *24th Sunday after Trinity.*
16. Monday ..... Michaelmas Term begins. Chancery Hearing Term commences.
20. Friday ..... Paper Day, Q. B.
21. Saturday..... Paper Day, C. P. Declare for Co. Court.
22. SUNDAY .... *25th Sunday after Trinity.*
23. Monday ..... Paper Day, Q. B.
24. Tuesday ..... Paper Day, C. P.
25. Wednesday .. Paper Day, Q. B.
26. Thursday .... Paper Day, C. P.
28. Saturday..... Michaelmas Term ends.
29. SUNDAY .... *1st Sunday in Advent.*
30. Monday..... Last day for notice of Trial for Co. Court.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

NOVEMBER, 1863.

ASSOCIATIONS FOR THE AMENDMENT OF LAW.

Law is a progressive science; but never can be said to be perfect. The aim of all is to make it as perfect as possible. The attempts to perfect it occasion amendments, which amendments should be carefully and considerately made, and made when necessary.

The ability to amend pre-supposes an acquaintance with the law to be amended—its working in regard to the relations of life. Law is a rule of action. Its imperfections are discovered by reason and experience.

None are more conversant with the law than those who are engaged in its administration. Men whose business it is to advise upon its application to the affairs of life, are those who not only discover its short-comings, but are most competent to suggest the requisite remedies.

Suggestions to be of real value ought to be systematized. Our law makers are not all lawyers. There is no officer whose special duty it is to suggest and superintend amendments of the law. Much, therefore, is left to spontaneous action, without the direction necessary to secure for the action the most beneficial effect.

Hence it is that associations for the amendment of the law are not only laudable but necessary. The aggregation of trained minds on subjects with which the minds are intimately conversant works an immense amount of good. No association of the kind has yet been formed in Upper Canada. Our object is to point out the working of the Association for the Amendment of the Law in the mother country, of which we so often hear, in the hope that the profession in Upper Canada may be stimulated to imitate it.

It is about twenty years since the "Society for Promoting the Amendment of the Law" was first established in London. Most of us are familiar with its name, and some of us are familiar with its working. Though still in its infancy, it has done the State good service. It is not composed simply of lawyers, but of eminent laymen. All work together for the common weal.

The declared object of the association is to promote, by discussion and otherwise, the careful and cautious improvement of the law of England in all its branches; to point out to the Legislature and the public the defects in the legal system; and to suggest appropriate remedies.

The association consists of honorary, corporate and ordinary members. Any gentleman may become an ordinary member. Chambers of commerce, town councils, law societies, and other bodies associated for any public object are eligible as corporate members. Honorary members are generally distinguished foreigners, or persons holding a judicial position, or former ordinary members who have left England. The officers of the association are a president, vice-presidents, treasurer, secretary, and eighteen managers. These compose the council by which the association is governed.

The veteran law reformer, Lord Brougham, is president of the association. Among the vice-presidents we find the Lord Chancellor, the Lord Chief Justice of the Queen's Bench, the Judge of the High Court of Admiralty, Vice-Chancellor Wood, Mr. Justice Keating, Sir Fitzroy Kelly, the Judge Advocate General, and others whose names are well-known to legal fame. Among the ordinary members we find the Attorney General, the Duke of Cleveland, Lord Ebury, Sir F. H. Goldsmid, Q.C., the Recorder of London, the Commissioner of the Court of Bankruptcy, the Lord Justice General of Scotland, the Lord Advocate of Scotland, several county court judges, queen's counsel, barristers, solicitors, members of Parliament, and other laymen. Among the corporate members we find the Belfast Chamber of Commerce, the Liverpool Chamber of Commerce, the Dublin Chamber of Commerce, the Glasgow Chamber of Commerce, the Manchester Chamber of Commerce, the Plymouth Chamber of Commerce, the Faculty of Procurators, Glasgow, the London Association for the Protection of Trade. Among the honorary members we find Chief Baron Pollock, Chief Justice Earle, the Right Hon. Joseph Napier, the Attorney-General of Hong-Kong, the Consular Judge at Constantinople, M. Troplong, M. Guizot, M. Berryer, and David Dudley Field.

There is an Annual Session, commencing in November and ending in July. During the session a number of general meetings are held for the reception of reports and papers, and for discussions.

If a member be desirous of bringing any subject before the association for consideration, he may do so in one of three ways:

1. He may read a paper to the association, having first obtained the consent of the council.

2. He may move a resolution on the subject at a general meeting.

3. He may address a communication to the council.

The association or council, as the case may be, will then, if they think fit, refer the paper, resolution or communication to a committee to consider and report thereon.

Every report of a committee is read at a general meeting. Papers and reports are printed by the association, and supplied gratuitously to every member. In order to facilitate its enquiries, the association has fitted up its rooms with an excellent law and parliamentary library, which is open at all hours of the day.

Ordinary and corporate members are elected by the association at its general meetings. The elections are by ballot, and one black ball in seven excludes. Honorary members are elected by the council, who report the elections to the general meetings for confirmation. Every member may propose an ordinary or corporate member by sending the name and address of the candidate for insertion, with the name of the proposer, in a book kept for that purpose. Every body entitled to corporate membership may, from time to time, nominate any number of its members, not exceeding five, as its representatives; and such representatives have all the rights of ordinary members, except that of being president, vice-president, manager, treasurer or secretary.

Ordinary members pay an annual subscription of two guineas, or a life subscription of ten guineas; corporate members pay an annual subscription of two guineas; honorary members are exempt from all payment. Both annual and life subscriptions are payable on the election of members, and payment in every case precedes membership. The first annual subscription is paid for the current year ending 31st October following election; and all future annual subscriptions are payable in advance on 1st November. Annual subscriptions of ordinary members are convertible into life subscriptions on payment of twenty guineas.

An annual meeting is held in June, appointed by the council, of which fourteen days' notice is given by the secretary to all the members. General and special meetings are held on days appointed by the association or council.

The president and vice-presidents are elected at the annual meeting, on motion, by show of hands, or (if a ballot be demanded at the time by at least seven members) by ballot. The managers are also elected at the annual meeting, by the members present, by means of voting papers. Any two members of the association may, by writing signed by them, nominate one ordinary member for election as manager; and every such nomination must be sent to the secretary eight days before the annual meeting. Managers are eligible for reëlection without nomination. Four days before the annual meeting the secretary is to send to all the members a list containing—

1. The names of the managers for the current year who have not given notice in writing of intention to retire.

2. The names of ordinary members nominated for managers.

A voting-paper containing the last-mentioned list is supplied to each member present at the annual meeting, who, after reducing the number of names to not more than eighteen, hands in the voting-paper to the secretary, within one hour from the commencement of the meeting, at the expiration of which time two scrutineers, appointed at the meeting, declare the results of the voting. In the event of an equality of votes, rendering the election as between two or more of the proposed managers uncertain, the result is determined by ballot.

The council, within fourteen days after the annual meeting, appoint the treasurer and the secretary for the current year.

Any vacancy occurring during the year in the office of president or manager, may be filled up at a general meeting (of which seven days' notice is sent by the secretary to all the members) on motion, by show of hands, or (if a ballot be demanded at the time by at least seven members) by ballot.

The association at the general meetings appoint standing committees, and also special committees to consider and report on specific subjects of reference.

Such is the working of the association. It is simple, and yet sufficient for all practical purposes. And we are glad to say that year by year the influence of the association is extending and being extended. Its discussions are marked with earnestness and ability. During the past year fourteen general meetings were held; eleven papers upon subjects of importance were read and considered, all of which were printed and circulated; two reports, prepared by committees specially appointed, were received, one of which, after careful discussion, was formally adopted by the association. Owing to pressure of business it was found necessary, upon more than one occasion, to hold meetings, and to have more than

one paper read on the same evening. Several special committees are now pursuing their special inquiries. Twenty-seven new members were enrolled during the year. Some of the recently elected members are influential public bodies.

There are at present twenty-nine honorary members and two hundred and ninety-six ordinary members. The latter includes eleven corporate members. This feature is a novel one; and we must say we approve of it. Corporate members, representing commercial, manufacturing and educational interests, are specially qualified to render important service to such an association. The bodies whom they represent share, through their deputies, in the deliberations of the association, and are, at the same time, in a position to make valuable communications upon subjects of interest. The association, whose object is the good of the people, is thus mediately brought into connection with the people, and by a species of reflex action the object of the association is directly advanced.

We cannot say too much in praise of such an association. Its conception is laudable, and its existence, as we have already said, is in a civilized community a matter of necessity. We trust that ere long the people of Upper Canada will give a proof of their advanced state of civilization by forming and successfully working an association of the kind. If we have done or said anything to hasten the movement our labor will not be in vain. We can only suggest; others must act. We feel confident that if either encouragement or support be needed from the parent association, the same shall not be wanting.

PROTECTION OF SHEEP.

An act of last session, having for its object the protection of sheep, effects a strange alteration in the substance of the law, to which we would direct attention.

The act contains seven clauses, besides one limiting its application to Upper Canada.

Section 1 enacts that "It shall be lawful for any person to kill any dog in the act of pursuing, or worrying, or destroying such sheep, elsewhere than on land belonging to the owner of such dog."

Sections 2, 3 and 4, provide, that on complaint in writing, on oath, to a justice of the peace, that any person "owns or has in his possession a dog which has within six months worried and injured or destroyed any sheep," such justice may proceed summarily with the matter, and, in case of conviction, may make order for the killing of the dog, and, "on defaulit, may in his discretion impose a fine upon such person not exceeding twenty dollars with costs." Section 5 enacts that no conviction under the act shall be a bar to an action for the recovery of damage done to such sheep; and section 7 enables the defendant in any action for killing a dog under the 1st section, to plead the general issue, and give the act and the special matter in evidence.

The above sections are so worded, we fear, that much doubt will arise as to their true meaning, and some difficulty in proceeding under them; but we do not purpose examining their clauses now. It is with sec. 6 that we are more particularly concerned. It is as follows:—"It shall not be necessary for the plaintiff in any action of damages for injury done by a dog to sheep, to prove that the defendant was aware of the propensity of the dog to pursue or injure sheep, nor shall the liability of the owner or possessor, as aforesaid, of any dog in damages for any injury done by such dog to any sheep, depend upon his previous knowledge of the propensity of such dog to injure sheep."

This, as regards injuries, &c., to sheep by dogs, completely alters the existing law, which is thus laid down, namely, that the owner of domestic animals not necessarily inclined to commit mischief, is not liable for any injury committed by them, unless it can be shown that he previously had notice of the animal's vicious propensity—in other words, in an action against the owner of a dog, for an injury committed by such dog to the person or to personal property, the rule of law is that the *scienter* must be alleged and proved. As the act comes at once into force, and contains nothing express to show that it is not intended to have a retrospective effect, there is more necessity for drawing attention at once to the above provision. The alteration in the rule of law seems to us of doubtful advantage, and exposes every farmer in the community to the danger of loss without misconduct on his part. True, it may be said, why should my neighbour's dog injure my sheep with impunity? But every farmer must keep a dog for his own protection, and dogs are not by nature inclined to kill sheep—in fact not one dog in a thousand will do so, and the rule seemed reasonable enough that the owner should not be held liable unless a mischievous propensity developed itself. Blame can only attach to the owner of a dog when, after having ascertained that the animal has propensities not generally belonging to his race, he omits to take proper precaution to protect the public against the ill consequences of those anomalous habits.

It seems strange that the Legislature should do away with a wholesome rule as respects *sheep* only—afford protection to sheep, and not to men. Thus, if a dog worries sheep, it is *not* necessary to prove that the owner "was aware of the propensity of the dog to pursue or injure sheep;" but if a dog grievously bites and wounds a grown-up person or a child, the disposition of the animal to do so and the *scienter* are still the gist of the action.

It is the *knowingly* keeping a dog *accustomed to bite mankind*, that constitutes the liability in case any person

is injured by such animal. And in an action for an injury alleged to be done by a ferocious dog of the defendant, known by him to be of that character, it was held, as most of our readers know, that the plea of "not guilty" put the *scienter* in issue, as well as the *character* of the dog.

Now, without gainsaying the fact that there is a large amount of money invested in sheep, and that a sheep is a very useful and valuable animal, and withal a very gentle creature, we must think that the Legislature, in its anxious care to protect sheep and lambs against ferocious dogs, has lost sight of protection for women and children, to say nothing of men, who might be supposed to be able to protect themselves.

ENGLISH BENCH AND BAR.

Mr. Sergeant Pigott has been appointed a Baron of the Court of Exchequer.

Sir Roundell Palmer, Q.C., has been appointed Attorney-General, in the room of Sir Wm. Atherton, Q.C., resigned, owing to ill health.

The new Solicitor-General is R. P. Collier, Q.C. His appointment is well received by the profession.

SELECTIONS.

THE COSTS OF ACTIONS IN THE SUPERIOR COURTS OF COMMON LAW *

Probably no subject with which a lawyer is professionally brought in contact, is so unattractive and even distasteful to him as that of costs. Still its importance is perceived almost without an effort of thought. The expense of bringing and sustaining an action for the vindication of a personal right may be so great, or so capricious in reference to its incidents, as to make recourse to the established tribunals too perilous for the ordinary citizen, and thus, with the highest intelligence and integrity on the Bench, it would happen that the administration of justice between man and man would practically be effected, if at all by extremely rude expedients. Of course this supposition is extreme and beyond all chance of realization, at least in this country, but it serves to point out the kind of impediment which an ill-adjusted system of imposing costs throws in the way of the efficiency of otherwise perfect judicial courts.

Persons unacquainted with the details of legal practice naturally enough imagine that there can be no difficulty in the matter. A. has a claim against his neighbour B, to enforce which he is obliged to seek the aid of a Court of Law. He succeeds in his suit: as a matter of course, in addition to the claim which he has thus established against B, he ought to receive from him reimbursement of the expenses to which he has been driven for the purpose of vindicating his right. Or on the other hand, he fails; it is equally plain that he ought in this case to pay B. the money which resistance to an unfounded claim has entailed upon him.

This theory is, however, little accordant with the facts of practice. Under hardly any circumstances does the award of costs refund to the successful party the whole of the money, which he has been forced to expend in the prosecution of his suit, and not seldom is it that he even fails to obtain this award. How far it may be possible or expedient to give the suitor complete relief in this respect is a grave question not readily to be answered, but it may be safely asserted, that the rules affecting costs in our common law courts are in a most unsatisfactory state of intricacy, and that any principle which may lie at the root of them, is almost concealed from the explorer amid the entanglement due to the combined operation of discordant Acts of Parliament.

A single example will illustrate the condition of our law of costs:—

An action for slander was tried at the Summer Assizes of 1861, wherein the jury found a verdict for the plaintiff, damages 1s.; it subsequently became a question for the decision of the Court of Common Pleas, whether or not the plaintiff was, under these circumstances, entitled to his full costs. The Court adjudged only 1s., and Erle, C. J., gave the reasons for this judgment in the following words:—"I think that the 3 & 4 Vic., c. 24 does not conflict with the statute of James, so as virtually to repeal it, but that both statutes may stand together." [His lordship read the 2nd section of 3 & 4 Vic., c. 24.] "I give that section its full application. The plaintiff in an action for slander has recovered less than 40s.; he is, therefore, to have no costs unless the judge certifies. The judge has certified, and the question is as to the effect of his certificate. I am of the opinion that the effect of it is to take the case out of the previous enacting part of the section, and the plaintiff then has the same right to costs as he would have had supposing the 3 & 4 Vic., cap. 24 had never passed. Then, by the Statute of Gloucester, he would have been entitled to his full costs unless that right was qualified by any subsequent right. His right is qualified by the statute of James, which says that in an action for slanderous words, where the damages are under 40s., the plaintiff shall recover only so much costs as damages (*Evans* v. *Rees*, 30, L. J. C. P. 16, L. O. 9, C. B. n s. 391).

Thus, after hearing a most learned and solemn argument, four of the ablest judges in Westminster Hall felt themselves obliged to take the case out of the operation of a Statute of Queen Victoria, which forbade costs, then to remit it to that of a Statute of Edward I., which gave FULL costs, and finally to put it under a statute of James I., which had the effect of giving the fortunate plantiff one shilling costs! Where can be found any satire upon our system of legal procedure more severe than that which is afforded by this matter of fact piece of burlesque? Surely the time has come for the well considered interposition of the legislature; and as all the law on the subject is the creature of statute, a very legitimate field for consolidation and amendment lies open to the reformer.

It is not difficult to give a tolerably consise, yet comprehensive history of the various enactments, which are at present in force.

Previously to the reign of Edward I. costs of suit were not it seems, given *totidem verbis* to the successful party. Lord Coke (2 Inst. 288) remarks, "by this it may be collected that justice was good and cheap in ancient times." However his lordship's inference is not inevitable, for there is little doubt (Reeve's Hist. Eng. Law, 400) but that it was then the practice for juries to form an estimate of the costs, and to include the sum so arrived at, in the amount of damages awarded by them; moreover, if this estimated sum ultimately proved insufficient to cover the actual costs, the courts used to award *increased costs*. Still wherever, as in real actions, the verdict of the jury did not take the form of damages, no costs could be recovered.

To put things on a more satisfactory footing, the 6 Edw. I., c. 1, commonly known as the Statute of Gloucester, was passed. The first section of this Act gave damages in certain real actions to which they had not before been incident; and the 2nd section provided, "that the demandant may recover against the tenant the costs of his writ purchased together with the

* A Paper by Mr. J. B. Phear, read at a General Meeting of the Society, June 8th, 1863, and ordered to be printed.

damages above said; and this act shall hold place in all cases where the party is to recover damages." The words "costs of writ purchased," were construed to mean all legal costs of suit, (2 Inst. 288), and with this interpretation, the sentence which follows them was held to confer upon the plaintiff in any action whatever, provided he recovered damages no matter how small, a strict right to his full costs of suit, in addition to those damages.

This statute still constitutes the only foundation on which a plaintiff can have his right to costs. It does not, however, embrace every case in which a plaintiff gains his suit; for it has been determined in a somewhat narrow spirit, that where the plaintiff, as in the case of a common informer suing for a penalty, has no right of action vested in him previously to the action being brought, he does not "recover damages" within the meaning of the Statute of Gloucester, and therefore is not included within its provisions, (Pilfold's Case, 10 Rep., 116 a.; *Tyte* v. *Glode*, 7. T. R. 267, and the *College of Physicians* v. *Harrison*, 9 B. & C. 524).

Notwithstanding that relief was thus early given to a successful plaintiff, no measure of it was extended to a defendant until the reign of Henry VIII., when it was enacted (23 Hen. VIII., c. 15), that in certain specified actions only, after non-suit or a lawful verdict against the plaintiff, the defendant should have judgment to recover his taxed costs against the plaintiff. Much of the remaining inequality between the two parties was removed by the 4 Jac. I., c. 3, which gave costs to the defendant, successful by nonsuit or verdict, "in all actions whatsoever, wherein the plaintiff might have costs (if in case judgment should be given for him.") There still remained the disability to recover costs imposed by the peculiarity of the wording of 23 Hen. VIII., c. 15, upon defendants in actions brought by executors and administrators in their representative character. This was taken away by the 31st section of 3 & 4 Wm. IV., c. 42, subject to the power of the court or a judge to otherwise order. And finally, the 8 & 9 Wm. 3, c. 11, s. 1, enlarged by 3 & 4, Wm. 4, c. 42, s. 32, placed one of several defendants, who obtains a verdict, or against whom a *nolle prosequi* is entered, in the same position as if the verdict had been in favour of all defendants alike, reserving power to the judge at the trial to relieve the plaintiff from the costs of such defendant, by certifying upon the record that there was reasonable cause for making him a defendant in the action.

So far legislation was confined to dealing with the costs of litigating matters of fact. But either party might defeat the other on a point of law; either the plaintiff or defendant, conceding his opponents facts, might demur to the legal results sought to be deduced from them; and if he succeeded in maintaining his position on that ground, certainly he had as good a right to be reimbursed his costs of suit. as if he had gained his point by disproving allegation of facts. This was at last recognised by the legislature, and the 8 & 9 Wm. III, c. 11 (already referred to), developed by 3 & 4 Wm. IV., c. 42, s. 34, gave the costs of a demurrer to that party in the action in whose favour it was determined.

Thus at last by the united force of the several statutes which have been quoted, and which range in date from the reign of Edward I., to that of William IV. (a period of 555 years) is established, with a still imperfect generality, the right of the successful litigant to the costs, which his adversary has obliged him to incur; namely:—

The right of a PLAINTIFF, whenever he *recovers damages* (excepting he be an informer), and whenever he succeeds on *demurrer*.

The right of a SOLE DEFENDANT, whether one or several persons, whenever he obtains a *non-suit* or *verdict*, in those cases where a successful plaintiff would get costs, subject as against an executor or administrator to the power of the court or judge to otherwise order; and whenever he succeeds on demurrer.

The right of ONE OF SEVERAL DEFENDANTS (in case all do not succeed), whenever he obtains a *verdict* or a *nolle prosequi* is entered against him, subject to the power of the judge who tried the cause, to certify that he was properly made a defendant.

Might not the whole of this series of enactments be advantageously swept away, and a more complete and satisfactory result attained by one or two sections of a consolidating statute?

So much for the costs of the *cause*. The costs of the *issues* are regulated by an entirely different set of enactments.

It might be imagined, from the terms in which the earlier statutes are couched, that the dispute between the plaintiff and defendant, as it appeared in the pleadings, must necessarily be single-headed. And yet this was not strictly the case. A plaintiff could always embrace several counts in one declaration, although the defendant was restricted to one answer to each of them with the additional privilege of being able to divide into parts any count which admitted of being so treated, and then to plead separately to each part. Thus it frequently happened that, by the act either of the plaintiff or of the defendant, or of both, that a plurality of issues between them arose for determination in the same action. If all these resulted in favour of the same party, the state of things was practically the same as if there had been only a single issue, and no difficulty on this account presented itself in the application of the foregoing statutes relative to costs. But it was quite otherwise when some of the issues were found for the plaintiff, and the remainder for the defendant. In the end, the Courts of Queen's Bench and Common Pleas appear to have decided (*Bridges* v. *Raymond*, 2, W. Bl., 800, and *Postan* v. *Stanway*, 5, East 261), that if the plaintiff succeeded on any *one* of the issues thus raised which circumstance gave him a verdict in a distinct cause of action, he was entitled to the costs of the whole cause including in the Common Pleas the costs of the count on which the defendant succeeded, without any deduction on account of those issues on which he had failed, and that the defendant had no right to any costs unless he defeated the plaintiff on all the issues. In the Exchequer, on the contrary, the practice (for there are no reported decisions on the point) showed a more liberal spirit of interpretation; and when the judges, under the powers given them by the 11, Geo. IV., and 1, Wm. IV., c. 70, sec. 11, made the new rules for securing uniformity of practice in the superior courts, they adopted the practice of the Court of Exchequer in this respect declaring that "no costs shall be allowed in taxation to a plaintiff upon any counts or issues upon which he has not succeeded: and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs," (Reg. Gen. H. T. 2, Wm. IV., r. 74.)

A *nolle prosequi* entered upon any counts or any part of a declaration, was put on the same footing as a verdict for the defendant, by 33 sec. of 3 & 4, Wm. IV., c. 42.

The disability under which a defendant laboured of not being able to plead more than one defence to the same cause of action, was for the first time removed by the 4 sec. of 4 Anne, c. 16, which empowered the defendant in any action, with the leave of the court in which it was brought, to plead as many several matters thereto as he should think necessary for his defence. But in order that this multiplication of issues might not be made the means of vexing a defeated plaintiff with unnecessary expenses, the 5th section of the same act gave him the costs of such of these double issues as he was fortunate enough to win at the assessment of the court, except in the case of a verdict on an issue of fact, when the judge who tried it certified that the defendant had reasonable cause for raising it. What result this construction of the statute (arrived at in *Richmond* v. *Johnson*, 7, East 583) produces in practice is not always ascertainable. *Callender* v. *Howard*, 10, C. B. 302, is one of the last reported cases upon the point

and there the learned arguments of Mr. Gray and Mr. Willes was perfectly appalling by their length, by the multitude of cases quoted in them, and the ingenuity with which these are applied. Nearly at the same time, the Court of Exchequer decided in *Howell* v. *Rodbard*, 4 Ex. 309 in direct opposition to the judgment of the Court of Common Pleas in *Callendar* v. *Howard*.

Surely at this stage the legislature might well have interposed to substitute something like method and simplicity in the place of the mass of statutes which have been described. The legislature did step in, and by the 81st section of the Common Law Procedure Act, 1852, after empowering both the plaintiff and the defendant with proper leave to plead double, provided that the "costs of any issue either of fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party whatever may be the result of the other issue or issues." A most inadequate enactment and one which has already been held in *Cazneau* v. *Morrice*, 2 Jur. n. s. 139, to apply only to the issues raised in double pleading; in fact it only explains, and does not even repeal the statute of Anne. We have therefore one more Act of Parliament added to our list of those which regulate costs, with very little corresponding benefit.

So far we have been concerned with the general rights to costs—

1st. Of the party who has been successful in the whole suit.

2nd Of the party who has succeeded on one or more of the counts or causes of action, but not on all the counts or causes of action involved in the suit.

3rd. Of the party who has been successful on an issue or issues, but not on the cause of action out of which it arose.

We now come to the class of enactments passed for the purpose of limiting this general right.

It was discovered at an early period that the indiscriminate award of costs to the successful party tended to encourage the bringing of actions on frivolous, though technically rightful grounds, and also favoured the vexatious choice of the higher and more costly in preference to the inferior tribunals. To check this evil the 43 of Eliz. c. 6, was passed which declared that, "if upon any action personal to be brought in any of her Majesty's Courts at Westminister, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, in the same court shall not amount to the sum of 40s. or above, that in every such case the judges and justices before whom any such actions shall be pursued shall not award for costs to the party plaintiff any greater or more costs then the sum of the debt or damage so recovered shall amount unto, but less at their discretion."

To explain this enactment it should be remarked that the County or Sheriff's Court of that time had exclusive cognizance (6 Ed. 1, c. 8 *Kennard* v. *Jones*, 4 T. R. 495), of all (see authorities in Com. Dig. County C. 8) personal actions (not being for trespass *vi et armis* or for lands of freehold, &c.) under the value of 40s.; and therefore it became a common device for the purpose of taking the case out of the inferior jurisdiction to lay the damages in the declaration at an amount above that sum. The framers of the statute struck at the root of this mischief by making the certificate of the judge, to the effect that the extra claim was not *bona fide* made, the instrument of taking away the right to costs: in effect they said to the plaintiff, "If you will harass your opponent by coming to the courts at Westminster, when you ought to bring your suit in the County Court, you shall forfeit the right to full costs which success would otherwise give you." It is worth remarking that this statute was not acted upon for 150 years, until C. J. Willes, in *Whith* v. *Smith* (cited in 2 Str. 1232), for the first time gave the depriving certificate, that action being represented as a very paltry one brought for removing sand from Hunslow Heath.

In the following reign it was thought necessary to do something still more stringent towards repressing frivolous actions for verbal defamation, and accordingly the 21 Jac. c. 16, s. 6 enacted, that in all actions for slanderous words, wherever tried, if the jury should assess the damages under 40s., then the plaintiff should recover only so much costs as the damages so assessed amount to, any law, &c., to the contrary notwithstanding.

So things remained in this respect until the 22 and 23 Car. 2, c. 9 was passed, which statute, by the construction of the judges (3 Wils. 322: *Marriott* v. *Stanley*, 1 Man. & Gr. 853), was limited in its application to actions of trespass *quare clausum fregit*, together with the personal actions excluded from the operation of the 43 Eliz. c. 6—namely, actions of assault and battery and those in which title to land came in question. In its treatment of these it differed materially from its great predecessor; for it laid down that if the jury gave less than 40s. damages the plantiff should not recover more costs, than the damages so found should amount to, unless the judge certified that an assault and battery was proved, or that title to land was chiefly in question. This section of the statute is not now in force, having been expressly repealed by the 3 & 4 Vic. c. 24; but it is necessary to refer to it because of its supposed connection with the 8 & 9 Wm. 3, c. 11, of which Act sec. 4 says, that "in all actions of trespass in any of his Majesty's Court of Records at Westminster wherein at the trial of the cause it shall appear and be certified by the judge under his hand, upon the back of the Record, that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit, any former law to the contrary notwithstanding." It has been held, in *Bowyer* v. *Cook*, 4 C. B. 236, that this merely operated to mitigate the stringency of the 136th section of the 22nd and 23 Car. 2. c. 9, and therefore that the repeal of the latter annihilates both. Obviously the words of the section have no meaning if there was nothing antecedent to them which operated to take away costs in cases where a certificate of wilful and malicious trespass might possibly be given. But were the Court of Common Pleas strictly right in saying the 136th section of the 22 and 23 Car. 2. c. 9, was the only enactment which had this operation? A verdict for less than 40s. in an action for trespass, *quare clausum fregit*, where title to land was not in question, followed by the certificate, pursuant to the 43 Eliz. c. 6, would have the same depriving effect. Of course, if the giving of the certificate is entirely discretionary with the judge as is probably the case, the above decision is practically correct; but still this very indirect mode of repealing an express statute is extremely unsatisfactory.

The 3 & 4 Vict., c. 24, is the only act relating to our present topic which remains to be considered, It repealed, in express terms, the 22 & 23 Car. II., c. 9; sec. 136, and impliedly we must assume, the 8 & 9 Will. III., c. 11, sec. 4; it also took actions of trespass and trespass on the case out of the operation of the 43 Eliz., c. 6. Having done this, the 2nd section enacted, that in actions of trespass on the case, where the plaintiff recovered less damages than 40s., he should have no costs whatever, unless the judge or officer who presided at the trial should certify that the action was really brought to try a right, besides the mere right to recover damages for the greivance complained of in the action, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious. And the third section provided, that nothing in the Act should deprive the plaintiff of his costs in an action for trespass committed by the defendant, after notice not to trespass.

Wilde, C. J., in *Bowyer* v. *Cook*, concisely summed up the effect of this most difficult statute by saying, that "a plaintiff who recovers less damages than 40s., in an action of trespass or trespass on the case, is entitled to no costs unless the judge shall certify that the action was brought to try a right, or that the trespass or grievance in respect of which the action is brought, was wilful and malicious, except where the defendant has had a previous notice not to trespass."

Where there has been this notice, which must be made to appear on the record by suggestion, if necessary, in which case it may be remarked that the costs of an issue on the suggestion, would not fall within any existing enactment, (*Norwood* v. *Pitt*, 5, H. & N. 801), as the Act then does not apply, and no other act operating upon actions of trespass remains, the plaintiff is remitted to his full right under the Statute of Gloucester.

Again, where a certificate has been given under the 2nd section the Act is also rendered inoperative, (*Evans* v. *Rees*, 30 L. J. C. P., 16), and the plaintiff either falls under the scarcely more merciful restraint of the 21 Jac. 1, c. 16, sec. 6, which only gives as much costs as damages, or obtains his full costs.

In all other personal actions, excepting trespass and trespass on the case, where the verdict is for less than 40s. damages, the 43 Eliz., c. 6, still governs the right to costs.

So much for the present state of the legislation upon costs, as defined by the time-honoured quantum of 40s. damages. It certainly is not so explicit as to render an attempt at simplification undesireable, even if there should be reason for continuing the existence of a limiting point, which has long ceased to have any practical significance.

Let us pass on to the next set of limiting statutes, namely, —the County Court and cognate Acts.

The modern County Court was established in 1846, by the 9 and 10 Vict., c. 95, and the 58th sec. of this act limited their jurisdiction, in respect of the amount in litigation, to cases where the debt or damage claimed is not more than £20. Over some of the cases within the class defined by sec. 58, characterised by certain circumstances of locality mentioned in sec. 128, the county courts were given a jurisdiction concurrent with that of the superior courts, while over the remainder, the county courts obtain exclusive jurisdiction (to use a somewhat incorrect but convenient adjective). Then following the example set by the 43 Eliz., c. 6, though not imitating its simplicity, the 129 sec. proceeded to exclude from the superior courts, on pain of losing costs, not all cases within the new county court jurisdiction, nor even all within its exclusive jurisdiction, but all contracts within the latter, together with so many torts within it as are defined by the circumstance, that the damages do not amount to more than £5.

Why the legislature should have thus attempted to separate actions for contract and tort, it is very difficult to conceive; the more so as they did nothing of the kind when fixing the superior limit of the county court jurisdiction. The learned judges of the Court of Queen's Bench lately, in *Tatton* v. *The Great Western Railway Company* (6 Jur., N. S., p. 800), expressed very strong opinions against the reality of this distinction; and that case illustrated in a remarkable manner the practical difficulty of observing it.

The latter part of the 129th sec., gave costs as between attorney and client to the defendant, in certain cases where the plaintiff did not obtain a verdict, unless the judge certified to the contrary.

This statute expressly left untouched, the question of costs in cases belonging to the concurrent jurisdiction, and impliedly in the case of judgment by default; it also provided, by judge's certificate, for a mitigation of the penalty in the other. However, as there was much practical inconvenience lying in the way of parties who wanted to avail themselves of these advantages, the provisions of this Act upon this point were superseded by the 13 & 14 Vic., c. 61.

The 1st sec. of the 13 & 14 Vict., c. 61, increased the higher range of the county court jurisdiction to £50, but it made no alteration in the £20 and £5 as determining the right to costs in the superior courts, so that cases triable in the county courts may now be separated into three classes:—

First, Those whose circumstances of locality, place them in the concurrent jurisdiction.

Secondly, Those not so distinguished, and where the amount recovered does not exceed £20 and £5, in contract and tort respectively.

Thirdly Those not so distinguished, and where the amount recovered lies between £20 and £50 in contract, and £5 and £50 in tort. inclusive of the latter limit in both cases.

There is no check whatever, provided by this act against bringing class three into the superior courts. If class two, or any resembling them, are brought there, no costs will be awarded unless the judge shall certify on the back of the record that it appeared to him at the trial, that the cause of action was one for which a plaint could not have been entered in a county court, or that there was sufficient reason for bringing the action in the superior court, or unless an order of court or of a judge in chambers be obtained, under the provision of sec. 13, and finally those of class 1, if brought in superior courts, and if only £20 or £5 be recovered, will also be awarded costs by an order under sec. 13, but not by a certificate. It must be added, that this Act expressly exempted judgment by default from deprivation of costs.

Whether the words "judgment by default," here used, are confined to actions of contract, or whether they extend to cases of tort, followed by an assessment of damages on a writ of inquiry is not clear. However as to judgments by default in actions of contract this doubt is now of no importance, for if the amount of damages claimed, and therefore recovered, does not exceed £20, the plaintiff is, by sec. 30 of statute 19 & 20 Vict., c. 108, deprived of costs, unless the court in which the action is brought, or a judge otherwise directs; and it has been held (*Heard* v. *Edey*, 1, H. & N., 716), that the effect of this is to remove default in an action on contract from the above exemption.

Previously to this change, sec. 13 of statute 13 & 14 Vict. c. 61, which provided in certain cases, a release by order of the court or judge from deprivation of costs, was repealed; and sec. 4 and statute 15 & 16 Vict., c. 54, substituted for it.

Thus we have in force four County Court Acts regulating costs in superior courts—one, the 9 & 10 Vict., c. 95, s. 129 giving costs as bewteen attorney and client to a successful defendant; another, the 13 & 14 Vict., c. 61, ss. 11 and 12, depriving a plaintiff of costs who obtains a verdict not exceeding £20 or £5 respectively unless the judge gives a certain certificate; a third the 19 & 20 Vict., c. 108, s. 48, places judgment, by default in the same position as the verdict just mentioned; and the fourth, the 15 & 16 Vict., c. 54, s. 4, enabling the plaintiff, in any of these cases, to get his costs restored to him under certain circumstances, by obtaining an order from the court or judge to that effect.

Analagous to the County Court Acts is the 15 Vic., c. 77, which re-organised the Sheriff's Court in the City of London and made it, in fact, the county court for a Metropolitan district. Secs. 120, 121, and 122, in effect, repeated the foregoing enactments of the County Court Acts relative to deprivation and restoration of costs in actions in the superior courts, merely placing the Sheriff's Court jurisdiction for that of the County Court's, among the facts to be certified by the court or judge, and making the disqualifying verdict "less than," instead of "not exceeding," £20 and £5 respectively. But the 119 sec., which appears to have found its way into the Act in a most unaccountable manner, introduced an additional restraint upon the plaintiff's right to costs. The only meaning that can be given to it (and even this construe-

tion, it may be remarked, renders part of its words superfluous) is, that if a plaintiff in superior courts, in any action on contract, which might with some exceptions, be brought in the city court (whose jurisdiction extends to £50 and is very comprehensive in regard to locality) recover £20, and not more than £50, he will be deprived of costs by the defendant entering a suggestion on the record, unless he obtains the certificate or order prescribed for the relief of the other cases.

Nor are these all the Acts which profess to deal with limited verdicts, for the 23 & 24, Vict., c. 126, s. 34, enacts, that in any action for tort in the superior courts, where less than £5 is recovered, the plaintiff shall have no costs if the judge certifies that the action was not brought to try a right, and that the trespass was not wilful and malicious, and was not fit to be brought. It is remarkable that this section does not place a verdict of exactly £5 under the depriving power of the judge but leaves it to the chance of escaping the forfeiting section of the County Court Act.

The confusion into which matters are thrown by these concurrent Acts of Parliament will be readily perceived from the annexed diagram.

What, after all, is the result aimed at by the voluminous mass of legislation and judicial decision which has been referred to, and imperfectly described? It is nothing more than this;—

1. To give the plaintiff or the defendant, or some of the individual defendants, should the action be brought against more persons than one, accordingly as they respectively succeed in the contest between them, the right to obtain the costs of suit from his opponent.

2. To distribute between the plaintiff and defendant the costs of the respective issues where several are raised by the pleadings to one cause of action, and neither party has succeeded upon them all.

3. To check vexatious litigation by prescribing some test for the purpose of sifting out of the superior courts all actions which either ought not to be brought at all, or might with complete justice have been decided in an inferior court.

In addition to the general legislation upon the subject of costs in the superior courts, which I have attempted to describe, there are many acts directed to the costs of action in special cases, such as actions on judgments, actions for infringement of patents, actions against persons for what they have done *pursuant* to a statute, actions for a debt of which affidavit has been filed under the Bankruptcy Act, actions brought by persons allowed to sue in *forma pauperis*, &c., &c. The length to which this paper has already run prevents me from making more than a passing remark upon one or two of these.

It may be doubted that whether the privilege of suing in *forma pauperis* is now needed under the conditions of modern society. Scarcely a recent instance is known where suits maintained through its aid have not proved vexatious. Perhaps, however, its theoretical propriety may justify leaving the power of granting it in the discretion of the judges.

The favour shown to persons said to be acting in pursuance of a statute is generally misplaced, for in ninety-nine cases out of a hundred, the offender had no notion that he had been erring officially, or under special protection, until he learned the fact from his pleader, and the plaintiff is as often innocently trapped into a useless litigation. But setting aside these considerations, and also the difficulty of practically determining whether the circumstances under which the jury found for the plaintiff entitle the judge to give his certificate there seems no better reason why, in cases of this class, the costs should be in the discretion of the judge, than that they should be in the multitude of others, where the defendant commits the breach of contract or wrong without express malice. Either leave all costs to the decision of the court or judge, as is the practice in the Court of Chancery, or adopt a uniform mode of making them, with as few exceptions as possible, abide the event of the action.

The subjoined draft of a bill will, better than any extended comments on the existing law, show how, I conceive, the matter might be advantageously dealt with by legislation, chiefly in the way of simplyfying and consolidating statutes at present in operation.

It will be observed that I propose to return to the ancient principle of marking out one area only, as the space within which the judicial discretion is to be generally exercisable. In choosing the limit, I have been guided by the legislature itself, which thought fit to make £20 the substitute for 40s. in determining the new county court jurisdiction. The only reason which I can imagine why tort should be allowed a lower limit in this respect than contracts, if the notion that more difficult questions of law as to liability of the parties may arise in them, notwithstanding the smallness of actual damage, than are involved in the construction of simple contracts. The truth of such a supposition I am not at all disposed to concede; and on the other hand, I should urge the fact that the bulk of frivolous and vexatious actions—those termed essentially attorneys' actions—is to be found amongst those where the damages for a wrong are small. On the whole, therefore, I have come to the conclusion that the exigencies of practice, do not more than the impartiality of theory recommend a distinction in this respect between actions on contracts and actions on torts.

1. The *first* section of the draft bill repeals all existing enactments on the subject (at least as far as I have been able to ascertain them), except those which apply to certain special forms of action, such as *sci. fa.* to repeal letters patent, proceedings in errors, &c.

2. The *second* gives costs to every plaintiff who obtains judgment.

3. The *third* gives costs to every defendant who obtains judgment.

4. The *fourth* deals with the case where there two or more defendants.

5. The *fifth* distributes the costs of issues where several are raised to the same cause of action.

6. The *sixth* provides, however, that in any action on a judgment, and in any other action where the sum recovered does not exceed £20, the plaintiff shall not be entitled to costs if a certain certificate or order to the contrary be obtained.

7. The *seventh* also provides that in case of an action on a debt, of which an affidavit has been filed in bankruptcy, the plaintiff shall not recover costs unless he be declared entitled to them by a certain rule or order; and moreover, that in the absence of such rule or order, he shall be obliged to allow the defendant his costs of suit out of the damages.

There are many objections to this provision, but I have permitted it to appear here because it was advisedly left unrepealed by the last Bankruptcy Act so recently passed. If it be allowed to stand, I think it ought to be so worded as to throw the burden of the certificate the other way, otherwise a suggestion on the roll will be needed.

8. The *eighth* preserves the privilege of suing in *forma pauperis*.

9. The *ninth* interprets the words "action," "plaintiff," "defendant," "person," "judgment," "costs of suit," and in directing that the last shall be estimated and taxed as between *attorney and client*, probably introduces the greatest element of change contained in the bill. Why the successful litigant, when recovering his expenses, should not be permitted to obtain the actual sum to which they amount under legitimate taxation, I have never been able to understand.

10. The *tenth* empowers the judges from time to time to make rules for the more effectually carrying the bill into effect.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 284).

OF THE SPECIAL PROVISIONS RELATING TO THE PROTECTION OF CLERKS AND BAILIFFS, AND TO THEIR PUNISHMENT FOR MISCONDUCT.

PROTECTION OF OFFICERS.

The duties of officers, often complicated and difficult to carry out, bring them constantly in unpleasant contact with suitors; and, taken from the body of the people, clerks and bailiffs cannot be supposed to know the law in all its bearings on their varied duties; so that if liable to vexatious actions for every little error or slip in the performance of their duties, men could not be induced to accept the office. It seems, therefore, but just that they, as other subordinate officers of the law, should be enabled to act without fear. Express provision has been made to protect them from insult, and from personal injury or interference while in the discharge of their duties. The Legislature, moreover, as in the case of constables and other public officers, has provided specially for the reasonable protection of clerks and bailiffs acting in good faith, although they may fall into trifling errors, or commit unintentional wrong. Indeed several of the provisions for their protection are taken from statutes long in force, for the indemnity of peace officers in the performance of their official duties.

Of the clauses in the statute on this subject, some relate both to clerk and bailiff; others relate to the bailiff only, and those acting in his aid. They are nearly all classed amongst the "penal clauses" in the act.

The first in order is section 182, which, while it relates generally to contempts in the face of the court during the actual sittings of a division court, specially refers to officers of the court, and, if nothing more, would show the duty of protecting from insult those who, from their position in court, are under peculiar restraints as subordinate officers. The enactment as to this point provides, that if any person wilfully insults any officer of a division court during his attendance in court, the judge may order the offender to be taken into custody, and may enforce a fine not exceeding twenty dollars upon such offender, and in case of non-payment may commit to gaol for a month.

The enactment in section 183 is kindred in character, and, indirectly at least, bears upon the protection of officers. During the actual holding of the court, every bailiff shall exercise the authority of a constable, with full power to prevent breaches of the peace, &c., in the court-room or building, or places adjacent.

Section 184 relates more particularly to direct assaults upon officers, and the rescue of property seized. It is as follows:—"If any officer or bailiff, or his deputy or assistant, be assaulted while in the execution of his duty, or if any rescue be made, or attempted to be made, of any property seized under a process of the court, the person so offending shall be liable to a fine not exceeding twenty dollars, to be recovered by order of the court, or before a justice of the peace of the county or city, and to be imprisoned for any term not exceeding three months; and the bailiff of the court, or any peace officer, may in any such case take the offender into custody, with or without warrant, and bring him before such court or justice accordingly."

The clerk is not mentioned by name in the section, as the bailiff is, but obviously comes within the meaning, being an officer of the court. The words are, "any officer or bailiff, or his deputy or assistant." The object of the clause is to protect all officers; and as to the rescue of goods, by section 208 all property seized under an attachment against an absconding debtor, is to be forthwith handed over to the custody and possession of the clerk. The design is to make the rescue of any property in the custody of the law penal; and it cannot be reasonably doubted that clerk and bailiff are within the spirit of the enactment.

The enactment in this section is cumulative, and a party assaulting an officer could be indicted for the common law offence. It may here be remarked, that so far as relates to a criminal proceeding, the process of the division court is as much a justification to the officer by virtue of the statute, as a writ of execution out of a superior court to the sheriff. Upon an indictment for an assault upon a county court bailiff in the execution of his duty, the production of the county court warrant for the apprehension of the prisoner was held to be sufficient justification of the act of the bailiff in apprehending the prisoner, without proof of the previous proceedings authorizing the warrant, even though the judgment be obtained in the one county, and the warrant sent for execution into a different county.

The county courts in England are similar to our division courts, and section 184 of the Division Courts Act is taken from the 114th of the County Courts Act 9 & 10 Vic. cap. 95, and nearly word for word the same.

It would seem that deputy clerks and bailiff's assistants are within section 184.

CORRESPONDENCE.

Division Courts—Abandonment of excess beyond $100—Effect thereof when less than $100.

To THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I would ask your opinion on the following point of Division Court practice:

A person has a claim against another, amounting to, say, $110, and he sues in the Division Court, abandoning the excess of $10 above the jurisdiction of the court. In his particulars of claim he charges the defendant with all the items of account, and states that the excess of $10 is abandoned. Supposing that the plaintiff succeeds in proving only such items as amount in the whole to $80, would the judge act correctly in deducting from that sum the excess of $10 abandoned, and giving judgment for $70 only, on the ground that the abandonment of the $10 was equivalent to the crediting of it, and that amount of the plaintiff's credits should be deducted from the amount of proved debits?

I ask this question, having frequently seen causes decided in this way, and being inclined to doubt the correctness of the principle.

If followed out, the ruling would in some cases lead to rather curious results. Suppose the claim were for $180, the plaintiff abandoning $80, and from want of proper evidence he was prevented from proving all but $60. The $80 must still be credited to the defendant, according to the ruling; and the plaintiff, instead of getting a judgment for $60, would have a verdict against him for $20!

Yours, very truly,

Prescott, Oct. 6, 1863. L. E.

[The question is one which will admit of some argument, and the statute might with advantage be more explicit. It is worthy of notice that the only clause in the act which gives an express right to abandon the excess over $100, would appear to apply only to suits against absconding debtors (Con. Stat. U. C. cap. 19, sec. 205). Section 59 of the same act gives the right only by implication, but, taken in connection with the Division Court rule, which may be considered as part and parcel of the act, we suppose the right cannot be questioned.

It may be said that a sum once abandoned cannot be recalled or claimed, and that therefore a plaintiff or defendant, having proved a certain portion of his account, should properly suffer a reduction of the sum abandoned from the amount so proved, as otherwise he would be giving up that which he really never had a right to claim, so far as his evidence went to show. We cannot think, however, that the Legislature intended that this abandonment should be taken in its literal sense, and doing so would clearly in some cases work injustice. We believe that the spirit and true meaning of the enactment is, that a suitor may claim *all he can prove*, not exceeding $100, and that any decision to the contrary is at all events not in accordance with equity and good conscience.—EDS. L. J.]

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* R. C. JONES, Esq., *Barrister-at-Law, Reporter to the Court.*)

MERRALL V. ELLIS ET AL.

Con. Stat. U. C. cap. 24 sec. 30—Effect thereof—Replender.

Where plaintiff declared upon a recognizance of bail, dated 6th December, 1854, alleging as a breach that the principal departed from the limits, without being released therefrom by due course of law, and defendant pleaded—1. That the recognizance was entered into before 5th May, 1859, and that afterwards the principal surrendered himself into the custody of the sheriff of the county of Brant, and while in such custody gave and substituted for the recognizance a bond, in conformity with Con. Stat. U. C. cap. 24 sec. 30, which was allowed by the county judge, and so that the recognizance was released and discharged. 2. A similar plea, with the exception that it was stated the allowance was endorsed after the commencement of the action; and plaintiff took issue on the pleas, and stated that he sued not for the cause of action in the pleas admitted, but for the non-performance and breach of the condition of the recognizance prior to the substitution of the bond; to which the defendants rejoined that the alleged non-performance and breach in the replication mentioned are the identical breach and non-performance set out in the declaration: on which the plaintiff joined issue; and the jury found a verdict for plaintiff on the first issue, with damages assessed at $1,651 59, and for defendant on the second and third issues; the court made absolute a rule to set aside the verdict, and awarded a replender, on payment of costs by plaintiff.

Semble, Con. Stat. U. C. cap. 24 sec. 30, which enacts that persons who, before 4th May, 1859, had given bail or security under a writ of *ne exeat* or *ca. sa.*, may surrender themselves into custody, and substitute for their bonds or other security theretofore given, a bond or other security to the effect and amount mentioned in the act, and thereupon the existing bail or security shall be discharged or released, does not destroy a cause of action which had accrued for breach of the condition of the original security before the giving of the substituted security.

This was an action of debt on a recognizance of bail, dated 6th December, 1854. The writ of summons issued on 11th August, 1862.

The declaration alleged that defendants, by recognizance, became bail for one Thomas T. Transom that he should remain at the suit of the plaintiff, within the limits of the gaol of the county of Brant until released therefrom by due course of law, and, in the event of his failing, that they would pay such sum of money, costs, sheriff's fees and poundage as the said Transom was liable to pay on the writ of *ca. sa.*, on which he had been arrested; that the defendants justified in due form of law; that the recognizance was duly filed in the office of the Deputy Clerk of the Crown and Pleas in the county of Brant, and notice given to the plaintiff; that the recognizance was enrolled of record; and that Transom was duly admitted to the limits of the said gaol, in pursuance of the recognizance and of the statute. Yet Transom departed from the limits without having been released therefrom by due course of law, and that neither he nor defendants have paid the said sums of money.

The defendants pleaded—1st. That the recognizance was entered into before the 5th May, 1859; that afterwards, and after the passing of the act (Con. Stat. U. C. cap. 24 sec. 30) and before the commencement of this suit, Transom surrendered himself into the custody of the sheriff of Brant, and, while in such custody, gave and substituted for the said recognizance a bond, in conformity with that statute; and, within thirty days from the execution of the bond, procured it to be allowed by the judge of the county court of the county of Brant, and the allowance to be endorsed thereon, which bond is filed in the office of the sheriff of the county of Brant, of all which premises the plaintiff had notice, and so defendants say the recognizance was released and discharged. 2nd. A similar plea, only stating that the allowance of the bond was endorsed after the commencement of this suit.

Replication—The plaintiff takes issue on the pleas and says that he sues not for the cause of action therein admitted, but for the non-performance and breach of a condition of the said recognizance made by Transom, prior to the giving and substitution of the bond and the allowance thereof.

Rejoinder—As to so much of the replication as states that the plaintiff "sues not for the cause of action (in the pleas mentioned, was apparently meant, as the replication contained the words "therein mentioned") but for the non-performance and breach of a certain condition of the said recognizance, in the said declaration mentioned, made by the said Transom, prior to the giving and substitution, &c.;" that the alleged non-performance and breach, in the replication mentioned, are the identical breach and non-performance

assigned and set out in the declaration, and except as in and by the pleas is admitted, there has been no breach or non-performance of the condition of the recognizance by Transom.

On this the plaintiff joined issue.

The case was tried at Brantford, at the Autumn assizes, 1862, before Richards, J.

The defendants admitted the departure stated in the declaration. The plaintiff admitted that since the departure complained of, and on 4th August, 1862, the defendant in the original action gave the bond produced under the statute, which was allowed by the judge. The judge's certificate was taken as evidence of the allowance. The bond was dated August 4th, 1862, and was made by Transom and the two defendants, jointly and severally, to the sheriff of Brant, in the penal sum of $3,216. The condition was (after reciting that Transom was arrested under a *ca. sa.* directed to the sheriff of Brant, to satisfy the plaintiff the sums for damages and costs, with interest, as therein set forth; and that Transom, on 5th December, 1854, gave bail in the said action in due form of law, and hath ever since remained and then was in the limits of the said gaol, under the bail so given; and that being desirous of obtaining the benefit of the statute, had surrendered himself to the custody of the said sheriff, and was in close custody, and, while in such custody, had, with two sufficient sureties, executed the said bond) that if Transom should observe and obey all notices, orders and rules of court, touching or concerning him, or his answering interrogatories, or his appearing to be examined *viva voce* or otherwise, or his returning or being remanded in close custody, and if, on reasonable notice to the now defendants, they should produce Transom to the sheriff of Brant, as provided by the statute, and if Transom should, within thirty days from the execution thereof, procure the bond to be allowed by the judge of the county court of the county of Brant, and such allowance to be endorsed thereon, the bond should be void.

The allowance was endorsed on the bond, as having been made by the county court judge, on the 13th August, 1862.

The jury found a verdict, on the first issue, and assessed the damages on the breach at $1,651 59, and for the defendants on the second and third issues.

In Michaelmas Term last *Freeman*, Q.C., obtained a rule *nisi* to set aside the verdict rendered for defendants and to enter a verdict instead for plaintiff, on the ground that the second and third issues were immaterial, and that the second plea shews no defence to the action, as the giving of the bond therein mentioned is not a defence to a breach of the recognizance declared on, or for judgment *non obstante veredicto* for the defendants on the second and third issues, or to set aside the verdict and grant leave to the plaintiff to withdraw the new assignment, and demur to the defendants' pleas, on the ground the pleas are not good in law, and that the issues thereon are immaterial.

Wood shewed cause. His argument was, that the declaration only contained one breach, to which the second plea contained a full answer in point of law, and that the issue on the rejoinder, that the breach mentioned in the replication is the same as that stated in the declaration, was found for the defendant, thus affirming the latter part of the rejoinder that Transom committed no breach of the recognizance, except that justified by the plea. He referred to *Thompson* v. *Lock*, 3 C. B. 540; *Edmonds* v. *Lawley*, 6 M. & W. 284; *Miller's case*, 1 W. Bl. 451; *LeMesurier* v. *Smith*, 2 U. C. O. S. 479.

Freeman, Q.C., *contra*, admitted he had no authority for the first part of the rule, which had been inadvertently inserted. But he urged that one or other of the alternatives in the latter part of the rule should be granted. As to the first plea it was untrue, as the evidence shewed and the verdict established, and on that the plaintiff ought to retain the damages given. The second plea, though true in fact, was no defence, unless it could be held that the statute had the retrospective effect of curing a preceding breach of the condition of the recognizance. He did not rely much on the replication as a new assignment, treating it as not very intelligible; but as the second plea could only be sustained by a retrospective construction of the act, it was, he contended, no defence in law, and, therefore, the verdict on it should not preclude the plaintiff from recovering. He referred to *Waine* v. *Beresford*, 2 M. & W. 848; *Baynes* v. *Brewster*, 2 Q. B. 375; *Cooke* v. *Pearse*, 8 Q. B. 1044-1066.

Draper, C. J. C. P.—The statute 22 Vic. cap. 33 sec. 7, which is incorporated in the Con. Stat. U. C. cap. 24 sec. 30, reads thus—"Persons who have heretofore (*i. e.*, before 4th May, 1859) given bail or security under a writ of *ne exeat* or *capias ad satisfaciendum* may surrender themselves into custody, or may substitute for their bonds or other security heretofore given under the writ a bond or other security to the effect and amount mentioned in the preceding sections of this act; and thereupon in either case the existing bail or security shall be discharged or released."

The replication which is to both first and second pleas, asserts that the breach of the condition of the recognizance, for which the action was brought, took place before the giving of the bond, and the substitution thereof for the recognizance. That may be so, whether or not the breach took place before the 4th May, 1859 (the day when the 22nd Vic. cap. 33 was passed). It is, nevertheless, a very different question whether the statute was intended to relieve defendants from liability on a recognizance previously forfeited, or only from an unforfeited recognizance, by the subsequent surrender of the debtor, or the substitution of a bond for such recognizance. In either case the replication asserts no new fact, for by the terms of the statute the substitution of the bond discharges the prior security, the breach of which, if it ever happened, must have happened before it was discharged; but it does not state whether such breach occurred before or after the 4th May, 1859. Nor does the rejoinder help, for it merely asserts that there never was more than one breach, but throws no light on the question when it occurred.

I am not satisfied that as between the execution creditor and debtor the allowance of the bond is of any importance. Rendering the original act it would rather seem that the only object and effect of such allowance is to relieve the sheriff from further responsibility. If so, both pleas in substance contain the same defence, and the verdict is for the plaintiff on the one and the defendant on the other.

It does not, however, appear on any part of the record whether the breach complained of occurred before or after the 4th May, 1859, and the application of the statute to this case may be found to depend on the question which of these two is the fact relied on, at least there is an opening for the two distinct questions; and we are not, I think, called upon to determine the law on the plaintiff's right of action, before we are distinctly informed on what he relies.

I think, therefore, we should make absolute as much of the rule as relates to setting aside the verdict, and granting a repleader on payment of costs by the plaintiff. He can then demur or reply to the pleas as advised.

See *Plomer* v. *Ross*, 5 Taunt. 387.

CHANCERY.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law, Reporter to the Court.*)

Sceally v. McCallum.

Municipal debenture—Liability of person negociating.

A person negociating the sale of a municipal debenture is not answerable that the municipality will pay the amount secured by the debenture. Where, therefore, a township municipality in pursuance of the Municipal Corporation Act of 1849, passed a by-law for the purpose of granting a loan of money to the Bayham, Richmond and Port Burwell Road Company, and issued debentures thereunder, which were subsequently declared to be illegal in consequence of the road company not having been properly constituted; the court, in the absence of any proof of fraud, refused to order one of the directors of the road company to refund the amount paid to him upon the sale of one of such debentures.

The bill in this case was filed by Anthony Sceally against Eliza McCallum, Heman Dodge, Shook McConnel, David Merritt and Sylvester Cook, setting forth that in the years 1853–4 certain persons in Bayham agreed to form a joint-stock company, for the construction of a road in that township, under the act 16 Vic., ch. 190, who took steps to incorporate the company under the name of the "Bayham, Richmond, and Port Burwell Road Company," and that the persons so forming the company fixed the sum of £4000 as the amount necessary for the construction of the road, and John McCallum, deceased, the testator in the bill mentioned was a director and the treasurer of the company, and that the municipality of Bayham believing that the company was duly constituted, passed a by-law for the purpose of loaning to the company the sum of £4000—which by-law was set out at length in the bill. This by-law the plaintiff in his bill contended was void on several grounds set forth in the bill, but which it is not neces-

sary here to state. Nevertheless, in pursuance of the by-law so passed, the municipality issued debentures to the road company, for the £4000 so required, in sums of £500 each, and which the company sold to divers persons, amongst others, one to the plaintiff, which he purchased from John McCallum, deceased, and paid therefor £400 cash; and £10 had been paid to plaintiff on account of the interest thereon; but the municipality refused to make any further payments on account of such debenture, alleging that the by-law so passed, and under which the debenture had been so issued was void. The bill further alleged, that when plaintiff purchased such debenture he fully believed that the debenture was a good and valid security for the sum mentioned in it; also that the company was a duly incorporated company, and that he had no notice that such debenture was void, or that the company was not duly incorporated until long after payment of the money for the debenture, and submitted that under the circumstances the contract for the purchase of the debenture ought to be rescinded, and the money paid by plaintiff refunded to him. That the defendants Eliza McCallum, Heman Dodge, and Shook McConnell were executrix and executors of the last will and testament of the said John McCallum, whose estate, it was alleged, was bound to make good to plaintiff his purchase money so paid for the said debenture. The bill prayed relief accordingly.

The defendants McCallum, Dodge and McConnell answered the bill denying all improper conduct on part of the testator in the sale and transfer of the debenture, and insisting that plaintiff took the same at his own risk, and that under the circumstances appearing there was not any ground for the interference of the court.

Roaf and *Fitzgerald* for the plaintiff.

Blake for the defendants, who answered.

SPRAGGE, V. C.—The cases cited by Mr. Roaf seem to proceed upon the ground of implied representation. When a party applies to another to give cash for a bill of exchange or other instrument he must be taken to represent that it is genuine, and the dealing being with an agent of the party to receive the money was held to make no difference where the representation was by the agent on his own behalf. This point was a good deal considered in *Gurney* v. *Womersley*, (4 E. & B. 133), in which previous cases were reviewed. The agent in these bill transactions is in fact the person dealt with, the principal borrower is not dealt with by the party advancing the money. This case differs from those cited in two respects: one, that the instrument was genuine; the other that McCallum and the other directors of the road company were only dealt with as representing the company. It is not unlike the case put by the Chief Justice Gibbs in *Jones* v. *Ryde* (5 Taunt. 494), that when forged bank notes are offered and taken, the party negociating them is not, and does not profess to be answerable that the Bank of England shall pay the notes; but he is answerable for the bills being such as they purport to be. The testator McCallum negociated the debenture with the plaintiff but no special case is made against him. The one case is made against all the directors, which is shortly, that the road company was not legally formed according to the statute; and that the municipal debenture of the township of Bayham is an invalid instrument. It is not charged that the directors knew that the company was not legally formed, or that the debenture was invalid, or that any representations were made to the plaintiff upon either point. The debenture was sold to the plaintiff, and delivered to him, and he paid the purchase money, which appears to have been applied, with all other moneys received, towards the construction of the road; the contract was completed; the bill asks for its rescission—the equity being simply the fact of the invalidity of the road company and of the debenture and the refusal of the municipality to pay the latter.

I find no precedent for such a bill; and the authorities are against such an equity as that upon which the bill is founded. If the sale had been by the defendants in their individual capacity there would be no such equity. *Wilde* v. *Gibson*, (1 H. L.C. 605) and *Legge* v. *Croker*, (1 B. & B. 506) cited with approbation by all the learned lords who gave judgment in *Wilde* v. *Gibson*, were much stronger cases for relief than this. In the case before the Lords, Lord Campbell adverting to the distinction between a bill for carrying into execution an executory contract, and a bill to set aside a conveyance that had been executed, observes; "With regard to the first, if there be in any way whatever misrepresentation or concealment which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed I apprehend, my lords, that a court of equity will set aside the conveyance only on the ground of actual fraud." This proposition was only qualified in the subsequent case of *Slim* v. *Croucher* (1 DeG. F & J. 518), which was before Lord Campbell, as Chancellor, to the extent that if there is actual representation as to a fact which the defendant had known, and had been actually a party to, and upon the faith of which the plaintiff had acted, his having forgotten the fact, (supposing such a thing proved, though scarcely susceptible of proof), would not relieve him from his liability.

Then does the circumstance that these defendants negociated the debentures as directors of a road company make against them. I think they did negociate them on behalf of the road company; and if so the law of principal and agent will apply to them. If they made expressly or impliedly any representation in regard to their principal, they will be bound by it, if untrue, and if another has acted upon it, even though the agent believed it to be true; but Mr. Story in his book on agency suggests this qualification, that the rule would not, or might not apply if the want of authority was known to both parties; or unknown to both parties; and authority is in favour of this qualification, for if the principal be dead the agent is not responsible for what he does, in the belief that he is still living. This was established in the case of *Smout* v. *Ilbery*, (10 M. & W. 1) in which case Baron Alderson, who delivered the judgment of the court, observed, that in all the classes of cases in which the agent has been held personally responsible; "it will be found that he has either been guilty of some fraud—has made some statement which he knew to be false or has stated to be true what he knew to be false; omitting at the same time to give such information to the other contracting party as would enable him equally with himself to judge as to the authority under which he proposed to act."

Tried by this test I do not think that the defendants made themselves responsible. It is right to consider what is necessarily understood by parties dealing together as the plaintiffs and these defendants did; or, in other words, what was the implied representation. I do not think it can be taken to be more than this, that the debentures were genuine, and that the road company whom they represented was a road company *de facto*. Agents for a company cannot, I think, be intended to undertake for the company, or to represent that all the formalities which are necessary to its being duly constituted have been duly complied with. Neither the agent nor the party dealt with understand this; there is no such implied contract, and in the absence of bad faith there is no reason, and I think no law, to attach personal responsibility in such a case. This, too, is a registered company, and the plaintiff had therefore the same means as the defendants of judging as to its validity if he chose to act prudently. It is intimated in the case of the *Athenæum Life Insurance Company* v. *Pooley*, (28 L. J. Chy. 119), by all the judges who decided the case, that it lies upon the party buying debentures to ascertain all facts essential to their validity. Here the plaintiff either made enquiries, or assumed that everything was correct and regular when he should have enquired; and the loss ought not to fall upon parties as innocent as himself, and who in no way misled him. He seems indeed to have acted on his own judgment, for he took time to consider before he made the purchase, and if he did not ascertain for himself that the debenture was a valid security, he gave the parties reason to believe that he had satisfied himself upon that point. It seems, indeed, that he really had done so, that he had taken legal advice; and he is represented as an intelligent man.

It is agreed on both sides that the debenture is not valid, though believed to be valid at the time by the municipality as well as others; the municipality at first paid interest upon it. In the view that I take of the case it is not necessary to decide whether the road company was validly constituted, for even supposing it not to be so, I think the defendants not liable.

I think the bill should be dismissed with costs.

Harrold v. Wallis.

Injunction—Receiver—Executor—Insolvency.

As a general rule an assignment for the benefit of creditors will be taken as a declaration of insolvency; and equivalent to bankruptcy in England; where, therefore, some of the legatees of a testator filed a bill against his executor and two of the legatees, charging a mal-administration, and alleging that the executor, subsequently to the death of the testator had made an assignment for the benefit of his creditors, and that he was insolvent, the court, upon motion for an injunction and a receiver, before answer, under the circumstances granted an interim injunction and a receiver, notwithstanding the executor denied any mal administration of the estate, or that his insolvency was the reason for his making the assignment of his estate.

Two of the legatees of the deceased testator Samuel Harrold filed a bill against his executor Wallis, his widow, and his unmarried daughter, alleging, among other things, that the executor had been guilty of mal-administration, and was insolvent, having made an assignment for the benefit of his creditors subsequently to the death of the testator. The bill prayed for an injunction and receiver; and

Hodgins, for the plaintiffs, moved on affidavits, before answer, for an injunction and receiver, conformably to the prayer of the bill.

McGregor, for the defendants, other than formal parties, opposed the motion, on counter affidavits, denying all the material allegations of the plaintiffs, except the making of the assignment.

Spragge, V. C.—The bill is filed by the two sons and the three married daughters of the testator, impeaching the will, as made by undue influence exercised by his wife and by defendant Wallis, who is named sole executor. The defendants are his wife and Wallis, and the unmarried daughters of the testator (the husbands of the married daughters are also defendants). This application is for a receiver; it is grounded on alleged misconduct in the administration of the estate, and upon the alleged insolvency of the executor, evidenced by his having recently, and since the death of the testator, made an assignment for the benefit of his creditors. The misconduct is denied upon affidavit; the alleged insolvency is also denied, and an explanation is offered in regard to the assignment, that it was made to pacify creditors, who it was expected would refrain from suing, upon seeing the amount of the assets; and it is alleged that the estate is more than sufficient, to pay all the debts in full; and there is some evidence in support of this.

I think the weight of authority is in favour of granting the application. In some cases a distinction is made between cases where the personal representative is an administrator, and where he is an executor, the court interfering with more difficulty in the latter case, because an executor is the personal choice of the testator; and mere poverty, there being no misconduct, appears not to be a sufficient ground for the appointment of a receiver. It was so held by Sir William Grant, (Amn. 12 Ves. 5), but he gave no direct answer to the suggestion, "suppose the executor was insolvent." And it was also held by Sir Thomas Plumer in *Howard* v. *Papera*, (1 Mad. 141), that poverty alone was not a sufficient ground; but Sir John Leach held in a subsequent case, *Dangley* v. *Hawk*, (5 Mad. 46), that bankruptcy was a sufficient ground. In the early case of *Middleton* v. *Dodswell*, Lord Erskine (13 Ves. 266), made the order on the ground of insolvency, though misconduct also was charged. In a case two years afterwards before Lord Eldon, *Gladdon* v. *Stoneman*, (1 Mad. 141, n), the order was made on the ground of bankruptcy. The question in that case and in *Langley* v. *Hawk* appears not so much to have been whether bankruptcy was a sufficient ground for the appointment of a receiver, as whether the circumstance of the commission of bankruptcy having issued before the death of the testator, he must not be taken to have intended to commit the administration of the estate to him, notwithstanding his bankruptcy. In *Scott* v. *Becher*, (4 Price, 346,) in the Exchequer, a receiver was granted on the ground of insolvency; and in *Mansfield* v. *Shaw* (3 Mad. 100), a like order was made on the same ground. *Smith* v. *Smith* (2 Y. & C. 353,) is not an authority the other way; the executor and trustee had been a bankrupt some thirty-eight years before, and the case was peculiar in its circumstances. The executor and trustee was himself interested, and the court felt that they could not usefully or properly interfere. Lord Abinger put it thus: "Then when the three trustees have renounced and his sister is dead, what is to be done? He is the only person who can interfere. He must do so for the benefit of others if not for his own." There are no such difficulties in this case. I think as a general rule that an assignment for the benefit creditors must be taken as a declaration of insolvency, and equivalent to bankruptcy in England. The expectation that the estate will be more than sufficient to pay the debts in full, is not in my opinion a sufficient reason for taking the case out of the rule; that was one of the grounds upon which the application was resisted in *Langley* v. *Hawk*, and proceedings had been taken to supersede the commission; but Sir John Leach said he must consider bankruptcy, notwithstanding, as evidence of insolvency. This case is stronger for the interference of the court. We have the executors own act, and to that I attach more weight than to the explanation he offers in regard to it.

There is also this in favour of the application, which is noticed in some of the cases as entitled to weight: that the interposition of the court is desired by a great majority of those interested in the estate. The affidavits are conflicting as to the fitness of the executor for his office, and as to his honesty and punctuality, but I proceed upon the grounds that I have stated. The question is whether the circumstances are such that the court ought to interfere for the protection of the fund; I have come to the conclusion that this is such a case.

CHAMBERS.

Reported by Robert A. Harrison, Esq., *Barrister-at-Law.*

Johnston et al v. McKenna.

Ejectment—Judgment in favor of several plaintiffs—Death of one—Issue of habeas within a year—Issue of alias after more than six months—Necessity for revival—Execution of writ.

Held, 1st, That the death of one of two plaintiffs in ejectment after judgment (where, for all that appears, the recovery is joint and survives), does not render necessary a suggestion of the death on the roll in order to support a writ of *hab. fac. poss.* for recovery of possession of the premises.

2. That where a writ of *habeas* was issued within one year after entry of judgment, an *alias* writ issued more than six years thereafter was regular without reviving the judgment.
3. That where the sheriff returned to the first writ of *habeas*, that "none came to receive possession," the presumption of release of the judgment did not arise in the same manner as if nothing had been done upon the judgment.
4. That the second writ might be executed by the removal from possession of a person who was the widow of a person that claimed under the judgment defendant.
5. That a recovery on the judgment roll for the whole of a lot, when in fact plaintiff proved title to the east half only, is not such an irregularity as to cause defendant to move against the judgment.
6. That the court or a judge would in such a case restrain plaintiff from taking possession of more than he in fact recovered.
7. That plaintiff in this cause having endorsed his writ for the recovery of the east half only, to which he proved title, there was no ground for the interference of either court or judge.

(Chambers, Sept. 12, 1863.)

C. S. Patterson obtained a summons on behalf of Patrick Turley and Abraham Maybee, calling on John Johnston, his attorney or agent, to show cause why the *alias* writ of *hab. fac. poss.* in this cause, and all process had thereon, should not be set aside; and why Patrick Turley, who is now seized of the estate of the Hon. George S. Boulton, whose tenant the above defendant was, and of the legal estate of the lands in question, should not be restored to the possession of the lands; or why the possession should not be restored to the widow of James Williamson, deceased, as the tenant of Turley, or to Abraham Maybee:

1. Because the writ is irregularly issued, the judgment not being revived, although one of the plaintiffs is dead, and although the defendant is dead.

2. Because upwards of six years from the entry of the judgment elapsed before the issue of the writ, and the said John Johnston was not entitled to issue the writ without reviving the judgment.

3. Because the writ was executed against a tenant of Turley's, against whom there was no judgment.

4. Because the writ commands the sheriff to give possession of lot No. 6, in the 7th concession of Murray, to plaintiff; whereas judgment was recovered against the plaintiff, claiming the same lot, in an action of ejectment, brought by plaintiff in this court, against

Abraham Maybee, and which last judgment was subsequent to the judgment in this cause.

By the affidavits filed on behalf of the application, it appeared that the patent of the lot issued to one James Johnston; that the heir-at-law (as it was said by Mr. Ruttan, but the heirship was denied by plaintiff) of the patentee sold this lot to Mr. Ruttan, in the year 1822; that Mr. Ruttan sold the east half of the land to the son of the defendant, in 1834; that Mr. Ruttan, and those claiming under him, have been in possession since about the year 1830 or 1831; that in 1852, the plaintiff commenced an action of ejectment against the defendant for the east half, and another action of ejectment against Abraham Maybee for the west half, to whom Ruttan had conveyed in 1846; that the plaintiff obtained a verdict against McKenna, but failed against Maybee; that the same evidence which procured a verdict for Maybee could have been given in this suit against McKenna, if there had not been some understanding about it (the defence was the Statute of Limitations); that judgment was entered against McKenna on the 16th June, 1863, and a writ of possession issued, upon which the sheriff's return is endorsed—"that no one came to him to show him the tenements, or to receive the possession;" that long before the *alias* writ issued, Wm. Johnston and the defendant died; that the *alias* was delivered to the sheriff on the 21st May, 1863, and re-executed on the 1st June by the east half being delivered to the agent of the surviving plaintiff, the said half being then in the possession of Williamson, who claims title under Sylvester McKenna; that the surviving plaintiff threatens to put the writ in force against Maybee; that Geo. S. Boulton owned the east half when this action was brought, although the defendant was in possession; that Boulton, in 1837, conveyed this half to McKenna, who mortgaged the same, and afterwards gave a deed of it to James Williamson, in 1856, who mortgaged it to John Hughes; and that Hughes assigned the mortgage to Durand, who assigned to Turley.

The title seemed really to be, on the part of the defendant, as follows: Daniel Johnston, assuming to be the heir-at-law of the patentee, conveyed to Ruttan; Ruttan to Patrick McKenna, whose heir-at-law the defendant was; the defendant to Robertson; Robertson to D. E. Boulton; D. E. Boulton to Geo. S. Boulton; Geo. S. Boulton to Wm. McKenna; Wm. McKenna to James Williamson; James Williamson mortgaged to Hughes; Hughes assigned to Durand; and Durand assigned to Turley, who, on the application, claimed as mortgagee.

It was alleged that the reason the plaintiff delayed executing his writ of possession was, that an action would be brought against him, and he would be turned out of possession, on the same evidence which defeated him in the suit against Maybee, and that the case was purposely postponed till the witnesses might not be forthcoming.

For the plaintiffs, Meyers stated that the suit against Maybee was not taken to trial by the plaintiff, but by the defendant; that Sylvester McKenna and his wife were the principal witnesses upon whose testimony as to the length of possession the verdict was rendered; and that this evidence was opposed to all that McKenna had always told Meyers. He also gave a full narrative of the proceedings. William Johnson swore he was the heir-at-law of the patentee; that after losing the suit against Maybee, he made up his mind not to proceed for the west half any further; that McKenna applied for a new trial, but was refused it; that he never was aware of any one being on the land till 1837, and that the evidence to the contrary was untrue.

It appeared that Turley had lately commenced proceedings in Chancery, and had perpetuated the testimony given on the trial in Maybee's suit, and was about to get a writ for possession from Chancery, when, as he said, the plaintiff had forestalled him.

Richards, Q. C., showed cause. He argued: 1. The death of one of the two plaintiffs is no irregularity, although no suggestion is made on the roll of his death, and although his name is still used as if he were living (Arch. Pr. 11 Edn. 596; *Qourke* v. *The Mayor of Gravesend*, 7 C. B. 777; Con. Stat. U. C. cap. 27, sec. 27). 2. That the death of a sole defendant does not, in ejectment, abate the proceedings; because the writ of possession is against the land, or to deliver possession of the land, rather than against the defendant personally (*Withers* v. *Harris*, L. Ray. 808; Con. Stat. U. C. cap. 27, sec. 39). 3. That it was not necessary to obtain the leave of the court, or of a judge, to issue the *alias* writ, although more than six years had elapsed since judgement was entered, because an original writ of execution had been issued within the year, and returned and filed (*Hall* v. *Boulton*, 3 P. C. Rep. 142). 4. That the plaintiffs, being entitled to possession, had the power to turn out any one in possession of the land, although a stranger to the original defendant; but in this case Mrs. Williamson, who was removed, was in possession under persons deriving title from the defendant. 5. That although, in the separate suits which the plaintiffs brought against the defendant and Maybee, the whole lot was claimed from each defendant, and although the plaintiffs recovered against the defendant for the whole lot, there is no repugnancy in the judgment in Maybee's action being against the plaintiff for the whole lot; that Maybee never was, in fact, in possession of the east half, and there can be no estoppel in his favor against this plaintiff in McKenna's suit, to which he is a stranger.

C. S. Patterson, in reply, argued: 1. The right of a surviving plaintiff to go on in his own name and in the name of a deceased co-plaintiff, only exists where the judgment is joint and the interest of the deceased passes to the survivor, which is not necessarily the case here; for the two plaintiffs may have been tenants in common, in which case the right of the deceased would not accrue to the survivor, but would devolve upon his heir or devisee; and that sec. 34 of the Con. Stat. U. C. cap. 27, does not apply to this case at all, because this co-plaintiff died before this section of the act was passed (*Davy* v. *Cameron*, 14 U. C. Q. B. 483; *Ib.*, 15 U.C.Q.B. 175; *Rex* v. *Cohen*, 1 Stark, N. P. 511; and Tidd's Pr. 8th ed. 1170; *Ib.*, 9th ed. 1119, 1121). 2. As to a sole defendant's death after judgment in ejectment, it does not seem to be decided that it is absolutely necessary to revive the judgment, although it is even here recommended to be proper to do it. 3. That this *alias* has been irregularly issued after the six years; because the plaintiff, never having applied to get the possession under his original writ, as appears by the sheriff's return, must be considered to have abandoned it; he cannot now, to avoid the necessity of a revivor, call in aid this effete process (*Doe d. Reymal* v. *Tuckel*, 3 Bad. 773).

ADAM WILSON, J.—As to the death of one of the plaintiffs after judgment and before the issuing of the *alias* writ, it is laid down in Tidd's Pr., 9th ed. 1120, that "It is now settled, that when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors without a *sciere facias;* but the execution should be taken out in the joint names of all the plaintiffs or defendants, otherwise it will not be warranted by the judgment." And this statement of the law is expressly supported by *Rult* v. *The Mayor of Gravesend* (7 C. B. 777), and in *Cooper* v. *Norton* (16 L. J. Q. B. 364). The case referred to in Tidd is *Penyer* v. *Brace* (1 Ld. Ray. 244), which was trespass against five persons, and judgment against all. The five bring error; and pending the proceedings in error, one of the five plaintiffs in error dies; upon which the plaintiff in the original suit sued out execution against all five; and it was held that if the writ in error had been certified to the court that it had abated by the death of one of the five, inasmuch as it was, until so certified, a supersedeas of the judgment below, the plaintiff below might have sued out his execution against the four living, and the fifth, who was deceased, without first suing out a *sci. fa.* The argument is stated as follows: "Where a new person shall take benefit by or become chargeable to the execution of a judgment, who was not party to the judgment, there a *sci. fa.* ought to be issued against him to make him a party to the judgment, or in the case of executors and administrators; but where the execution of a judgment is not chargeable or beneficial to a person who was not a party to the judgment, there it is otherwise as where there is a survivorship." In the same case, in 1 Salk. 319, it is added, "There is no reason why death should make the condition of survivors better than before." And Holt, C. J., says that "a *capias* or *fi. fa.* being in the personalty, might survive, and might be sued against the survivors without a *sci. fa.*; otherwise if an *elegit*, for there the heir is to be a contributory." In the same case, in 8 Mod. 338, it is said, "If two plaintiffs recover, and one die before execution, the survivor may take it out without a *sci. fa.*, because he is party and privy to the judgment; and if it should happen that the dead man had released the judgment, the defendant may bring *audita querela*, and be relieved."

In *Withers* v. *Harris*, 7 Mod. s. c., Ld. Ray. 806, judgment in ejectment, upon the terms that there should not be execution till a

year and a half after; and whether this judgment could be executed without a *sci. fa.* was the sole question. Holt, C. J., said, "You may sue out execution in ejectment within a year after judgment, in the name of a defendant who has died within the year, without a *sci. fa.*; because, in the writ *hab. fac. poss.* you do not say against whom the execution is to be had, but it is only to have the possession."

In Adams on Ejectment it is said, "Where a sole defendant in ejectment dies after judgment and before execution, it has been doubted whether a *sci. fa.* is necessary, because the execution is of the land only, and no new person is charged; but the surer method is to sue out a *sci. fa.*"

In *Newnham, jun.*, v. *Law* (5 T. R. 577), one of two plaintiffs died before judgment, but the suit went on to judgment and execution in the name of both of them. The defendant applied to set aside proceedings. The plaintiff surviving sued out a new rule to strike out the name of the deceased from the execution, and to suggest the deceased's death on the roll. Lord Kenyon, C. J.: "This objection should not have been taken by the defendant at all. The plaintiff might have made the suggestion as a matter of course, and he ought not to be permitted to make the amendment. Rule absolute to amend without costs, the defendant's rule being discharged."

In personal actions, then, there is no defect in one plaintiff, as survivor of his deceased co-plaintiff, who has died since judgment, proceeding to enforce that judgment by execution in the names of himself and of the deceased plaintiff; because there is a survivorship in law of the rights of the deceased to the one who is living; and there is no one, in the language of the cases, "to take benefit by or become chargeable to the execution of the judgment."

It is argued, however, by Mr. Patterson, that that is not the fact here, for it does not necessarily follow that the two original plaintiffs had such an interest as would accrue on the death of one to the survivor; that they might have sued under the statute as tenants in common, or in some other capacity, character or interest, which was individual, and not joint; and that by the act of 1851, under which this action was begun, "the names of all persons claiming the property are to appear as plaintiffs, which may apply to separate interests;" and that the question at the trial should be (except in certain cases), whether the statement in the writ of the title of the claimants is true or false; and if true, then which of the claimants is entitled; and upon such finding, judgment may be signed and execution issue for the recovery of possession and costs, as at present in the action of ejectment, and the said judgment having the same and no other effect than at present.

All this shows rather that although plaintiffs may join personally now (which in effect they did under the former law as fictitious lessors of the fictious plaintiff), the recovery shall be to the same effect and in the same manner under the present law, according to the respective rights and interests of the claimants, as it would have been under the former law by the same persons stating joint or several demises, according to the nature of their estates; so that if joint tenants join now as plaintiffs, they shall recover the entirety; and if tenants in common join, they shall recover in severalty, as they could by proper demises under the old law.

This I take to be the meaning of the statute; for the jury are to say which of the claimants is entitled, and then judgment and execution are to follow, as under the old law. The case of *Davy & Russell* v. *Cameron* supports this view.

Under the old law, tenants in common could not unite in a joint demise. Their proper way was to state their interest in severalty, although each one might state a demise for the entirety (2 Chit. on Plg. 6th ed. 630). Joint tenants could lay a joint demise, but they could also lay individual demises for the entirety. If tenants in common proceeded each in the one action for their undivided shares, the recovery of judgment would show on the face what portion went to each lessor; so that on the death of one, the survivor could not have execution for the share which belonged to the deceased. And if they proceeded in the one action by separate demises for the entirety in each demise, they could only recover according to the fact and nature of their title, and not for the entirety which each claimed; so that here again the recovery would, notwithstanding the larger demand, shows what each lessor was entitled to; so that one, on the death of the other, could not claim the deceased's share. So if joint tenants proceeded on a joint demise, as they might, the recovery would follow the nature of the demise, and show a joint title, which would therefore, on the death of one, devolve entirely upon the survivor, and entitle him, according to the above decisions, to execution for the whole; because it would appear on the face of the record that no one else than himself was to take benefit by or become chargeable to the execution of the judgment. But if joint tenants, instead of joining in the demise, proceeded each on a separate demise for the whole, as they might, this would not entitle each one to a recovery for the entirety, but only to his own particular share, and would amount to a severance of the tenancy, which, appearing upon the record, would prevent the survivor from claiming the entirety or more than his own share upon the decease of his co-tenant.—*Doe dem Raper* v. *Longsdale*, 12 East. 39; *Doe dem Marsack* v. *Read*, 12 East. 57; *Doe dem Brown* v. *Judge*, 11 *East.* 288; *Doe dem Whayman* v. *Chaplin*, 3 Taunt. 120; *Doe dem. Hillyer* v. *King*, 6 Exch. 791; *Doe dem Poole* v. *Goungton*, 1 A. & E. 750; which last case contains some of the above, and many other authorities bearing on the subject.

The conclusion to be drawn from my view of the law is, that the joint claim by two under the act of 1851, and a joint recovery, is evidence of a joint estate and title in the two plaintiffs so recovering; and that a separate right, title or interest, if it existed, should, however the writ was framed, have been found by the jury, and so entered on the record, to show incontrovertibly, for the purposes of execution, that the rights of the plaintiffs were several. In fact, in the absence of such several recovery, I must take the recovery, for the purposes of execution, to have been and to be a joint recovery, and therefore a title which does survive, and to which no other person can take benefit or become chargeable.

This disposes of the first objection, and, from the cases before mentioned, it disposes also of the second.

The third question, I think, is determined by the fact that an execution did in this case in fact issue, and was also returned and filed within the year. The sheriff's return, that none came to receive possession, does not, I think, raise the presumption, which want of an execution altogether raised in law, that the plaintiffs had released the judgment. Nothing done upon a judgment might well raise this presumption, but something done upon it could not raise such presumption contrary to the act done.

As to the fourth objection, I think, without determining the abstract right of how far the sheriff may proceed in executing a writ of possession, that he was justified in removing Mrs. Williamson, the actual occupant of the premises; because she was in possession by right of her husband, who did claim title under Sylvester McKenna, the defendant in this action, or those in privity with him. In such a case an action for mesne profits would, under the old law, have been maintainable against her.—*Doe* v. *Whitcombe*, 8 Bing. 46; *Doe* v. *Harvey*, 8 Bing. 239; *Doe* v. *Harlow*, 12 A. & El. 40.

And lastly, that although the plaintiff's recovery is for the whole lot against the defendant, when in fact he proved title only to the east half, and should have recovered for that only, the recovery itself is not regular, although the court will restrain the plaintiff on motion from taking possession of more than he actually proved title to if he offers to exceed that limit; but in this case the plaintiff has not offered to do this, but has limited his endorsation to the sheriff to deliver the east half only; and this is all which the sheriff has delivered.

Upon the whole, I think, therefore, the summons must be discharged, with costs.

Summons discharged, with costs.

In the Matter of Geoffrey Hawkins.

Habeas Corpus—Common Law—Power of judge to issue—Con. Stat. U. C., cap. 24 sec. 41—Not applicable to plaintiffs against whom defendants obtain judgments for costs—Form of order of committal when made by junior judge of county court.

Held, 1. That at common law the judges of the Superior Courts of Common Law for Upper Canada have power to direct the issue of writs of *habeas corpus ad subjiciendum* in vacation, returnable either in term or vacation.

2. That a plaintiff against whom a defendant has recovered a judgment for costs only in either of the superior courts of common law or a county court, is not liable to be examined or committed under sec. 41 of Con. Stat. U. C. cap. 24.

Quære, must an order of committal made by a junior judge of a county court, under sec. 41 of Con. Stat. U. C. cap 24, on the face of it show the death, illness, unavoidable absence or absence on leave of the senior judge.

Semble, it need not; for the maxim *omnia presumuntur recte esse acta* will be held to apply.

(Chambers, September 14, 1863.)

The Sheriff of the united counties of York and Peel brought up the body of Geoffrey Hawkins, under a writ of *habeas corpus*,

dated the second day of September instant (in term time), and issued on a fiat of Mr. Justice Morrison, by which the sheriff was commanded to bring the party before the presiding judge in Chambers, or one of the judges of the Court of Queen's Bench, forthwith, to do, receive and suffer all and singular those things which the said judge should then and there consider of him in this behalf.

The writ was tested in term time, in the name of the Chief Justice of Upper Canada, and marked—

"By Statute 31 Car., *ad faciendum, subjiciendum, recipiendum.*

CHAS. C. SMALL."

and was not signed by any judge.

To this writ the sheriff returned that by virtue of it he had the body of the party, whom he arrested on the third of September, under an order, of which a copy was annexed to the writ; which order was made by the junior judge of the county court of the united counties of York and Peel, for not attending and being examined according to an order and appointment.

The copy of order attached was in a cause in the county court of the united counties of York and Peel, in which Geoffrey Hawkins was plaintiff, and John Kenrick was defendant, and was as follows:

"Upon reading the summons issued in this cause, on the seventeenth day of July instant, calling on the above-named Geoffrey Hawkins (judgment debtor) to shew cause why he should not be committed, pursuant to the statute, for not attending to be orally examined, under the order made in this cause on the eleventh day of June last, before William Mortimer Clarke, Esquire, the examiner named in said order; and the appointment of said William Mortimer Clarke made therein duly served on said Geoffrey Hawkins; and upon reading the affidavit of service of said summons; and the enlargement thereof, made respectively on the twentieth and twenty-ninth days of July last, on the undertaking of said Geoffrey Hawkins, by his counsel, that he would attend before said examiner, William Mortimer Clarke, Esquire, at his office, on Monday, the twenty-seventh day of July last, and Wednesday, the fifth day of August instant, respectively, at three o'clock in the afternoon of the said last mentioned days, and submit to be examined pursuant to said order; and upon reading the several reports of the said examiner, that the said Geoffrey Hawkins again failed to attend on both said last mentioned days; and the several affidavits of John Alexander Kains, to the same effect; and the said summons, by virtue of the said enlargements, being now returnable, and no cause being shewn to the contrary:

"I do order, that the said Geoffrey Hawkins be committed to the common gaol of the united counties of York and Peel (being the counties in which the said Hawkins resides) for the period of thirty days, pursuant to the statute in such case made and provided, for his default in not attending and being examined, pursuant to said order and appointment. And I do order that the sheriff of the said united counties of York and Peel to arrest and commit the said Geoffrey Hawkins accordingly.

"Dated at Chambers, August 7th, 1863.

(Signed) "JOHN BOYD, *J. J.*

"To the Sheriff of the United Counties of York and Peel."

The *habeas corpus* was granted on the affidavit of Mr. Hawkins, to the following effect, so far as it was material to the present decision: that he was the plaintiff in a certain action against John Kenrick in the county court; that Kenrick recovered a judgment against Hawkins in the action for costs of defence and nothing else; that he urged in the county court against his examination that the judgment was for costs only; that an order was made on which he was arrested; that he was the judgment debtor in that action; and that he was arrested on the order referred to.

It did not appear expressly by the return that the judgment was for costs only.

The affidavit on which the writ was granted stated this fact; and perhaps sufficient might have been made out of the order itself to lead to the same conclusion.

Mr. Hawkins, upon the return being read and filed, moved for his discharge upon several grounds, some, if not all of which, but one—viz., that he was entitled to be discharged, upon the ground that he was not liable to be examined or arrested on a judgment for costs only—were overruled at the time.

Robert A. Harrison shewed cause. His argument and the cases relied upon by him appear in the decision of the learned judge who heard the argument.

ADAM WILSON, J.—The question arises on the 41st sec. of cap. 24 of the Consolidated Statutes for Upper Canada. The 287th sec. of the C. L. P. Act of this country, which corresponds with the 60th sec. of the C. L. P. Act (1854) of England, must also be referred to, as well as sec. 160 and some of the following sections of our Division Court Act.

The point raised is of some importance, although not of much difficulty, further than the presumed opinion of the ex-Chief Justice of Upper Canada, then Mr. Justice McLean, hereinafter referred to, intimating his holding a contrary opinion, must necessarily make it so, and I shall be obliged, in vindicating my opinion, to set out the sections referred to at large.

The Consolidated Act for U. C. cap. 24, sec. 41, provides that, "In case *any party* has obtained a judgment in any court in Upper Canada, such party or any person entitled to enforce such judgment may apply to such court, or to any judge having authority to dispose of matters arising in such court, for a rule or order that the *judgment debtor* shall be orally examined upon oath before the clerk of the crown, or before the judge or clerk of the county court within the jurisdiction of which such *debtor* may reside, or before any other person, to be named in such rule or order, touching his estate and effects, *and* as to the property and means he had when the *debt* or liability which was the subject of the action in which judgment has been obtained was incurred; *and* as to the property and means he still hath of discharging the said judgment, and as to the disposal he may have made of any property since *contracting such debt* or *incurring such liability;* and in case *such debtor* does not attend, as required by the said rule or order, and does not allege a sufficient excuse for not attending; or, if attending, he refuses to disclose his property or his transactions *respecting the same;* or does not make satisfactory answers *respecting the same;* or, if it appears from such examination, that *such debtor* has contracted or made away with his property, in order to defeat or defraud his creditors, or any of them—such court or judge may order *such debtor* to be committed to the common gaol of the county in which he resides, for any time not exceeding twelve months; or such court or judge may, by rule or order, direct that a writ of *ca. sa.* may be issued against such debtor, and a writ of *ca. sa.* may thereupon be issued upon such judgment, or in case such debtor enjoys the benefit of the gaol limits, such court or judge may make a rule or order for such debtor's being committed to close custody under the 35th section of this act."

The English C. L. P. Act of 1854 sec. 60—which is, in fact, the same as sec. 287 of our C. L. P. Act—enacts that, "It shall be lawful for *any creditor* who has obtained a judgment in any of the superior courts to apply to the court or a judge for a rule or order that the *judgment debtor* shall be orally examined as to any and what debts are owing to him before a master of the court, or such other person as the court or judge shall appoint; and the court or judge shall make such order for the examination of such debtor, and for the production of any books or documents; and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party before a master under this act."

But this section of the C. L. P. Act, although corresponding with the above section 41 in many particulars, is not the one from which that section has been taken, for this last section is not confined to creditors only, and it goes far beyond the C. L. P. section in many other respects.

The provisions with which it more nearly agrees are to be found in sections 160 and 165 of our Division Courts Act, which are taken from the County Courts Act of England, 9 & 10 Vic. cap. 95 secs. 98 and 99.

Section 160 of the Division Courts Act enacts to the following effect that "Any party having an unsatisfied judgment or order in any division court for the payment of any debt, damages *or costs*, may procure a summons requiring the *defendant* to appear at a time and place therein named to answer such things as are therein named; and if the *defendant* appears he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt, or incurred the damages or liabilty which formed the subject of the action, and as

to the means and expectation he then had, and as to the means and property he still has of discharging the said debt, damages or liability, and as to the disposal he has made of any property."

Section 165 enacts in substance that if the party so summoned,

1. Does not attend, &c., &c.

4. If it appear to the judge that the party *obtained credit from the plaintiff*, or incurred the debt or liability under false pretences, or by means of fraud or breach of trust, or that he wilfully *contracted the debt or liability*, without having had at the time a reasonable expectation of being able to pay or discharge the same.

5. If it appears to the satisfaction of the judge that the party had, when summoned, or, since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments which the court in which the judgment was obtained was ordered; and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned resides or carries on his business, for any period not exceeding forty days.

Section 170 authorises the judge to rescind or alter any order for payment previously made against any *defendant* so summoned.

Section 171 authorizes the judge to examine both *plaintiff* and *defendant*, and also any other persons touching the several things hereinbefore mentioned, under certain circumstances, before judgment, and to commit the *defendant* to prison, in like manner as he might have done in case the *plaintiff* had obtained a summons for that purpose after judgment.

Section 172 enacts that no protection, order or certificate granted by any court of bankruptcy for the relief of insolvent debtors, shall be available to discharge any *defendant from* any order of commitment.

Section 173 declares that no imprisonment under the act shall extinguish the *debt* or other *cause of action* on which a judgment has been obtained, or protect the *defendant* from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this act, or to deprive the *plaintiff* of any right to take out execution *against the defendant*.

Mr. Hawkins contended that under sec. 41, before stated, he was not liable to be arrested, because he was the plaintiff in the action, and judgment had been recovered against him for costs only, and he also maintained that the proceedings were open to several other exceptions which I overruled. He cited the case of *Challin* v. *Baker*, 26 L. T. 206, in support of his view that an arrest could not be made for costs only, and which he contended was applicable to his case, although that was a decision under the English C. L. P. Act, sec. 45, before set out, referring to where a *creditor* obtains a judgment; and although our act, under which the arrest was made, is more comprehensive than that section; for he argued that the true construction of our act does not at any rate enable a defendant to examine a plaintiff or arrest him, when a judgment is for costs only.

Mr. Harrison, *contra*, argued that the Legislature, in sec. 41, by using the expression "any party," did so advisedly, to afford a defendant the very reasonable remedy which he ought to have as well against the plaintiff, as the plaintiff against the defendant, for the discovery of the plaintiff's estate and effects, in order that they may be applied to the liquidation of the costs of the action, which, it must be presumed, have been unjustly imposed upon the defendant by the plaintiff's wrongful proceedings, and which may amount to a large sum, and are at all times of serious consequence to defendants; that the arrest is not for the non-payment of costs —which would be contrary to section 3 of the act—but for the neglect and wilful contempt of the plaintiff to the order of the judge —and that there is a plain distinction between the two cases, of which the decision in *Henderson* v. *Dickson*, 19 U. C. Q. B. 593, is a very excellent illustration: and that the process has not been pressed vindictively against the applicant, for if he will now engage to appear and be examined according to the order of the judge his longer imprisonment will not be insisted on.

Mr. Harrison referred to the decision given below of the ex Chief Justice of Upper Canada, Mr. Justice McLean, in *Meyers* v. *Robertson*, 5 U. C. L. J. 251, determining that the section is not restricted to creditors, and is applicable to those cases in which judgments have been recovered against plaintiffs for costs only.

Mr. Harrison further contended that this writ of *habeas corpus* was not one which could be issued under the 31 Car. II cap. 2, for that act applied to criminal cases only, which this is not; and that the Imperial Statute 56 Geo. III cap. 126, which enables judges of the superior courts to issue and adjudicate upon such writs in vacation, in other cases than those which are embraced in the Statute of Charles, does not extend to, and has never been adopted in this province; that the applicant should, therefore, have applied to the court in term time, as he was arrested while the courts were sitting, or must apply in the ensuing term, if he be then in custody; and he referred to Crowley's case, 2 Swanst 1, as a decision upon this point.

As I entertained very strong doubts upon the power of the judge to commit under the circumstances stated, I bailed the applicant, binding him to appear from time to time before the judge in chambers until the matter was finally disposed of.

The case of *Challin* v. *Baker*, 26 L. T. 106, which was cited by Mr. Hawkins, is as follows:

The defendant in that case was called upon by judge's summons to shew cause why she should not, under the 60th sec. of the C. L. P. Act of 1854, attend before the master and submit to examination as to the debts due and owing to her or accruing due; and why, also, she should not produce all books of account, &c., relating to such debts. The judgment had been obtained in ejectment. Mesne profits were not claimed. A verdict was taken against the defendant, she not appearing, and costs were taxed at £35 13s. 2d.

For the plaintiff it was contended that he having obtained a judgment, was entitled to an order to examine his "judgment debtor."

For the defendant it was contended that the plaintiff was not a *creditor* who had obtained a judgment within the meaning of the section; that although he may become a judgment creditor in respect of his costs, yet the statute only applies to actions in which the plaintiff is a creditor at the time of the action brought; that in fact it refers only to creditors bringing actions for the recovery of debts or pecuniary demands in respect of which they have given credit. Platt, B., said that the statute clearly did not apply to a plaintiff in ejectment, and therefore dismissed the summons with costs.

The case of *Meyers* v. *Robertson*, 5 U. C. L. J. 254, referred to by Mr. Harrison is as follows:

The defendant called upon the plaintiff to shew cause why a writ of *ca. sa.* should not issue against the plaintiff for his contempt in not appearing and submitting to oral examination, in pursuance of an order and appointment, duly made under the 22 Vic. cap. 96 sec. 13, now forming sec. 41 of the Consolidated Act for Upper Canada before referred to.

No cause was shewn by the plaintiff. The defendant applied for the usual order for a *ca. sa.* under the statute. McLean, J., on hearing that the judgment was in favor of the defendant for the costs of defence merely, refused the order, on the ground that no *ca. sa.* could issue for costs only; but he said "he would grant the order for committal of the plaintiff under the statute, and he allowed the summons to be amended and again served for that purpose."

I have considered both of the cases on this particular point to which I have been referred, and while I quite agree with the decision of Baron Platt that under the clause relating to *any creditor* having obtained a judgment, no power is given to a plaintiff in ejectment to proceed by the examination of the defendant, when the recovery is for costs merely, and which equally excludes a defendant from so proceeding for his costs only, because in neither case is the party applying "a creditor who has obtained judgment." I am not called upon to dissent from any opinion of Mr. Justice McLean, because he made no decision that the defendant could examine, and arrest for not submitting to examination, the plaintiff in a case when the judgment had been recovered for costs only, because Mr. Justice McLean pronounced no decision whatever. He simply granted a summons on the plaintiff to shew cause why he should not be committed for contempt—a course which might, and no doubt would have been taken by any other judge, to hear on argument what could be advanced in favor of or against such an application. It does not appear that any order was ever made, and it is quite clear that no opinion was expressed upon the occasion.

There is then no authority contrary to the opinion which I entertain upon the construction to be placed upon the 41st section of this act. And if this section be read in connection with sec. 287, there is a decision expressly in favor of my opinion. Or if it be read with the light of the sections of the Division Courts Act before referred to, it will be manifest that this summary proceeding to enforce the payment of a judgment for costs only cannot be maintained, because every word of these sections applies to plaintiffs as against defendants only, and applies to those cases in the same manner as the 41st section under consideration, where the party proceeded against "contracted a debt or incurred a liability which formed the subject of the action."

I think that this section does, however, apply to other cases than to those where the relation of creditor and debtor strictly exists, for by this section any party who has obtained a judgment may apply to have the judgment debtor examined. Now any *party* is certainly not a word applicable only to creditors. Nor is the expression *judgment debtor* necessarily restricted to those cases *where judgment is recovered for a debt*—as every person who has a judgment rendered against him for a sum of money and costs is properly then, whatever he was before, a judgment debtor. Nor is the word "liability" synonimous with "debt." It may apply to any other cause of action, as for instance, trespass—trover—detinue, &c., where something else is recovered than the costs. And if the act stopped here I should not feel at liberty under this section, unless it is to be controlled by sec. 287, before mentioned, to say that a defendant who had obtained a judgment for costs only, was not a party who might examine the plaintiff as a judgment debtor respecting his estate and effects. But the apparent comprehensiveness of the early part of the clause is very plainly and precisely controlled when it expresses what the subject of the examination is to be—respecting his property and means at the time "when the *debt* or *liability, which was the subject of the action* in which judgment has been obtained against him, was recovered," "and as to the disposal he may have made of any property since *contracting such debt or incurring such liability.*"

The act, although carried beyond the strict case of the party applying having been a creditor, is nevertheless expressly confined to those cases only where *the judgment debtor* had "contracted a debt or had incurred a liability *which was the subject of the action*" in which judgment had been obtained against him, which may perhaps include almost every case in which there is a recovery by a plaintiff against a defendant for some pecuniary amount beside the costs of the action. But it may not include the case of a defendant who has a judgment for his larger set off because it can scarcely be said that that set off was *the subject of the action*, which I understand to mean is the same as *the cause of action*. It certainly, however, does not, in my opinion, extend to any case in which *costs alone* are recovered by a defendant, for, or in no sense can they, as between party and party, be said to be *the subject of the action.*

I think the whole scope of the clause bears this construction, and it emphatically corresponds with the declaration in the third section of the act that, "no person shall be liable to arrest for non-payment of costs," and also with sec. 287 of the C. L. P. Act.

It is true that this arrest is not in form for non-payment of costs, but it certainly is in respect of the non-payment of costs—and the summons and order for Mr. Hawkins' examination, and probably also the summons and order for his committal would, before arrest, have been held by all parties as discharged by a payment of those costs. As no doubt that would have been the effect of a payment, it makes me all the more careful while giving full effect to the distinction between the form and the substance of such a proceeding. We see that the form is strictly within the plain provisions of the law authorising an arrest where such provisions do not authorize an arrest for the substance.

It is noticeable that under the Division Courts Act a plaintiff may examine a defendant where he has a judgment or order *for costs.*

With the express legislative declaration contained in the analogous clauses already mentioned in the Division Courts Act, and with the equally strong inference to be deduced from the language of the 41st section itself, I have no difficulty in saying that in my opinion the defendant in the County Court judgment had not the right to call upon the plaintiff to submit to an examination, nor had the judge of the court below the power to order his imprisonment for not appearing for examination.

I do not however, by any means, say that the judge acted harshly. On the contrary, I think, while he assumed he had the power which he exercised, that he acted with a good deal of forbearance, considering the number of enlargements of the summons which were made to afford the applicant an opportunity of submitting to an examination and to spare himself from the unpleasant duty of committing the plaintiff to gaol, for what must have seemed to him a direct contempt of his order.

It is urged by Mr. Harrison, that the applicant cannot be discharged by any of the judges of the Common Law Courts in vacation, although he may be discharged by the Court of Chancery, or by any judge of that court exercising the functions of the full court, because that court is always open, while the Common Law Courts are open only during the terms.

There is no doubt that the statutes before referred to by Mr. Harrison, and the important decision of Lord Eldon, also referred by him, give much countenance to this doctrine. And that at different times very great doubt existed whether the common law judges really did possess the power of acting upon the writ of *habeas corpus* in vacation, in cases not within the operation of the statute of Charles the Second; but without entering into any argument to meet this assertion of the state of the law, it is quite sufficient for me to say that I find it decided in Leonard Watson's case, 9 Ad. & El. 731, that a single judge does possess such a power at the common law in vacation; and with this decision, which has been acted on ever since, I shall not hesitate to exercise the power until I am corrected by some higher tribunal. It is a power which has been exercised in this province for many years past without doubt or controversy, and I shall not cast doubt upon such a power now. I find that Sir James Macaulay, a judge, beside his great judicial qualifications, quite remarkable for his caution, and most unlikely to assume a power which he did not clearly think he possessed, saying in *Reg* v. *Tubbee*, 1 U. C. Pr. R., Rep. 100. "He would have granted the *habeas corpus in chambers* had it not been found desirable to amend the papers on which the application was founded, and not being able conveniently to remain in chambers until they were corrected, he requested the prisoners attorney to apply to Mr. Justice Burns, who granted the writ, and I know of many other cases of a similar kind before many of the other judges, and I believe it is the well know practice of the Crown office from the enquiries which I have caused to be made there.

My opinion then is, that the superior courts of common law of this province, and the respective judges of these courts, have the like powers of issuing the writ of *habeas corpus* which the superior courts, and the judges of such courts, possess in England, and that the authorities shew that such writs may be issued and may be made returnable before a single judge in vacation at the common law.

The prisoner then being properly before me, I have enquired into the cause of his imprisonment, as I was bound to do, and I find him, in my opinion, illegally in custody, and therefore I discharge him.

This (Mr. Justice Wilson added to the foregoing) was the opinion I was prepared to express, but it was intimated to me if I had no objection, that as the matter was of some importance it might be desirable to have it re-argued before myself and an associate judge. Accordingly I requested his lordship the Chief Justice of Upper Canada to be good enough to attend for the purpose, which, at great inconvenience to himself, whilst preparing his numerous judgments in cases argued during last term, he at once consented to do, as it was a case involving the personal liberty of the subject. The re-hearing has since taken place before the Chief Justice and myself. Mr. Hawkins, assisted by Mr. Doyle, supported the application, and Mr. Paterson opposed it, when the substance of the arguments above mentioned were again advanced, which, I must say, did not at all shake my opinion above stated; and I have now the satisfaction of being fortified in the correctness of my view by the superior judgment and long judicial experience of the Chief Justice of Upper Canada, who is clearly of opinion that under sec. 41 of cap. 24, of the Consol. Stat. U. C., a plaintiff cannot be compulsorily examined or considered as in contempt for not submitting to such examination, or be imprisoned for such contempt upon a judgment recovered by a defendant for costs only.

The Chief Justice is also as clearly of opinion that at common law a judge has the power to issue a writ of *habeas corpus*, and to adjudicate upon it in vacation.

It has not become necessary to determine the other questions of the due service of the proceedings in the court below, or whether the applicant's residence was properly in the united counties of York and Peel, so as to be subject to arrest within these counties; but a new point appeared in the course of the re-hearing which had not been noticed before, being that the order on which the arrest took place was issued by the junior judge, and it nowhere appears under sec. 6, of the County Courts Act, that the senior judge, who is still living, was ill, or unavoidably absent, or absent on leave at the time, which are the conditions necessary to exist to give the junior judge jurisdiction over the county court business; but as it is not necessary to give any opinion on this question for the decision of this case, it is only stated in order that it may not appear the matter has escaped attention. Perhaps the maxim *omnia presumunter rect esse acta*, as the Chief Justice said, may apply, and the general presumption that a person acting in a public capacity is duly authorised so to do.

The general result, as I have above mentioned is, that Mr. Hawkins must be discharged from his imprisonment.

I have only to add that the Chief Justice is in no way answerable either for my language or my reasoning—he has only desired me to express his opinion that the plaintiff was not liable to be examined or committed for, or in respect of costs only, according to his construction of the statutes.

Order for discharge.

FREELAND v. BROWN.

Judgment—Agreement to pay 12 per cent. interest for forbearance—Denial of same—Summons to stay proceedings.

Where judgment was, on the 28th December, 1860, recovered by plaintiff against defendant for £2,486 14s. 8d. debt, and afterwards defendant made large payments of money to plaintiff, part of which plaintiff alleged he received upon an agreement to pay 12½ per cent. interest for forbearance, which agreement defendant denied, and the facts admitted between the parties went far to establish some such agreement or arrangement, a summons, obtained by defendant (who sought to have all interest in excess of 6 per cent. applied in reduction of the judgment debt), calling upon plaintiff, among other things, to show cause why all proceedings should not be stayed, on a *fieri facias* against the goods of defendant, then in the hands of the sheriff, was discharged with costs.

(Chambers, Sept. 17, 1863.)

Leys obtained a summons for the defendant, calling on the plaintiff to show cause why all proceedings should not be stayed on the *fieri facias* against goods issued in this cause, and why a reference should not be made to the Master to ascertain what amount (if any) remains due on the execution.

This summons was granted, on the affidavit of the defendant, which was to the following effect: that about the 24th September, 1860, he was served with the writ of summons in this cause, by which the plaintiff claimed £2,526 6s. 8d., and interest on £2,466 from the 1st August, 1860, which the defendant swore he believed far to exceed the plaintiff's just and legal claim; that judgment was signed on the 28th December, 1860, for £2,486 14s. 8d. for debt, and £4 7s. 9d. for costs; that he paid to the plaintiff, after the service of the writ of summons, and before judgment, $1,142 44c., for which no credit appears to have been given; that since judgment he paid to the plaintiff $7,600 42c.; that on the 16th April, 1863, a *fieri facias* against his goods was delivered to the sheriff, to levy $4,589 3c. for debt, and $5 for the writ, with interest from the 24th March, 1863; that since the issuing of the *fieri facias* he paid to the plaintiff $2,358 28c.; that by the statement annexed to the affidavit showing the payments made by the defendant in this action, it appears he has satisfied the whole amount of the plaintiff's claim with costs; that he paid the plaintiff his fees; and that notwithstanding such payment and satisfaction, the plaintiff refuses to withdraw his writ from the hands of the sheriff, but insists that the defendant still owes a large sum on the judgment.

The statement referred to commenced with the entry of the judgment on the 28th December, 1860, and admitted the plaintiff's claim at that time to be £2,491 2s. 5d., or $10,364 48c.; so that the questions were only upon the matters which occurred since that time.

The plaintiff made affidavit that he has no personal interest in the case; that his name was used only as a trustee from Mr. Crum, of Scotland, the lender of the money; that a few days after suing out the writ of summons, he agreed with the defendant's attorney to delay proceedings till the 25th October, 1860; that he did so; that he subsequently agreed with the defendant to delay entering judgment till the 1st December, 1860, upon the express condition, which was then agreed to by the defendant, that the defendant would, on or before the 1st November, 1860, pay to the plaintiff interest upon the principal moneys remaining due on the mortgage at the rate of 12½ per cent. per annum up to the said 1st November; that the amount of interest was $946 98c. or thereabouts, but the defendant did not pay the same at the time agreed, but he afterwards made the following payments—November 6th, $400; November 12th, $200; November 16th, $154 64c.; November 22nd, $192 44c., remainder of the said interest: that these sums are all he received from the defendant in the month of November on account of the mortgage; and he distinctly and positively swears that all of these sums were paid on account of interest only, and no part thereof was paid on account of principal due upon the mortgage; and for all these sums the defendant got credit as payments for interest, as before stated, and as he (the defendant) well knew.

The plaintiff also swore that on the 6th and 16th November, the defendant paid into the plaintiff's office the sums of $100 and $95 36c. (both of which sums are included in the defendant's statement as payments made in this cause), but neither of such sums was paid on account of the mortgage, for both of them were paid on account of a judgment against the defendant in the plaintiff's office, and which the plaintiff was then threatening to enforce, in favor of one John Rankin. That after the entry of judgment he was urging payment, when the defendant told the plaintiff he (the defendant) had made arrangements for borrowing money to pay off the whole of the plaintiff's claim. The plaintiff then consented to wait, upon the express condition and understanding that the defendant was to pay interest on the principal secured by the mortgage—the whole of which still remained due, and was admitted by the defendant to be due—at the rate of 12½ per cent., from the 1st November, 1860, until the whole was paid off; and that he should also give additional security; the judgment to stand as collateral security, to be enforced at any time when he made default; to both of which the defendant assented. That in this and in a subsequent agreement, the amount remaining due on the mortgage for principal was $9,866 66c., and upon that sum he was to pay 12½ per cent., and upon that sum he has been charged such rate, and not upon the amount recovered by the judgment. That the defendant afterwards asked the plaintiff to accept of only part of the sum, as he wished to pay off some other debts, and to give him time for the balance, saying that as he was paying such large interest it was a good investment. That the plaintiff consented to do this, on the following terms, to which the defendant agreed: first, that the defendant should reduce the mortgage to $5,000; second, that he should also pay all interest, at the rate aforesaid, from the 1st November, 1860, to 14th October, 1861, and the costs, which amounted to $36 50c.; third, that all present securities should continue to stand for the reduced principal, and for interest thereon at the rate aforesaid, such interest to be payable half-yearly. That in pursuance of this agreement the defendant paid, on the 4th June, 1861, $3,000; and about the 14th October, 1861, $2,673 22c. That immediately on receipt of this last mentioned sum, "I sent to the defendant a written statement, showing $302 still due under his last agreement, requesting payment; a true copy of which statement is annexed, marked B." That the defendant never disputed the correctness of the statement, and subsequently paid this balance as follows: about the 1st November, 1861, $100, and about the 10th November, 1861, $202 20c.; "and I distinctly say the defendant paid the several sums charged for interest in the said statement as interest at the rate mentioned therein, and as he had agreed to do." That he did not receive any money on account of this suit on the mortgage after he received the $202 20c. until he received the $1,000 afterwards mentioned; and, so far as he knows, no money was paid upon such account, excepting $312 50c., which was paid to the plaintiff's then partner about the 4th June, 1862. That after the defendant's return from the old country, he asked the plaintiff to send him a statement of what was due for principal and interest on the mortgage; and the plaintiff sent him one, a copy of which was annexed, marked C. That afterwards, pressing the defendant for payment, the defendant wrote the letter annexed, marked D, stating, among other

things, "I have not $5,500 in cash to pay you, until the money is forthcoming from Chaffey's client." That the defendant paid, on account, $1,000, about the 23rd March, 1863, but he never disputed the correctness of the last statement. That he frequently said the plaintiff's client need not be so urgent for payment of the principal, as he was getting such large interest for his money. That there was justly due on the said mortgage, on the 23rd March, 1863, after giving credit for the $1,000, the sum of $4,540 3c., according to the agreements before mentioned; but the error in addition in statement makes the endorsation of *fi. fa.* $4,589 3c. That the sum of $312 50c. entered in the defendant's statement as paid on the 14th April, 1862, the plaintiff is satisfied, was never paid. That defendant did pay, on the 4th June, 1862, $312 50c., which was the exact half-year's interest due on the 14th April.

Mr. Morris, who was the partner of Mr. Freeland, swore that he only received the one sum of $312 50c., which was on the 4th June, 1862; and that the defendant and himself went over the items of account in the office books of Freeland & Morris, relating to this mortgage, but no omissions were discovered.

The defendant, in reply, put in an affidavit of his own, going into the mortgage transaction previous to the entry of the judgment, not only seeking to open the judgment, but going out of the case made by his former affidavit, and upon which alone the summons was granted, and so far the affidavit was not entertained. Defendant in his affidavit then proceeded to state that the only agreement for the payment of interest that he made with the plaintiff, was the original agreement at the making of the mortgage, and he denied that he agreed to pay interest at the rate of 12½ per cent. up to the 1st November, 1860, or at any other special rate; or that he at that time or any future time agreed to depart from the contract made in 1857, in any shape whatever: that he paid the plaintiff, on the 8th November, $500, instead of $400, as the plaintiff says; and that on the 16th November he paid $250, and not $154 64c., as the plaintiff says; and that he paid all these different sums of $500, $200, $250 and $192 44c. on account of this mortgage. He totally denied that the rate of interest to be paid by him was ever at any time after the making of the mortgage in 1857, made or proposed to be made in consideration of extending the time of payment of the mortgage money, or any part thereof, or that time was ever given him on condition of his paying any extra or increased interest beyond what he was bound to pay under the mortgage. And he further swore that the sums paid to the plaintiff on account of the mortgage, so far as he was concerned, were always paid on account, and not as a settlement to any particular period, or for any particular claim; and that he carefully avoided doing so, always intending to have a full examination into the plaintiff's claim before settlement thereof.

The defendant, in a supplemental affidavit, stated that he paid the different sums of $500, $200, $250 and $192 44c., all on account of interest on the mortgage.

C. S. Patterson, for the plaintiff, showed cause. He contended that although the mortgage was made before the 22 Vic. cap. 85, yet, having been made since the 16 Vic. cap. 80, the defendant could not recover back any payments of interest made exceeding the rate of 6 per cent., nor could he at any time after such payment have claimed them to be allowed in reduction of the principal (*Quinlin* v. *Gordon*, 7 U. C. L. J. 232); that the special agreement spoken of by Mr. Freeland is expressly corroborated by the different statements sent to Mr. Brown, and which are deliberately adopted by him, because, with them in his possession, showing the rate of 12½ per cent. is charged and demanded, he voluntarily made the different payments referred to; that it was not that Mr. Freeland, after receiving money, gives Mr. Brown a statement of how the account stands, but it was that Mr. Freeland first of all rendered an account distinctly claiming the 12½ per cent. interest, and then that Mr. Brown adopted the statement by specially making the payment upon and in accordance with the statement rendered; that perhaps whatever verbal difference there may be between Mr. Freeland's affidavit and Mr. Brown's may not be of any practical importance, because, while Mr. Freeland asserts his right to charge the higher rate, upon the special agreement which he says was made regarding it, Mr. Brown (denying the special agreement) admits he believed and was under the impression that he had to pay the 12½ per cent., according to the mortgage itself, for he thought that that was the rate of interest which was provided for in the mortgage; and that such an arrangement as Mr. Freeland declares was made upon the security of the judgment of the court was not an abuse of the proceedings of the court, but was an agreement perfectly legal, for any rate of interest may be contracted for, and even before the late acts it might have been enforced if it was agreed upon as a consideration for the forbearance of the execution he referred to.—*Smith* v. *Alder*, 1 B & Ad. 603; *Hugh* v. *Jones*, 6 Scott, N. R. 696; C. L. P. Act, p. 269; *Lane* v. *Harlock*, 4 D. & L. 408; *Ib.* 22 L. J., Chan. 985.

Richards, Q. C., in reply, insisted there could be no recovery of so large a rate of interest without a clear bargain to that effect; that the allegation of Mr. Freeland was met by the denial of Mr. Brown; that although the defendant made the payments after the statements were rendered to him, he made them on account generally, because he knew he owed far more than the sums demanded; that Mr. Freeland had no right to appropriate the payments made as he pleased, that being the right of the debtor, and not of the creditor; that he (Mr. Brown) had expressed how they should be applied, viz., upon the debt, and not upon any other claim; that, whether such a claim could be enforced against Mr. Brown or not, admitting that he had made a bargain for such a rate of interest, still it could not be exacted upon a judgment which only bears 6 per cent. interest; and that it was a use, or perhaps an abuse, of the proceedings of the court which would not be allowed.—*Bell* v. *Tidd*, 9 Dowl. P. C. 949; *Ex parte Hodge*, 26 L. J.; Bankruptcy, 67; Arch. Pract. 11 Ed. 403; English Rule, 76 of H. T. 1853.

ADAM WILSON, J.—I do not think it is necessary to determine how far and in what respects the two affidavits differ as to the fact of an agreement having been made for the 12½ per cent. after this action was begun, because I think the collateral and circumstantial evidence which I shall refer to either supports Mr. Freeland's view or corresponds with the defendant's belief and impression that he was in fact paying at that rate.

The plaintiff says the defendant agreed to pay interest at 12½ per cent. to the 1st November, 1860, for the forbearance of entry of judgment until the 1st December, 1860, and that the interest amounted to $946 98c.; and that the defendant afterwards paid, in November, $400, $200, $154 64c. and $192 44c.—$947 8c. The difference between the plaintiff and the defendant, whether the $100 additional paid when the $400 were credited, or the $95 36c. additional when the $154 46c. were credited, is of no kind of importance; for there can be no question but that these two extra sums were paid by the defendant and received by the plaintiff. The plaintiff says he applied them on another claim against the defendant. The defendant says he had no right to do so, but he does not deny that he owed the other claim. There ought not to be any contention about such a sum under these circumstances; for if the defendant has received less credit on this claim than he was entitled to, he must have received more upon another claim than he has got.

Then Mr. Freeland says it was agreed that the defendant should reduce the claim to $5,000, and pay interest thereafter at 12½ per cent. half-yearly upon such reduced amount; and he states that after receiving two large payments on account, there was still a balance against Mr. Brown of $302 21c., which had to be paid to bring the demand down to the $5,000; and that he sent Mr. Brown, in October, 1861, a memorandum to this effect; and that Mr. Brown, in the following month, paid this identical sum of $302 21c., with the memorandum in his possession charging him 12½ per cent.

Then, in April, 1862, a half-yearly payment of interest at 12½ per cent. fell due on the $5,000, which was $312 50c., and Mr. Brown paid this precise sum.

Then, in January, 1863, the plaintiff rendered a further statement, claiming interest at the same rate, making the total at that time, of principal and interest, $5,468 75c., to which, or to some similar demand, Mr. Brown answered, that he had not $5,500 to pay, until the money was forthcoming from Chaffey's client.

I cannot but assume, upon all these facts, that there was and must have been some understanding between the parties as to the rate of interest to be paid.

I am not considering whether the rate is oppressive or not; I am only determining whether a bargain or arrangement of some kind has or has not been made or assented to, by which a particular rate should be paid, without regard to its quantum; and from the best opinion which I can form, I think there has been such a bargain or arrangement.

I had, during the argument of this case, great doubts whether, even assuming that a special bargain had been made for more than 6 per cent., either upon the judgment itself or upon the mortgage with the security of the judgment, it was such a proceeding as would be sanctioned and upheld by the court; but it is clear the contract upon the judgment for a higher rate of interest than 6 per cent. is not illegal; for, while in England 4 per cent. is the rate authorized by statute to be levied on judgments, the rule of court No. 76, of H. T. 1853, provides that in cases where there is an agreement between the parties, more than 4 per cent. interest shall be secured by the judgment. Then the endorsement may be made accordingly to levy the amount of interest so agreed.

If the defendant thinks he can sustain his case, he is not precluded by my opinion. He may either apply for a review to the full court, or take proceedings by *audita querela* to try the facts. The very large sum involved has induced me to examine the whole of the facts in detail, and the result at which I have arrived is, that the summons must be discharged with costs.

Summons discharged, with costs.

COUNTY COURTS.

In the County Court of the County of Elgin, before D. J. Hughes, Esq., Co. Judge.

Stanton and Warren v. McLean.

Attorney's bill—Delivery of bill containing items before action.

In an action on an attorney's bill for costs, where the costs were charged at one lump sum, although the costs as between party and party had been taxed at that sum in the original suit, and no bill of items had been delivered by the plaintiffs to their client. *Held*, that it was not a compliance with the 27th sec. of Con. Stat. of U. C., cap. 35.

This was an action to recover the amount of an attorney's bill.

Pleas—1st. Non-assumpsit. 2nd. No bill of costs delivered one month before action brought pursuant to the statute.

At the trial a bill of costs was proved to have been mailed by the plaintiffs to the defendant in a Common Pleas suit (*McLean* v. *Campbell*), in which the present defendant was plaintiff, and the charge was thus made:—"1862, Feb. 1,—To costs on entering judgment, £40 19s. 3d.; interest up to May 1st, 1863, on costs taxed, £2 11s. 3d.; total, £43 10s. 6d."

It was admitted that this was the only bill delivered to the now defendant.

Horton, for defendant, moved for a nonsuit, because the bill was not a sufficient compliance with the statute, and cited *Drew* v. *Clifford*, 2 C. & P. 69; *Waller* v. *Lacey*, 1 Scott's N. P. 186, 1 M. & G. 54, 8 Dow. 563; *Pigott* v. *Cadman*, 26 L. J. Ex. 134.

Stanton, for plaintiffs, insisted that the statute requires a delivery of a bill stating the costs taxed at that amount, and that a delivery of a bill in that way is a sufficient bill, and that the bill having been once taxed, the statute is complied with, and a further compliance with the statute is superseded by the taxation.

Leave was reserved for defendant to move in term to enter a nonsuit on the objection taken, and a verdict was taken for plaintiffs for £45.

In the following term the motion was accordingly made. The cases cited in argument were those above mentioned. Reference was also made to 7 U. C. L. J. 135.

Hughes, Co. J.—I think the opinion of the editors of the U.C. L. Journal on this subject to be correct, and I feel bound to adopt it. The question involved here was discussed in a precisely similar case in 7 U.C. L. J. 135. The editors of the Law Journal, in answer to a communication over the signature "S. P. Y.," upon the authority of *Drew* v. *Clifford*, 2 C. & P. 69, and *Philby* v. *Hazle*, 29 L. J. C. P. 370, (which last case I find also reported in 2 L. T. N. S. 433, and in 8 C. B. N. S. 647,) state that a bill delivered as this was, "to amount of taxed costs in suit B. v. C. $56.53," and "to costs of proving claim in Chancery, G. v. E., $12.80," is not a sufficient compliance with the statute, because it should give the items in detail.

Drew v. *Clifford* is one of the cases which was referred to at the trial by Mr. Horton, and was brought upon the bill of several attornies in copartnership. The bill signed was delivered in the following terms:—"Austin v. Clifford. An action having been brought and judgment obtained, the costs of the action were taxed at £51 13s. 3d." The taxation between party and party was proved. It was held not sufficient to charge the costs of the action brought for the then defendant, by the plaintiffs, as attorneys, in one lump sum, although the costs in that action had been taxed at that sum as between party and party. Lord C. J. Abbott held that the plaintiffs could not recover, for he said, "a bill must be delivered with items, if for no other purpose, at least to shew that the party is not charged for the same thing twice over. I think that this bill charging a sum in the lump is not sufficient."

The reason for this is obvious in another point of view from that put by Lord C. J. Abbott. The 27th sec. of the Con. Stat. of U. C., cap. 35, provides that "no suit at law or in equity shall be brought for the recovery of fees, charges or disbursements, until one month after a bill thereof has been delivered by the party, &c." It does not follow that the costs taxed as between party and party would be necessarily proper to be charged as fees, charges or disbursements as between attorney and client; because there may be, and generally are, disbursements to witnesses included in a bill of this kind taxed as between party and party, which are ordinarily paid by the party himself and not by the attorney, which a party may have a right to recover from the opposite party, and his attorney would have no claim to as against his client. The same remark may apply to fees disbursed to counsel in a case where leading or second counsel has been employed.

I think therefore that the rule for a nonsuit to be entered must be made absolute in this case.

Per cur.—Rule absolute.

DIVISION COURTS.

In the First Division Court of the County of Elgin, before D. J. Hughes, Esq., County Judge.

The Corporation of Vienna v. Marr.

Taxes—Action against defendant as collector.

Held, that the roll not being "certified under the hand of the clerk," defendant was not bound to distrain on the goods of a party assessed.

The claim attached to the summons set forth a plaint wherein plaintiffs sought to recover $26.88 "for that the defendant having accepted the office of collector of taxes for the corporation of the village of Vienna for the year 1861, undertook and promised to perform the duties of said office; that one H. McC. was rated on the roll for that year for $26.88, but defendant neglected to levy the said amount out of the goods in the possession of the said H. McC., although had defendant properly performed the duties of his said office the said amount might have been made, and the plaintiffs have, in consequence, sustained damages to the amount above claimed."

The defendant, being a responsible person, was not required by the corporation, and did not enter into any bond with sureties for the due performance of his duties.

It was proved that H. McC. had goods in his possession out of which defendant might have levied the taxes; that he seized a waggon which was claimed by the reeve of the village, and he, in his private capacity, forbade the sale of it; that there were other goods out of which defendant might have made the amount. Defendant applied to the council for an indemnity to sell the waggon, which they refused to give.

Defendant returned upon the roll opposite the name of H. McC. "property levied upon and sale forbid by G. Suffel." This return was not made until some time late in the year 1862.

Ellis, for the defendant, objected, 1st, that the plaintiffs had never placed a proper roll in defendant's hands, which would justify his selling the waggon or H. McC.'s other goods. The roll was produced and it was objected that there was no proper certificate of the clerk to the collector, setting forth that that was the roll as the statute (Con. Stat. U. C., cap. 55, secs. 91, 92,) requires. The roll was not certified or signed by the clerk. He also objected that there is a special remedy set forth in the statute (see sec. 177 of the same act,) and that it should have been pursued; therefore no action will lie. He cited *Tayles* v. *Carson*, 1 U. C. L. J. 29, and *Municipality of Whitby* v. *Flint*, 9 U. C. C. P. 449, and insisted further that the word "shall" in the 177 sec. is imperative, even where a bond is given, and cited *Tiernan* v. *School Trustees of Napanee*, 14 U. C. Q. B. 15.

Mann, for plaintiffs, insisted that the irregularity in the roll was waived by the collector accepting and acting under the roll and retaining it in his possession for two years without returning it, and cited *Macnamara on Nullities*, 24 & 25, and that there was no equity in a collector acting as the defendant had done, and waiting until the last stage of the proceeding before objecting to the roll. *Wooden* v. *Moxon*, 6 Taunt. 490.

HUGHES, Co. J.—I am quite satisfied that if this plaint had been for the recovery of taxes, assessed against H. McConnell, which the defendant had actually collected and received to the use of the plaintiffs, he would be estopped from setting up the defence of which he has now availed himself, because he could not be permitted, in that case, to set up an irregularity of any kind, whether in the rate itself or in the roll which might have been intended as his authority for collecting, or that there was no by-law legally constituting him the collector, as a defence to the action. But that is not what is complained of by the plaintiffs. It is that the defendant, being their collector, neglected to levy an amount out of goods in the possession of McConnell, which the defendant had undertaken to collect, although the money might have been made but for the defendant's negligence. The answer to this was, that Mr. Suffel forbade him to sell a waggon he had seized, claiming it as his own, and that the plaintiffs would not indemnify him in selling it, and also that the plaintiffs did not arm him with a properly certified roll as his legal warrant for selling McConnell's goods or goods in his possession.

I think that without a roll properly certified under the hand of the clerk, as required by the section of the statute cited in argument, the defendant was not either authorised or bound to enforce the payment of the sum in question, and that if he had done it he would have been committing an act of trespass for which Mr. Suffel (if defendant had sold the waggon) or Mr. McConnell (if defendant had sold other property) might have successfully prosecuted him at law, because he lacked the legal warrant under which to justify himself.

It was the duty of the plaintiffs either to have armed him with that essential, or to have supplied him with an indemnity. They did neither. The plaintiffs have, therefore, no right to complain that the defendant did not do that which would in itself have been an act of trespass, or to charge that as negligence upon the defendant, the doing of which might have subjected him to an action of trespass, for the want of the very essential which they themselves have not supplied and ought to have supplied.

I dare say the defendant would have sold the waggon if he had not been interfered with, but as it turns out he could not have sold any of the property without making himself a trespasser; and as the plaintiffs did not legally authorise the act which they now complain he ought to have done and did not do, the action, I think, fails, for he was not in law bound to do it.

The cases of *Kepp* v. *Wiggott*, 10 C. B. 35, and *Municipality of Whitby* v. *Flint*, 9 U. C. C. P. 449, bear me out in my opinion upon this point.

Per cur.—Nonsuit.

QUARTER-SESSIONS.

In the Court of Quarter Sessions for the United Counties of Huron and Bruce, before ROBERT COOPER, Esq., Chairman.

HELPS, Appellant and ENO, Respondent.

Sufficiency of Notice of Appeal—Sufficiency of conviction under Master and Servants' Act.

Held:—1. That a notice of appeal, stating "that the formal conviction drawn up and returned to the Sessions is not sufficient to support the conviction &c.," is sufficiently particular to allow all objections being raised which are apparent on the face of the conviction or order.

Held:—2. That a conviction under the Master and Servants' Act, Con. Stat U.C. cap. 75, s. 12, must shew that the person against whom the complaint is lodged was a servant at the time of the conviction or order; that the complaint was, "upon oath," and in what manner the wages are due.

[September 10. 1863.]

The appellant in this case was charged by the respondent before Thomas Holmes, Esq., J. P., with refusing to pay him his wages as a hired servant.

The complaint was laid under the 12th Sect. of Con. Stat. of U. C., cap. 75; the appellant was by Thomas Holmes and other Magistrates sitting with him, ordered to pay the sum of $35, together with costs, within 21 days from date of order.

The order (which was in the form of a conviction) was duly returned to the Sessions and filed.

Appellant's counsel proved his notice of appeal, and it was contended—

First. That the conviction or order did not show that complaint was laid before the Magistrates "upon oath."

Second. That it did not show that at the time of order made the relation of master and servant existed, and without which the Magistrates had no jurisdiction.

Third. That the ordering of the payment of wages might mean others than that of servant's wages within the meaning of the act.

Fourth. That no order can properly be made for payment of wages under said act unless the complainant was in service of master at the time the information laid, and that fact must appear in the order of payment.

Respondent's counsel urged that appellant could not, under his notice of appeal, which was according to the form given by Con. Stat of Can., page 1130, show that the order was defective and not sufficient in law—that the notice was too general, and not sufficiently particular.

R. COOPER, Chairman.—The notice of appeal is according to the form given in Con. Stat. of Canada, page 1130. It strictly follows the act. The words of the form are, "that the formal conviction drawn up and returned to the Sessions, is not sufficient, in law, to support the conviction," &c. I think these words are sufficiently particular to allow all objections being raised to the order or conviction apparent on its face. The respondent is bound to show an order good in law under this notice. I think, therefore, the objections raised by the respondent's counsel cannot prevail, and that all questions as to the validity of the order must be entertained by the Court.

I am of opinion that an order made by a Magistrate, directing the payment of wages to a servant, under the provisions of the act cited in the argument, must strictly comply with all the requirements of that act. Nothing can be left to intendment. It is departing from the common law to give Magistrates jurisdiction in matters properly belonging to civil tribunals. When such jurisdiction is conferred they act strictly within their authority. Have the Magistrates done so here? I think not. They have not shown that this respondent was a servant at the time the complaint was made or at the time the order was made. They have not stated that the complaint was made "upon oath" as the statute required, neither have they said in what manner the wages was due. For aught the Court can see the respondent might have been years out of the appellant's service. Suppose he had, could the respondent in this case have brought his former master before a Magistrate and had him committed for having refused to furnish "necessary provisions?" If it be conceded he could not, I cannot see how this order can be sustained, because that part of the 12th section of the act referred to, is as applicable to the case before us as the one suggested.

The Court is of opinion that the order must be quashed with costs.

Per cur.—Order quashed.

ENGLISH REPORTS.

QUEEN'S BENCH.—IRELAND.

M'NALLY v. OLDHAM.

Libel—False representation—Justification—"The Black List"—Publication of records.

A party publishing a copy of a judgment does so at his peril; and if the judgment has been satisfied by payment before the publication, and he publishes it as an existing liability, he is liable in an action for libel, and if special damage has followed, in an action for a false representation.

[January 13 and 22.]

Demurrer. The first paragraph of the summons and plaint complained that theretofore, to wit, at the time of the committing of the grievances thereinafter complained of, and long before, the plaintiff was in business as a jeweller in the city of Dublin, and was in large trade and good credit in said city; that in the course of his said trade the plaintiff became indebted to one Edward

Johnston in the sum of 157*l.* 4*s.*; that said Johnston recovered a judgment therefor in the court of Exchequer, on the 17th May, 1860; and thereon the plaintiff paid the amount of the said judgment and costs, amounting to the sum of 181*l.* 17*s.* 5*d.*, on the 19th May, 1860. And plaintiff said that during all the time aforesaid, and at the time of the grievance, &c. the defendant was the proprietor and publisher of a periodical commonly called "The Black List," yet the said defendant falsely and maliciously printed and published of and concerning the plaintiff in the defendant's said publication, commonly called the "Black List," and on the 24th May, 1860, long after the said judgment had been satisfied as aforesaid, the words following, that is to say, "24th May, 1860; debtor's name, M'Nally, George; address, College-green, Dublin; trade jeweller (meaning the plaintiff) date, 17th May, 1860; court, Exchequer; amount, 157*l.* 4*s.*; costs, 7*l.* 4*s.* 11*d.*; creditor Edmond Johnston" (meaning thereby that said judgment had been recovered against the plaintiff and was then an existing liability against his estate and effects, and that said Edmond Johnston was then a creditor of plaintiff. And plaintiff said that by reason of such publication the plaintiff's trade and credit were ruined, and the plaintiff thereby became bankrupt, to the plaintiff's damage of 2000*l.* Second paragraph—That being such trader as aforesaid, he, the said plaintiff, was in good credit in his said trade, and at the time of the committing of the grievances, &c., that divers persons, and in particular Joseph Myers and Co., of Birmingham, Prince and Son, of Birmingham, John Nathan, of Dublin, and B. Boam, of London, were in the habit of delivering goods to him in his trade on credit; and that the plaintiff, on the 24th May, 1860, was considered by said persons as a person who might safely be trusted with goods on credit, and was in fact at said time so trusted by them. And the plaintiff was not, on the said 24th May, 1860, and at the time of the committing, &c., indebted to Edmond Johnston in the sum of 157*l.* 4*s.*, or at all, yet the defendant on the 24th May, 1860, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiff a false and malicious libel in the words following (setting out the words above given, with an innuendo that the said plaintiff was on said day a judgment-debtor of the said Edmond Johnston in the sum of 157*l.* 4*s.*, and 7*l.* 4*s.* 11*d.* costs); by reason whereof the said plaintiff had been and was greatly injured in his good name, credit and reputation; and divers persons who had trusted the plaintiff in his trade with goods on credit, and in particular the said persons so named as above, ceased so to do, and withdrew their credit from the plaintiff, to his damage in the sum of 2000*l.* Third paragraph.—The plaintiff being such trader, and in such credit as aforesaid, that at the time of the committing, &c. divers persons, and in particular the said persons in the last paragraph mentioned, were in the habit of trusting the plaintiff in his trade with goods on credit; and the plaintiff was, at the time of the committing, &c. so trusted by them. And the plaintiff was not at said time indebted to one Edmond Johnston in the sum of 157*l.* 4*s.*, or at all, of which the defendant had notice; yet the defendant on the 24th May, 1860, and divers other days and times from thence upon the commencement of the suit, falsely published and represented in writing to the said persons so named as above, and to divers other persons, that the said Edmond Johnston was a creditor by judgment of the plaintiff, and that the said plaintiff was in fact indebted to the said Edmond Johnston in the sum of 157*l.* 4*s.*, with 7*l.* 4*s.* 11*d.* costs, on said day, the 24th May, 1860, although defendant had notice as aforesaid that said debt was paid, by reason whereof the plaintiff was injured in his good name, credit and reputation; and divers persons, and in particular the said persons so named as above, withdrew their credit from the plaintiff, and ceased to consider the plaintiff as a person who might safely be trusted with goods on credit, and refused any longer to deal on credit with the plaintiff, and the plaintiff thereby became ruined and bankrupt to his damage of 2000*l.* Fourth paragraph.—That at the time of the committing, &c. and long before, plaintiff was a trader in the city of Dublin, and in great business as such trader, and at the time of the publication thereinafter complained of, the plaintiff was not indebted in any sum to Edmond Johnston, of which the defendant then had notice; yet the defendant, on the 24th May, 1860, falsely, fraudulently, and maliciously made a false representation in writing to divers traders and others, and amougst others to B. Boam, John Nathan and Joseph Myers and Co., of and concerning the plaintiff, in the words and figures following, that is to say (setting out the words above given and stating that the meaning was that the said Edmond Johnston was a creditor of the plaintiff.) And plaintiff averred that, by reason of the premises said persons, traders and others, withdrew their credit from plaintiff and he became bankrupt, to the plaintiff's damage 2000*l.* Fifth paragraph.—That at the time of the committing, &c. and long before, plaintiff was a trader in the city of Dublin, and in great business as such trader, and at the time of the publication thereinafter complained of, the plaintiff was not indebted in any sum to Edmond Johnston, yet the defendant, on the 24th May, 1860, falsely and maliciously printed and published in writing a false and malicious libel of and concerning the plaintiff, in the words following, that is to say (setting out the words above given, with an innuendo that the said Edmond Johnston was a creditor of the plaintiff), whereby the plaintiff's credit was ruined, and he became bankrupt, to the plaintiff's damage of 2000*l.*

The defendant pleaded, fifthly, for a further defence to all said paragraphs, that the publication and representation in writing by each of said paragraphs complained of was one and the same identical matter and thing, that is to say, the publication in said first paragraph in express terms set forth; and said that, before the said printing and publishing by defendant the said Edmond Johnston, in said paragraph mentioned, duly obtained a judgment in the Court of Exchequer in Ireland against the said plaintiff for the sum of 157*l.* 4*s.* for debt, besides 7*l.* 4*s.* 11*d.* for costs of suit; and said judgment was duly enrolled and of record in said court, and duly registered, and not annulled or satisfied on record at the time of said publication and representation in writing; and said publication and representation in writing was a matter so appearing of record and registered as aforesaid, and not further or otherwise, and was made *bonâ fide* and without malice.

To this defence plaintiff demurred, saying that so far as it was pleaded to the first paragraph of the plaint it did not disclose any defence good in substance, because it admitted the sense imputed in and by the said first paragraph to the publication therein mentioned, but did not justify the publication in the sense in the said first paragraph so imputed; and because the publication of the judgment in said fifth defence mentioned was not the publication of any public judicial proceeding in a court of justice; and because the publication of matter false in fact contained in a record of a court of justice by a person not a party to the record, whereby a party to the record sustained damage, is not in itself lawful or privileged; and because, as it appeared by said first paragraph that the judgment therein mentioned was paid prior to said publication, and the defendant published said judgment as being at the date of the said publication an existing liability against the plaintiff, any privilege for the publication of the record in said defence mentioned was taken away by the facts stated in said first paragraph. And that the said defence, so far as it was pleaded to the second paragraph, did not disclose any defence thereto good in substance, for the reasons already stated with reference to it as pleaded to the first paragraph; and that the said defence, so far as tt was pleaded to the the third paragraph, did not disclose any defence thereto good in substance, because said defence admitted that the defendant represented that the plaintiff was in fact indebted to Edmond Johnston on the 24th May 1860, but did not justify the representation in the sense charged in said third paragraph; and because the publication in said fifth defence mentioned was not the publication of any public judicial proceeding in a court of justice; and because the publication by a person not a party to a record of matter false in fact contained in a record of a court of justice whereby another, a party to the record, sustains damage, was not in itself lawful or priviliged; and because inasmuch as defendant had notice prior to said publication that the debt therein mentioned was paid, and yet published said record, having actual notice that the statements in said publication contained were false in fact, any privilege otherwise existing for such publication was thereby lost; and that said fifth defence, as pleaded to the fourth paragraph, did not disclose any defence thereto good in substance for the reasons assigned as grounds of demurrer to said defence as pleaded to the third paragraph; and that said defence, so far as same was pleaded to the fifth paragraph, did not disclose any defence thereto good in substance for the reasons assigned as grounds of demurrer to said defence, so far as same was pleaded to the first and second paragraphs.

S. Walker (with him *Heron, Q. C.*), for the plaintiff, in support

of the demurrer.—The justification does not answer the entire charge. It admits the sense imputed to the publication, and does not justify in that sense. The charge is, that the defendant published in the "Black List," not merely that a judgment had been recovered on the 17th May, but that that judgment was, on the 24th May, the date of the publication, an existing liability against the plaintiff. It is no answer to that to say "a judgment was recovered on the 17th, which in fact I have a right to publish:" *White* v. *Tyrrell*, 5 Ir. C. L. Rep. 498; *Edsall* v. *Russell*, 4 M. & Gr. 1090; *O'Connor* . *Wallen*, 6 Ir. C. L. Rep. 378. Suppose, however, the plea answered the entire charge, if any immunity exists for the publication of a judgment of record, it must be either because it is the publication of the judicial proceedings of a court of justice, or because a record is in its own nature a thing so public that a party may safely publish it. But the publication of a judgment is not analogous to the report of a public trial. There is nothing to show in this case that the thing published is of the character which may be published; and the manner and object of publishing it are quite different from the manner and object of publishing the report of a trial: *Davison* v. *Duncan*, 7 Ell. & Bl. 231; *Andrews* v. *Chapman*, 3 C. & Kir. 289; *Hoare* v. *Silverlock*, 9 C. B. 28; *Lewis* v. *Levy*, 1 Ell. Bl. & Ell. 537. Then, a judgment of record is not a matter of so public a nature that a party may safely publish it. The publisher ought to show that he has some interest in the contents of it. The fact of being allowed to get a copy of a document is a very different thing from the right to make that document public: (*Rex* v. *Creevy*, 1 M. & S. 273; *Popham* v. *Pickburn*, 7 H. & N. 891.) *Fleming* v. *Newton*, 1 H. of L. 363, will be cited on the other side, but it is distinguishable. There was no allegation of malice, or of any injury having resulted from the publication in that case. Then also the publication was literally true. The statutes there giving publicity to the record of protests were different from and stronger than the statute 1 & 2 Geo. IV. c. 53, which relates to the record of courts of justice in this country. Lastly, on the facts as they appear in this defence, the publication here was an unfair one. It amounted not only to a statement that a judgment had been recovered, but to a statement that the judgment was in full force on the 24th May, which is translating the thing published to the injury of the plaintiff: (*Lewis* v. *Clement*, 3 B. & A. 702; *Lewis* v. *Walter*, 4 B. & A. 605.) Further, it appears from some of the counts that at the time of the publication the defendant had actual knowledge that the thing which he published was untrue, which makes the publication an unfair one.

W. Sidney and *Armstrong*, Serjt., for the defendant.—The defendant had a right to make this publication as a publication of a record of a judment. As a principle every court of justice is open, and the publication of even an *ex parte* application for a criminal information has been held to be justified. It is true, that a regular plea of justification must justify the libel in the sense imputed to it in the innuendo. [HAYES, J.—Perhaps the defence here may be upheld as a plea of excuse.] Then, there is no case showing that the right to publish the proceedings in a court of justice is confined to proceedings openly had: (*Curry* v. *Walter*, 1 B. & P. 525; *Lewis* v. *Levy*, 1 Ell. Bl. & Ell. 537.) *Fleming* v. *Newton*, 1 H. of L. 363, is a strong authority in favour of the defendant. Then, publicity is required not merely for the purpose of showing that there is an existing debt, but also for the purpose of showing the *status* of the party, which may be very important. Under the various Bankrupt Acts, and under the statute 7 & 8 Vict. c. 90, there is express legislative authority for inspecting the various records of the courts upon payment of a fee. The inspection and exemplification of the records of the Queen's courts are the common right of the public: (2nd Taylor on Evid. s. 1340.) The fact of knowledge of the alteration of the position of the parties does not take away the privilege of publishing an existing record. The defence in this case is not to be looked upon as a plea of justification to the counts in libel, but as an explanation of the circumstances under which the publication took place. The words here are not defamatory, and no action will lie on them, although special damage is alleged: (*Kelly* v. *Partington*, 5 B. & Ad. 645.) Nor is the publication said to have been of the plaintiff as a trader. The words here do not come within any definition of a libel, and the plaint itself is bad; (*Parmiter* v. *Coupland*, 6 M. & W. 105.) As to the counts for a false representation, the defence is good as to them, and, so far, the objection made on the ground of the defence not justifying in the sense imputed does not apply. They also cited *Re Bagot*, 8 Ir. L. R. 295; *Clarke* v. *Taylor*, 3 Sc. 95: 2 Wms. Saund. 244 (5), note *q*.

Heron, *Q. C.*, in reply, cited *Stiles* v. *Nokes*, 7 East, 492.

LEFROY, C. J.—This case comes before the court on a demurrer to the fifth defence. In the course of the argument, the defendant took the course, which was properly open to him, of insisting on the objections which, as he considered, lay to the summons and plaint, and showed that it did not state a good cause of action. The case is one of considerable importance, and concerns the public, or at least a large portion of the public, as well as the plaintiff. The nature of the case and of the defence can be best known, and it is important that they should be correctly known, from a statement of the summons and plaint, and of the defence that has been pleaded to it. In the case there are involved questions of importance, and the result of all is, that we are of opinion, first, that the plaintiff has shown a sufficient cause of action; and, secondly, that the defence pleaded does not state a sufficient ground of either justification or excuse. The action is brought by the plaintiff as a trader, not only alleging that he was a trader of credit, but specially stating particular persons with whom it was of importance that his credit should be maintained—persons who supplied him with goods (naming them) upon credit. After that general statement as to his credit generally, and as to the persons whom he named, who were induced, by this publication to withdraw from him the credit they had therefore given, it goes on to state, that on the 24th May, the defendant published of and concerning him a false and pernicious libel, stating the publication as of the 24th May, which will be found important; and what is also material stating it to have been made in a document known as the "Black List," a very significant term and one fairly to be adverted to on the principle that, though this comes before the court now upon a consideration of the pleading, the law is perfectly settled that, with respect to the meaning of language, the court is to exercise the same judgment that individuals would do with respect to the meaning of terms where they are not affected by an innuendo so as to change the ordinary meaning. Well, having thus stated and given that denomination to the publication, he goes on to say: [His Lordship read the words complained of, the innuendo, and the rest of the first count.] This charge is repeated through four other counts, as we used to call them, or paragraphs, as is now the appellation to be given to them, with different circumstances of more or less aggravation. One of those circumstances is, that the plaintiff was, in consequence of this publication, driven to bankruptcy and to ruin. Another circumstance of aggravation is the allegation, that the defendant knew that this representation, that the plaintiff was on the 24th May a judgment-debtor of Johnston's was false. I now come to the defence which is pleaded to this summons and plaint, making this preliminary observation, that the action is brought by this party, as a trader, for the injury done to him in his trade. Another observation important to make is, that he has, by the innuendo, alleged the meaning in which these terms were used and applied by the publication, and in which meaning, if the defendant has any justification or excuse, he must justify or excuse the terms he has made use of. Upon that principle of law we are all agreed, and as to it we have, I must say, the candid and proper admission of the counsel for the defendant. It is said that the innuendo cannot be used to make actionable words which otherwise would not be so. That I shall have to consider afterwards; but I proceed on the defence which has been pleaded. [His Lordship read the fifth defence.] Here, the defendant states as his defence, that at the time of publication, namely, on the 24th May, there was a judgment standing against the plaintiff; that he published this judgment as it stood on the record; and that, as it stood on the record, it was not annulled or vacated; but he does not deny the allegation in the count that the judgment had been previously paid off, and therefore was, in substance and reality, annulled; whereas it is here held out to the public that, at the date of this publication, namely, on the 24th May, this plaintiff was a judgment-debtor upon a judgment duly enrolled, upon which, therefore, execution might have been at any moment issued against this trader. He thus passes by without traversing the allegation that, previously to the 24th May the judgment had been, in truth, annulled by payment, which operates as complete a vacancy of the judgment as if it had been vacated on the record. He, therefore,

in justifying himself as he does, by arguing that he had a right to publish this as a part of the record, and part of the proceeding in a court of justice, omits a very important matter. He would have been justified if he had published the judgment as it stood in reality, as a judgment annulled and satisfied; but if, instead of that, if, instead of availing himself of a legal right, which none of us mean to question, the right of publishing a judgment, a true copy of a judgment, so long as the party does not add a sting to it; if he adds the sting, that it is an unsatisfied judgment, this becomes an exercise of a legal right, with an addition which makes that injurious to the plaintiff in a way that it would not have been if he represented the truth of the transaction. Well, the other counts allege, and no answer is given to the allegation, that the party knew, and was apprised that the judgment was paid off. To that he gives no answer. If the representation was false, made of a trader, the party made it at his peril, whether he knew of the falsity or not, and the peril has been realised in this case; for the allegation undenied is, that the persons whom the plaintiff was in the habit of getting credit from withdrew that credit, the consequence of which was, that he was driven to bankruptcy and ruin. Then the question arose whether this summons and plaint discloses a cause of action. The defendant states at the outset that this is no libel, because, looking to the definition of a libel given by Parke, B., in *Parmiter* v. *Coupland*, 6 M. & W. 105, the language here used was not defamatory. Why, to be sure, if the language is not defamatory, and no innuendo is added, the party cannot sustain an action. But this is not a declaration for an injury arising from defamation of the trader's character, but it is a declaration by a trader for a libel affecting his credit, and though that is attempted to be met by saying that the allegation complained of was made "*bona fide*, and without malice," the facts being admitted, the party cannot avail himself of these general words in order to screen himself from the consequence of the act which it is admitted he has done. But suppose the publication not to be a libel in the strict sense of the word, still, under the C. L. P. A., a party is allowed to add to his declaration an action on the case for a false representation of him as a trader in respect of his trade, from which representation an injury has resulted, and I apprehend there can be no doubt that an action on the case will lie for a false representation made respecting a trader and his circumstances, when it produces an actual injury, if the injury is admitted. It is a *damnum cum injuria*, and therefore, even admitting the objection that this is not strictly speaking a libel, that it is not stated with all the strictness that would become the statement of a libel, the publication is, at all events, a representation, stating of a man in his trade a circumstance which has, upon the admission on the face of the pleading, brought ruin and bankruptcy upon him. It cannot be doubted that that is a cause of action, though the case should fail on technical grounds as a charge of libel. It is argued on the authority of a case from Scotland which came before the House of Lords, that this publication is justified. The Scotch case came before the court upon an application for an injunction. The application was made in Scotland under a jurisdiction which belongs to the courts of that country, to enjoin a party from the publication of a matter which the court deems libellous. The judgment in Scotland was to prevent the publication of the matter which the party justified himself in publishing, because it was published under the authority of an Act of Parliament, by which a record was made of persons in trade who suffered their bills to be protested, and there was authority given by the Act for the benefit of the liege people to publish the list of the merchants or other persons who thus suffered bills to be protested. There was a publication accordingly as against the plaintiff, as having let his bill be protested. The justification so pleaded was held insufficient. There was an appeal to the House of Lords, and the decision of the Scotch court was there overruled, on the ground that this was a publication justified by law and allowed by statute, and accordingly that case was attempted to be pressed into service here, because it is by law allowed to a party to go to the record and get a copy of it, and it was said, I think truly and properly, that he had a right to publish the record of that judgment; and if he had published it as it stood on the record simply, it would have brought him within the protection of the Scotch case, because then he would have published it as it really existed; but forgetting altogether that, he thought he might have published it as it appeared to exist on the record, and added to it that which did not appear on the record, and gave it a sting, which deprived the party who had paid off the judgment of the benefit of his payment, the effect of which was to annul the judgment, and not to leave it, as it was published to be, an existing liability. The proceeding in Scotland of the protest being published was the publication of a truth, for the party had suffered his bill to be protested, and I may observe, even to allow that publication an express Act of Parliament was required; and the party could only have the protection of that Act of Parliament by publishing according to the Act, that is, according to the truth of the transaction that there was a protested bill at the date of the publication. But here it is published that on the day of publication there was a judgment unannulled, with an existing liability upon it, and though there might have been a right to publish the judgment as it stood, there was no right to add to it the sting which gave it all its pernicious consequence, namely, that it was a subsisting judgment, when in truth, so far from that, it was as much an annulled judgment as though it had been vacated and satisfied on record; for the Act of Parliament which allows a party to plead payment of a judgment as a matter in *pais*, makes that payment as full a satisfaction as a satisfaction on the record. The defendant therefore, published what was not the truth, in the exercise of a legal right, and added to it the sting, which made it pernicious, and therefore illegal, and it is an admitted fact that by reason of that publication the party was driven to bankruptcy and ruin. I should be sorry that there could be a doubt that such conduct was the foundation of an action. I do not know how trade could be carried on, if traders were not protected against such a proceeding as this; and it imports the public, and becomes us, to look into the case anxiously, and if we find ground to condemn such a proceeding as this, to do so; and it is high time the public should cease to be infested by such a nuisance. Every trader in the community should be protected against a proceeding, which is, in fact, an invitation to all his creditors to issue a commission of bankruptcy, in order to prevent his substance being swept away, as it would be if the judgment was such as it was represented, that is, an existing liability. The case in Scotland, therefore, was very different from the present one. The party there acted under an Act of Parliament, and what he did he did *bona fide*, and according to the truth of the transaction. The very contrary has been the case here. These are the grounds which occur to me in this case for coming to the decision that in this matter, whether we look at it as a libel, or as an action on the case for a false representation affecting a trader in his credit, and producing the consequence here alleged, there is a foundation for an action for damages in one light or other, and that therefore the justification attempted fails, for it passes by and omits the sting of the offence, whether we look on the action as one for libel, or as an action on the case. In every view of the case, therefore, we cannot hesitate in holding that there is here a cause of action. Our judgment therefore must be for the plaintiff, allowing the demurrer.

O'Brien, J.—I also am of opinion that the demurrer should be allowed. The Lord Chief Justice has gone into the case so fully that it is not necessary for me to go over the facts again. Three of the counts in the summons and plaint are framed in libel, and two in the shape of an action on the case for a false representation. It was admitted by Mr. Sidney that so far as the counts were maintainable as counts in libel, and so far as the defence pleaded to them was pleaded as a justification of the libel, it cannot be sustained, as it does not justify it in the sense imputed in the summons and plaint. The three counts state that the meaning of the publication was, and the publication fully bears it out, that judgment was then an existing liability against the plaintiff, and that Johnston was then a creditor of his. This is not justified in the sense so imputed, and the defence, therefore, fails. But it was sought to be said that it was a plea of excuse, which is good; and it was also contended by Serjt. Armstrong, he having a right to fall back on the summons and plaint, that the counts are not maintainable as counts in libel. I was rather startled at being told that such a publication as we have here was not a libel. We were referred to the case of *Parmiter* v. *Coupland*, 6 M. & W. 105, where Parke, B. says that "a publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel;" and it was contended that it was thereby stated that such publications,

and such only, were libellous. But that is not so; Parke, B. merely decides that the publication before the court was a libel, because it tended to impute dishonest conduct to the plaintiff; but he never laid it down that nothing save what imputed dishonest conduct was a libel. There is a very proper definition of a libel given in Addison on Wrongs, p. 578, where, enumerating the publications which are libellous, the writer says that publications "which are injurious to the private character or credit of another are libellous." Now, here is a publication of a man engaged in trade, and it represents that he was indebted in a considerable sum by judgment, and when the statement of that is followed in the summons and plaint by the statement that the plaintiff in consequence of that, suffered special damage, the persons who dealt with him refusing to give him any further credit, am I to be told that the publication is not libellous? It is enough to state the general definition of the law of libel, and to state the present pleading, to show that this publication is a libel, and is actionable. Then, am I to be told that we are to disregard the innuendo where the defendant sets up a plea of excuse where a positive meaning is put in and admitted; am I to be told that we are to disregard that? It is enough to state the ground on which the privilege is contended for, namely, the right to publish proceedings in a court of justice. But it is necessary that this publication should be true, not only true in fact, but that it should not be given in such a way as to convey a meaning contrary to the truth. Because a man is justified upon grounds which I do not question, in publishing a record of all the judgment, is he justified in publishing it in such a manner as to convey that not merely judgment, but execution also, was obtained? Many a trader may resist a claim because he thinks it ill-founded, and the claim is paid the moment the action is decided. In this case judgment was obtained on the 19th May, and the amount was paid on the 19th. Are we to be told that the fact of the payment was to be withheld, when the judgment, which is so much affected by that payment, is published? It is an important circumstance that the publication was on the 24th May, 1860, a week after the judgment, and the charge is, that the publication was so framed as to convey a meaning that the debt was then due. Unless it could be contended that the privilege of publishing truth extended to privilege to publish untruth; I do not see how the privilege can be claimed here. I therefore think we do not in this case trench upon the decision of the House of Lords in *Fleming* v. *Newton*. It may be perfectly right that the publication in Scotland was justifiable, but that does not extend to a publication so made as to convey a false representation injurious to a party. But we are told also that two of the counts are unsustainable, because they are not counts for libel, but counts for a false representation. It comes round to the same thing. There is here an innuendo, or what in a libel would be called an innuendo. Well, I do not conceive why, because it does not bear the technical name of an innuendo, when the action is for a false representation, we are to throw it aside. What becomes, then, of the privilege? As I said before, the defence seeks to extend the privilege of publishing truly what is untrue, or publishing in such a manner as to convey an imputation wholly false. Well, we are told now, supposing a proceeding carried on for several days, and a party publishes every morning a true account of what took place the day before, and it is said the character of a party may be greatly injured, and yet will it be contended that the publisher of the newspaper is liable? I say not, because at the time the publication was made the publication was true, and the publisher gave truly all that took place. But I think, if, on the other hand, a man should daily tell all the proceedings that existed, and then give an unfair publication of them, the plea of privilege would be gone. Well, we were referred then to a proposition which, I think, could not be maintained, that except words are defamatory in themselves, their publication is not actionable, although it is followed by special damage. Well, if "defamatory" includes the case which I have put above, I do not quarrel with the proposition; but if it is attempted to confine its meaning to the cases of charges of dishonesty, and matters of that description, I think there is no foundation for it, and the case in 5 B. & Ad. authorises no such proposition, because the words there were not defamatory at all, and there was no innuendo, and the court held that the words themselves being neither defamatory nor injurious, those words unaccompanied by an innuendo were not actionable, though the words were followed by special damage. On these grounds I concur with the judgment of my Lord Chief Justice. On looking to the counts of the summons and plaint, I think something might be said on the fifth count. Of course, it will be for the plaintiff to say, if he succeeds, how far he will take damages on that.

HAYES, J.—I am unwilling to go over the ground trodden by the Chief Justice and my brother O'Brien. I feel I have little to say, except to express my concurrence with them. The declaration consists of two sets of counts. Two of them are for a false representation. That part of the declaration shows a good cause of action there is no question. The other set of counts are in libel. Serjt. Armstrong says, that the publication complained of in them does not amount to a libel; but, looking at the whole law, I have arrived at the conclusion that these are good counts in libel, understanding by libel the publication of defamatory matter without justification or excuse; and I take it that this is a publication of such matter, without justification or excuse, and the enunciation of those two words leads me to consider the defence which has been set up. First, then, is it a plea of justification? I think not; and the plain reading of it will convince any one of that. To the two counts for a false representation, the answer set up is a plea of justification, that there was a judgment against the plaintiff on the 17th May, and that it remained on record. I cannot see how that justifies the publication complained of; and I do not see either, how it applies to the counts in libel. Well, is it a plea in excuse? In form it is that; and I take it, that the pleader intended that this should not be a plea in justification, but in excuse. Now, a great deal of argument has been expended to show that every subject has a right to publish records of courts of justice. In the abstract, I agree to that; and even without the authority of the case in Scotland, I would agree to it. But, like every privilege a subject has, he avails himself of it at his peril, and he must be cautious that when he is using it he does not misuse it, as he must bear in mind the axiom, *sic utere tuo ut alienum non lædas*, and when he is publishing records he must take care he does not do it without justification or excuse, to the detriment of another. I think that has been done in this case, for this party has not only published the proceeding, but has published it with a sting or tack added to it. It might not have been actionable to say that one party recovered a judgment against another; but as he goes on to say that the relation of debtor and creditor still exists, and thus injures the character of the party who was defendant in that action, he must be responsible; and it is neither justification nor excuse to tell us that there is a record existing unvacated and unannulled, which nobody means to deny. Upon principles, therefore, as old as the old law, we may, I think, safely come to the conclusion that the plea cannot be sustained, and that the demurrer to it must be allowed.

Demurrer allowed.

GENERAL CORRESPONDENCE.

By-law—Conviction—Repeal—Effect thereof.

TO THE EDITORS OF THE LAW JOURNAL.

Prescott, 6 Oct., 1863.

GENTLEMEN,—Is a conviction valid which is made by a Justice of the Peace under a municipal by-law, which is afterwards (that is, after the making of the conviction) quashed for illegality?

Yours truly.

L. C.

[By-laws which are regularly passed, and valid on the face of them, have the force of statute law. Convictions had under them while in force endure notwithstanding their repeal.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. HAWKINS AND OTHERS v. WILLIAMS AND OTHERS.

Executor—Legacy to—Assent.

Leasehold property was bequeathed to three persons, who were also appointed executors of the will, upon certain trusts. One only of the executors proved the will. Six years afterwards he conveyed the whole property, professing to do so as executor.

Held, that lapse of time from the probate of the will was no evidence of assent to the legacy, and that therefore the whole property passed.

C. P. NEVILLE AND ANOTHER v. KELLY.

Reward for discovery and apprehension of felons—Action for—Duty of Police Constable.

Where a police constable apprehended a person on suspicion of having robbed his master, and, before information of such apprehension had been given to the master, he offered a reward. The police constable was held to be entitled to sue for the reward, he having in due performance of his duty communicated the circumstances of the apprehension to his superintendent, who stated the fact to the defendant.

To a declaration claiming a reward under a public advertisement for having given information which led to the recovery of the defendant's property, and the apprehension and conviction of the thief (a boy in the defendant's employ), the defendant pleaded that before the publication of the advertisement the plaintiffs apprehended the thief, and kept him in custody until after the publication of the advertisement, although they knew that he had absconded from the service of the defendant with the property in question, and contrary to their duty they neglected to inform the defendant of such apprehension. The plaintiffs replied that at the time of the apprehension of the boy they were policemen, and that they apprehended the boy, and, in pursuance of their duty as such policemen, informed the Chief Superintendent for the district of the apprehension and of all the circumstances which had come to their knowledge concerning the theft within a reasonable time, and that in consequence thereof and at their request the superintendent informed the defendant, and that such information could not reasonably have been given before the publication of the advertisement.

Held on demurrer, that the replication was a good answer to the plea.

B. C. EX PARTE LEE.

Attorney—Enforcing undertaking—Summary jurisdiction of Court—Breach of faith—Rule to pay money.

L., an attorney, who had issued a *ca. sa.* upon which a defendant in an action was arrested, arranged with the attorney for the defendant that he should be discharged from custody on paying £60 down, and giving his note for £60 at six months. The former sum was paid, and *L.* gave the attorney of the defendant an order for his discharge, on condition agreed to, that it should not be lodged till the defendant's note was obtained. The defendant refused to give his note. The defendant's attorney then said that he would obtain his client's discharge by a judge's order, on conditions in accordance with the agreement. *L.*, upon faith in this, left the order for discharge in the hands of the defendant's attorney, and upon subsequently receiving a summons to show cause why the judge's order should not be drawn up, gave his consent. The defendant's attorney improperly lodged the order for his client's discharge, left with him as above mentioned, without obtaining the judge's order.

Held, upon an application by *L.* for a rule against the defendant's attorney to pay over money according to terms of the order to which *L.* had consented, that those terms were made by him for the benefit of his client, and that the application was without precedent, and must be refused.

C.P. PEDDER v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PRESTON.

Corporation acting in more than one capacity—Banking accounts—Set-off.

A municipal corporation, in addition to its ordinary capacity, acted as managers of baths and wash-houses, and likewise as the local board of health. They had a banking account with the plaintiffs, and had three separate accounts. On the bank suspending payment, a sum of money was due to the corporation from the bank, on the local board of health accounts. The plaintiff sued the defendants for the amount due to the bank, whereupon the defendants set off the amount due from the bank on the other account.

Held, that the defendants might set off this claim one against the other, as the plaintiff and the defendants were debtors and creditors on the separate accounts in the same rights.

EX. EVANS v. ROBINS.

Vendor and purchaser—Misdescription—Ground-rent—Provision for compensation or arbitration—Return of deposit.

On a sale of a "freehold ground rent," "arising out of and secured upon certain houses, with a right to the reversion," which turned out to be an annual sum, payable by the lessee in respect of the user and enjoyment of a garden under the covenant of the owner.

Held, that the purchaser was entitled to a return of his deposit, and held, also, that the usual provision that in case of dispute as to the amount of compensation it should be settled by arbitration, did not apply, the vendor not having resorted to it, but insisted on the full performance of the contract, and the negotiations having thereupon come to an end.

EX. CRESSWELL v. HEDGES.

Tenant in common—Right of as against co-tenant—Destruction of property—Pleading.

One tenant in common sued in trespass by another, for destroying the property, may plead that except in respect of a certain undivided share or shares, he, and not the plaintiff, is entitled or interested, and as to such share or shares payment into court.

CHANCERY.

L. J. LUCAS v. WILLIAMS.

Administration—Executor—Priority.

An executor, who makes himself liable for debts of the testator has no priority in respect of such debts, over the other creditors of the testator, but stands in the same position as the creditors for whose debt he has made himself liable.

M. R. IN RE THE MITRE ASSURANCE COMPANY EX PARTE EYRE.

Winding-up—Contributory—Liability of former holder of shares—Transfer to nominee of directors to stop injury by dissatisfied shareholders.

Where the directors of a company, fearing an exposure of its affairs, entered into a compromise with a dissatisfied shareholder, who had presented a petition to obtain the usual winding-up order, in pursuance of which compromise, the shares of the petitioner were transferred to one of the directors, a sum of money paid by them to the petitioner, and the petition withdrawn.

Held, that the transfer of his shares, made under such circumstances, did not release the petitioner from his liability in respect of them, and that in the subsequent winding-up of the company, he was properly placed on the list of contributories.

The transfer in question, had not been with all the formalities required by the deed of settlement of the company; but the court considered, that even if these formalities had all been observed the transferor would not have been released from liability.

M. R. BARNETT v. TUGWELL.

Will—Construction—Gift to a class of children legitimate or legitimate.

A bequest of property, on the happening of certain events, equally between the children "legitimate or illegitimate" of A. A had five illegitimate children, all of whom were alive at the date of the will. A afterwards married and had nine legitimate children.

Held, that both classes of children took under the bequest, the illegitimate children who were living at the date of the will, being considered as the object designated to take under the gift to the class of "illegitimate children."

The union in one gift to a class of children, of legitimate and illegitimate children, does not invalidate the gift, although the members of each class of children have to be determined upon different principles.

V. C. R. WILKINSON v. DYSON.

Will—Construction—Condition not to interfere.

A testator by his will, gives a legacy to his son W. M. W., upon condition that he does not interfere or intermeddle in the management of the estate, either individually or as solicitor, and he also declares with regard to another son G. B. W., who is abroad, that he shall personally receive his share, not by attorney, or if not personally, by certain means pointed out. W. M. W. is the general attorney under a power for G. B. W. in this country, and after various communications a bill is filed to administer the testators estates, G. B. W. being plaintiff, and W. M. W. one of the defendants, but there is no actual proof that W. M. W. authorised the suit, the question on his examination not being directly put to him, but he admitting that the suit arose in consequence of the communications.

Held, that there was no proof of a breach of the condition, and therefore, that W. M. W. was entitled to the legacy.

Semble, the onus of proving a breach lies on the party alleging it, and the other side cannot be called on to prove a general negative. A case of suspicion is not sufficient; there must be actual proof of the breach.

V. C. R. CURLING v. AUSTIN.

Specific performance—Identity—Way—Compensation—Costs—Evidence in chambers—Objections abandoned and again raised.

Possession by a purchaser, given or permitted by a vendor, without receipt of rents and profits by the purchaser, does not render the purchaser liable to pay the purchase money into court; but he will be ordered to give up possession or to pay the purchase money. If the common decree of specific performance and for an inquiry for title be made, the purchaser may raise objections which he abandoned before the suit, and the court will not add any inquiry on the subject to the decree or direct the chief clerk to state special circumstances. On further consideration, the court will not, on the question of costs or interest, look at any evidence but that in the cause, and not at the proceedings and evidence in Chambers on an interlocutory motion.

A clause in an agreement for purchase, that the purchaser is not to require any further proof of identity than given by the title deeds exempts the vendor from producing further evidence, but he cannot force the title on the purchaser, unless the evidence is complete.

On the sale of a house or stables in an *cul de sac*, the vendor is not bound to show a title to the roadway.

M. R. DAVIS v. ANGEL.

Will—Construction—Condition precedent—Bill by person having a contingent interest.

A devise in trust for A. (in case he should marry the testator's niece Esther) for life, subject to the proviso after mentioned, and after his decease in trust for the eldest son of A, who should be living at his death, and have attained twenty-one, or who should live to attain twenty-one, in fee. Proviso that in case A should not marry Esther, the bequest to him should not take effect, but that such share should fall into the residue.

A., in the testator's lifetime and with his assent, married Isabella, who was still alive, by whom he had a son, the plaintiff in this suit, Esther was also still alive and unmarried. The present suit was instituted to ascertain and secure the plaintiff's interest.

Held, that the marriage of A. with Esther was a condition precedent to the vesting of the bequest, and that the assent of the testator to A.'s marrying a lady other than Esther did not remove it.

Held also, that the plaintiff's interest was a contingent interest, a bill would not lie by him or on his behalf to secure the property.

REVIEWS.

GODEY'S LADY'S BOOK: Philadelphia. The number for October is received, and it contains no less than seven colored figures in the Fashion plate, and ten engravings in wood. It contains also several entertaining stories, such as "Aunt Sophia's Visit," "The Vertical Railways," "The Village with One Gentleman," "The Modern Cinderella," "The Sisters' School," and "The Pursuit of Wealth under Difficulties." A new story by Marion Harland, entitled "Leah Moore's Trial," also appears in this number. A Christmas Story, for the December number, also from the pen of Marion Harland, is promised. The terms of the magazine, considering its great utility, are very moderate, viz.: one copy, one year, $3; two copies, one year, $5; three copies, one year, $6; four copies, one year, $7; five copies, one year, and extra copy to the person getting up the club, making six copies, $10; eight copies, one year, and an extra copy to the person getting up the club, making nine copies, $15; eleven copies, one year, and an extra copy to the person getting up the club, making twelve copies, $20.

APPOINTMENTS TO OFFICE, &c.

COUNTY CROWN ATTORNEY.

FRANCIS R. BALL, Esquire, Barrister-at-Law, to be Clerk of the Peace, in and for the County of Oxford, in the room and stead of W. Leguenticen, Esquire, removed. (Gazetted Oct. 10, 1863.)

CHARLES LESTER COLEMAN, of the Town of Belleville, Esquire, Barrister-at-Law, to be Clerk of the Peace, and County Crown Attorney, for the County of Hastings, in the room of John O'Hara, superseded. (Gazetted Oct. 17, 1863.)

CORONERS.

WILLIAM HUME, Esquire, M.D., and WILLIAM CASE WRIGHT, Esquire, Associate Coroners, County of Halton. (Gazetted September 26, 1863.)

PETER STUART, Esquire, and ELIPHALET W. GUSTIN, Esquire, M.D., Associate Coroners, County of Elgin. (Gazetted Oct. 3, 1863.)

JOSEPH CARBERT, Esquire, M.D., Associate Coroner, United Counties of York and Peel. (Gazetted Oct. 10, 1863.)

ANGUS BELL, Esquire, Associate Coroner, County of Grey. (Gazetted Oct. 10, 1863.)

ANGUS BELL, Esquire, Associate Coroner, County of Simcoe. (Gazetted Oct. 10, 1863.)

AARON WALTER GAMBLE, Esquire, M.D., Associate Coroner, County of Lambton. (Gazetted Oct. 10, 1863.)

JAMES HENRY, of the Village of Mono Mills, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel. (Gazetted Oct. 24, 1863.)

DE WITT H. MARTYN, of the Village of Kincardine, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce. (Gazetted Oct. 24, 1863.

FRANCIS McCANDLASS, of the Township of London, Esquire, M.D., to be an Associate Coroner for the County of Middlesex. (Gazetted Oct. 24, 1863.)

GEORGE ALVA CARSON, of the Town of Whitby, Esquire, to be an Associate Coroner for the County of Ontario. (Gazetted Oct. 24, 1863.)

NOTARIES PUBLIC.

EDWARD BURTON HAYCOCK, of Ottawa, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted September 26, 1863.)

STAFFORD LIGHTBURN, of Hastings, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted Oct. 3, 1863.)

EDGAR BARKER, of Dunnville, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Oct. 3, 1863.)

J. SAURIN McMURRAY, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted Oct. 3. 1863.

CHARLES SAMUEL JONES, of the Village of St. Mary's, Esquire, Attorney at-Law, to be a Notary Public for Upper Canada. (Gazetted October 17, 1863.)

DONOUGH O'BRIEN, Esquire, to be a Notary Public for Upper Canada. (Gazetted Oct. 24, 1863.)

THOMAS McLEAN, Esquire, to be a Notary Public for Upper Canada. (Gazetted Oct. 24, 1863.

WILLIAM BASTALL, of Kincardine, Esquire, to be a Notary Public for Upper Canada. (Gazetted Oct. 24, 1863.)

TO CORRESPONDENTS.

"R. L."—Under "Division Courts."

"L. C."—Under "General Correspondence."

DIARY FOR DECEMBER.

1. Tuesday .....The Clerk of every Municipality except County to return number of resident ratepayers to Receiver General.
6. SUNDAY.....*2nd Sunday in Advent.*
8. Tuesday .....Quarter Sessions and Co. Court Sittings in each County.
12. Saturday .....Last day for service for York and Peel.
13. SUNDAY.....*3rd Sunday in Advent.*
14. Monday .....Collector to return Roll to Chamberlain or Treasurer. Last day for collection of money for School Teachers.
20. SUNDAY.....*4th Sunday in Advent.*
21. Monday .....Nomination of Mayors Recorder's Court sits.
22. Tuesday.....Declare for York and Peel.
24. Thursday .....Sittings of Court of Error and Appeal commence.
25. Friday .....CHRISTMAS DAY.
27. SUNDAY.....*1st Sunday after Christmas*
30. Wednesday ..Last day for not. of Trial for York and Peel.
31. Thursday.....End of Mun. year. Last day on which rem. half of Grammar School Fund payable.

BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Ardagh & Ardagh Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

DECEMBER, 1863.

SUMMARY PROCEDURE BEFORE MAGISTRATES.

Our attention has been directed to the very imperfect state of the law in reference to procedure before Magistrates, in cases in which they are authorized to convict summarily.

No branch of criminal administration is more frequently brought into operation than this, and the very extensive powers committed to Magistrates are little understood and very seldom exercised in the manner required by law. Occasionally cases are reported in the Superior Courts exhibiting this fact; but a vast number come before the Quarter Sessions in the form of appeals from the convictions of Justices, and in nearly every case the convictions are found to be insufficient in form or in substance, and are accordingly quashed. In some instances this arises from ignorance or carelessness of the convicting Justice, but in the great majority of cases the fault does not lie at the door of the Magistrates, but is in the system under which he is authorized to act.

The Magistracy are increasing in number, and the mischiefs we allude to increase in at least the same ratio. It is a great evil, when offenders are allowed to escape by reason of informality in the proceeding to convict them, and the constant recurrence of the evil is calculated to weaken the force, if not of all laws, at least of those for the prevention and punishment of small crimes and misdemeanors. A notorious offender, a wilful Sabbath breaker, or one who violates the wholesome restrictions on innkeepers, for example, is charged with the offence before a Magistrate. He is summoned, appears, and, the evidence taken bringing the charge home to him, is convicted of the offence and a fine imposed upon him. The Magistrate from some cause fails to put the conviction in legal form. The defendant appeals to the Quarter Sessions, and the conviction is quashed. Surely this is calculated to encourage opposition to authority and to foster crime, and yet these things may occur without much fault on the part of the convicting Justice. True, it may be urged that men should not be appointed to an office the duties of which they are not fitted by education to perform; but if that rule were acted on in the present state of the law, not two Magistrates in each county in Upper Canada would be found equal to their work.

Attempts have been made by enactments from time to time to simplify procedure, and it was partially done up to a certain period; but there never has been *any general law of procedure* governing *all* cases of summary conviction, and no full set of forms has ever been given by the legislature, applicable to the various cases within the Magistrates' jurisdiction. If it be said that a treatise on the duties of Magistrates would remedy the evil, our reply is at best it would only do so in part, for few who have not been regularly trained can apply general rules and principles (which only could be given) laid down in a text book, to particular cases, if at all complex in their nature.

What would be the remedy? The first and most obvious one is to amend the law by establishing an uniform mode of procedure in all cases of summary convictions, and giving a full set of forms of convictions, or providing for the framing of such forms by authority. Another mode would be to transfer the jurisdiction in these cases to the Division Courts, leaving to Magistrates the ministerial duties of the office, including the arrest of offenders about to escape. And still another method we find suggested in the *English Law Times* (for in England, with a better educated and more experienced magistracy, the evil is felt, as well as with us), the leading feature of which is the appointment of a clerk, a barrister of five years' standing, in each petty sessional division, at a fixed salary.

We follow the course of the *Law Times* in drawing attention to the subject, soliciting suggestions from persons of experience as to the reform necessary.

Any one who has taken the trouble to examine the convictions returned by Magistrates will bear us out in the assertion that in nine of every ten special cases the convictions are bad, void or voidable for some defect. Magis-

trates should not exercise their office in peril of actions against them at every step, nor be feeble as ministers of justice because imperfectly informed as to the nature and limits of their powers, and the mode in which their judgments are to be rendered effective.

It may be mentioned, without any reflection upon the magistracy as a body, that the present fee system is not without serious objections, and that even the *suspicion* that a Magistrate may act with too keen an eye to his profits from a case, is not calculated to strengthen the respect due to the administration of this branch of the criminal law.

DAYS FOR DELIVERY OF JUDGMENTS.

QUEEN'S BENCH.

Monday, 14th December.....10 o'clock.
Saturday, 19th December..... 2 o'clock.

COMMON PLEAS.

Monday, 14th December ..... 2 o'clock.
Saturday, 19th December.....10 o'clock.

LAW SCHOLARSHIPS.

The examination during last term for the scholarship of the third year, resulted in the award of the scholarship to Mr. J. J. Stephens. The maximum number of marks was 380, and of these Mr. Stephens obtained 342. The examination for the scholarship of the fourth year resulted in the award of the scholarship to Mr. Geo. H. Holmstead. The maximum number of marks was 350, and of these Mr. Holmstead obtained 294. Mr. Richard Walkem obtained 293 marks; and it is said that a second scholarship was awarded to him.

AMENDMENTS OF MUNICIPAL LAW.

Two Acts of last session of Parliament deserve immediate attention on the part of those concerned. The one, cap. 16, entitled, "An Act to extend the provisions of the 275th section of the Act respecting the Municipal Institutions of Upper Canada, and to provide for the election of Councillors in the several townships of Upper Canada, whenever the same may be divided into Electoral Divisions under the authority of the said section." The other, cap. 19, entitled, "An Act to amend the Consolidated Assessment Act of Upper Canada, in respect to arrears of taxes due on non-resident lands, and for other purposes respecting Assessment." The former was treated by some of the lay press as abolishing the division of townships into wards. There can be no greater mistake. Townships divided into wards are not intended to be affected by it. Its only application is to townships not divided into wards, but for convenience of electoral purposes divided into Electoral Divisions. The latter Act has for its chief object the prevention of the sale for taxes of occupied or improved lands, and throws upon county treasurers, township clerks and assessors additional duties to those hitherto performed by them. It also removes all doubt as to the liability to assessment of unpatented lots of land sold or agreed to be sold by the Crown. Both Acts are subjoined:—

CAP. XVI.

An Act to extend the provisions of the two hundred and seventy-fifth section of the Act "respecting the Municipal Institutions of Upper Canada," and to provide for the Election of Councillors in the several Townships of Upper Canada, whenever the same may be divided into Electoral Divisions under the authority of the said section.

[Assented to 15th October, 1863]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. Whenever a township in Upper Canada is divided into Electoral Divisions, and polling places established therein, and Returning Officers appointed therefor, under and by the provisions of the two hundred and seventy-fifth section of chapter fifty-four of the Consolidated Statutes for Upper Canada, a meeting of the Electors for such township shall take place on the last Monday but one in the month of December, before the Annual Election, as provided by the said Act, at ten of the clock in the forenoon, for the nomination of candidates, for the Councillors to be elected for the said township, at the Township Hall, if there be one in the said township, but if there be no Township Hall, then at the place where the first meeting of the Council of the said township was held for the then current year; and the Township Clerk shall give the notice required by section ninety-seven, of chapter fifty-four, of the Consolidated Statutes for Upper Canada.

2. The Township Clerk shall preside at such meeting, or in case of his absence, through sickness or otherwise, the Council shall appoint a person to preside in his place; and if the clerk or the person so appointed does not attend, the electors present shall choose a chairman, being an elector, to officiate from among themselves.

3. Such clerk or person so appointed, or chairman so chosen, shall have all the powers of a Returning Officer.

4. If only five candidates have been within one hour proposed by any of the electors present at such meeting, the clerk or person so appointed to preside, or chairman so chosen, as the case may be, shall declare such candidates duly elected Councillors to serve for the then next following year.

5. If more than five candidates shall be proposed at such meeting, and any candidate proposed after the first five, or any elector on his behalf shall demand a poll, the said clerk or person so appointed, or chairman so chosen shall, on the following day, post up in the office of the clerk the names of the candidates so proposed, and give notice of the names to the Returning Officer appointed for each and all the said Electoral Divisions.

6. In case of the nomination of more than five candidates, and no candidate nominated after the first five, or no elector on his or their behalf then demanding a poll as aforesaid, the clerk or person so appointed, or chairman so chosen, shall declare such five candidates first nominated, duly elected Councillors to serve as aforesaid.

7. In case of a poll being so demanded, the Returning Officer for each Electoral Division, in such township, shall cause a poll to be opened at the polling place appointed in such division, on the first Monday in January following, and shall take the votes in the same way and keep the poll open for the full time required by law for taking the votes, in cases where no Electoral Division shall be established.

8. Every Returning Officer shall, on the day after the close of the poll, return the poll-book to the Township Clerk, verified under oath before the said clerk, or any Justice of the Peace, for the

county or union of counties in which the said township may lie, as to the due and correct taking of the votes for the said Electoral Division.

9. The Township Clerk or person so appointed, or chairman so chosen as aforesaid, shall add up the number of votes set down for each candidate in the respective poll-books, and ascertain the aggregate number of votes, and shall at the Township Hall or such other place at which the nomination was held, at noon of the day following the return of the poll-books, publicly declare the same, beginning with the candidate having the greatest number, and so on with the others, and shall thereupon publicly déclare elected the five candidates respectively standing the highest on the poll.

10. In case two or more candidates have an equal number of votes, the said clerk, whether otherwise qualified or not, shall give a vote for one or more of such candidates so as to decide the election; and except in such case, no Township Clerk shall vote at any such election.

11. This Act shall be taken and read as part of the Act entituled *An Act respecting the Municipal Institutions of Upper Canada.*

CAP. XIX.

An Act to amend the Consolidated Assessment Act of Upper Canada, in respect to Arrears of Taxes due on non-resident Lands, and for other purposes respecting Assessments.

[Assented to 15th October, 1863.]

For the greater protection of persons owning non-resident lands in Upper Canada, and also for the more sure collection of the taxes thereon: Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The treasurer of every county in Upper Canada shall furnish to the clerk of each municipality in the county a list of all the lands patented or described for patent in his municipality, in respect of which any taxes shall have been in arrear for five years preceding the first day of January in any year, and the said list shall be so furnished during the month of January in every year, and shall be headed in the words following:—"List of Lands liable to be sold for arrears of taxes in the year 18—." And for the purposes of this Act, the taxes for the fifth year preceding shall be deemed to have been due for five years, although the same may not have been placed upon a collection roll until some month in the year later than the month of January.

2. The clerk of every municipality in each county is hereby required to keep the said list so furnished by the county treasurer on file in his office, subject to the inspection of any person requiring to see the same; and he shall also deliver to the assessor or assessors of the municipality each year, as soon as such assessor or assessors are appointed, a copy of such list; and it shall be the duty of the assessor or assessors to ascertain if any of the lots or parcels of land contained in such list are occupied, and to notify such occupants and the owners thereof, if known, of the amount of taxes due on each such lot, and enter in a column (reserved for the purpose) the words "occupied, and parties notified," or "not occupied, and parties notified," as the case may be; all such lists shall be signed by the assessor or assessors, and returned to the clerk with the assessment roll, and the clerk shall file the same in his office for public use; and every such list, or copy thereof, certified by the clerk, shall be received in any court as evidence in any case arising concerning the assessment of such lands; and the duties hereinbefore imposed upon the treasurer of any county or union of counties, and the clerk and assessor or assessors of any municipality, or counties, shall be performed by the chamberlain or treasurer, and the clerks and assessors of cities and towns withdrawn from the jurisdiction of the council of the county in which such cities and towns are situate.

All assessors shall attach to each such list a certificate signed by them, and verified by oath or affirmation, in the form following:

"I do certify that I have examined all the lots in this list named, and that I have entered the names of all occupants thereon, as well as the names of the owners thereof, when known, and that all the entries relative to each lot are true and correct, to the best of my knowledge and belief."

3. The clerk of each municipality shall, after the assessment roll for the current year shall have been returned to him by the assessors, examine the roll, and ascertain whether any lot embraced in the said list last received by him from the county treasurer is entered upon the roll of the year as then occupied; and the said clerk shall, on or before the fifteenth day of May in each year, furnish to the county treasurer a list of the several lands which shall appear on the resident roll to have become occupied, and the said county treasurer shall, on or before the first day of July in the then current year, return to the clerk of each municipality an account of all arrears of taxe due in respect of such occupied lands; and the clerk of each municipality shall, in making out the collector's roll of the year, add and include such arrears of taxes to the taxes assessed against such occupied lands for the then current year, and such arrears shall be collected by the collectors of the municipalities in the same manner and subject to the same conditions as all other taxes entered upon the collector's roll.

4. The treasurer and sheriff of every county shall not be required to inquire before sale of lands for taxes whether there is any distress upon the land, nor shall they be bound to inquire into or form any opinion of the value of the land; and if any taxes in respect to any lands sold by the sheriff after the passing of this Act, shall have been in arrears for five years, as in the first section of this Act mentioned, preceding the first day of January in the year in which the sheriff shall sell the said land, and the same shall not be redeemed in one year after the said sale, such sale and the sheriff's deed to the purchaser of any such lands (provided the said sale shall be openly and fairly conducted) shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them.

5. The said treasurer of the county shall not issue his warrant to the sheriff for the sale of any lands which have not been included in the list furnished by him to the clerks of the several municipalities, in the month of January of the year in which he shall issue his warrant, nor of any of the lands which have been returned to him as being occupied under the provisions of the third section of this Act.

6. If the clerk of any such municipality shall neglect to preserve the said list furnished to him by the county treasurer for the year in which the same shall be furnished, or to furnish such lists as aforesaid to the assessor or assessors, or shall neglect to return to the county treasurer a correct list of the lands which have come to be occupied, as directed in the third section of this Act, or if any assessor or assessors shall neglect to examine such lands as are entered on each such list, and make return in manner hereinbefore directed, every person making such default shall, on summary conviction thereof before any two justices of the peace having jurisdiction in the county of which the municipality shall form a part, be liable to the penalties imposed by sections one hundred and seventy-one and one hundred and seventy-three of the act relating to the assessment of property in Upper Canada, chapter fifty-five of the Consolidated Statutes for Upper Canada, to be recovered by distress and sale of any goods and chattels of the party making default.

7. That part of section ninety-eight of the said Act, commencing with the words, in the fifth line, "*or in case of*" to the end of the section, is hereby repealed.

8. All that part of section three of the Act passed in the twenty-fourth year of Her Majesty's reign, intituled: *An Act to amend the Assessment Act*, after the words, "Municipal Council," in the fifth line, to the end of the section, is hereby repealed, and the following words shall be inserted instead thereof: "at any time before the first day of May in the year next following that in which the assessment is made, it shall be lawful for such council to try such complaint and decide upon the same; provided always, that this clause shall not affect any assessments made prior to the present year one thousand eight hundred and sixty-three.

9. Unpatented land, vested in or held by Her Majesty, which shall hereafter be sold or agreed to be sold to any person, or which shall be located as a free grant, shall be liable to taxation from the date of such sale or grant, and any such land which has been already sold or agreed to be sold to any person, or has been loca-

ted as a free grant, shall be held to have been liable to taxation since the first day of January, one thousand eight hundred and sixty-three, and all such lands shall be liable to taxation thenceforward, under the Act respecting the assessment of property in Upper Canada, in the same way as other land, whether any license of occupation, location ticket, certificate of sale, or receipt for money paid on such sale, has or has not been, or shall or shall not be issued, and (in the case of sale or agreement of sale by the Crown) whether any payment has or has not been, or shall or shall not be made thereon, and whether any part of the purchase money is or is not over-due and unpaid; but such taxation shall not in any way affect the rights of Her Majesty in such land.

10. The one hundred and thirty-eighth section of the said Act respecting the assessment of property in Upper Canada shall apply to all sales and conveyances which may be hereafter made under the authority of this Act.

11. Section one hundred and eight of the said Act, chapter fifty-five of the Consolidated Statutes for Upper Canada shall be amended, by inserting after the word "granted," in the third line, the words "sold, or agreed to be sold by the Crown."

12. Section one hundred and three of the said Act, chapter fifty-five of the Consolidated Statutes for Upper Canada shall be amended, by substituting "May" for "March," in the third line.

REGULÆ GENERALES.

MICHAELMAS TERM, 27 VICTORIA.

The following Rules shall come into force and take effect upon and after the first day of Hilary Term next, but shall not apply to any rules granted or issued before that day.

NEW TRIAL, &c. LIST.

1. The party who obtains any rule *nisi* for a new trial, or for entering a nonsuit or a verdict, or for increasing or reducing a verdict on leave reserved, may, on or after the fourth day inclusive after the serving such rule, file the same, together with an affidavit of service, with the Clerk of the Court granting such rule.

2. The party served with any such rule may (if the same has not been already filed by the party who obtained the same), on or after being served therewith, file the copy served, with an affidavit of the fact and time of such service, with the Clerk of the Court granting such rule.

3. In case the party to whom any such rule is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or before the fifth day after the granting such rule, and upon filing with the Clerk an affidavit that the rule has not been served, enter a *ne recipiatur* with such Clerk; after which the Clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

4. The Clerk shall, immediately on the receipt of any rule or copy under the first or second rule, enter a memorandum thereof in a book to be kept for that purpose, in the order in which the same shall be delivered to him; such memorandum to be according to the following form:

——— TERM, (year).

Plaintiff's name.	Defendant's name.	Description of Rule.	When filed with the Clerk	How disposed of.

5. On the first Saturday, the second Tuesday, and the second Friday of every Term, the Court of Queen's Bench, after going through the bar to hear motions for rules *nisi* or motions of course, will hear the rules so entered, according to the order in which they stand, in preference to any other business. And on the first Friday, second Monday, and second Wednesday of every Term, the Court of Common Pleas will, after going through the bar to hear motions for rules *nisi* or motions of course, hear the rules so entered according to the order in which they stand, in preference to any other business.

6. Each Court, in its discretion, will hear any rule so entered, when both parties are present and prepared to proceed.

7. If, when a rule is called on in its proper order, the party who obtained the same does not appear to support it, and the opposite party attend and applies to have it discharged, such rule may be discharged accordingly.

8. If the party called upon to show cause does not appear when the rule is called on in its proper order, the Court will hear the other side *ex parte*, and dispose of the rule.

9. If neither party appear, the rule may, in the discretion of the Court, be treated as having lapsed, and be struck out of the Clerk's books.

10. In the absence of other business, the Court may in their discretion hear rules so entered on any other days during term besides those mentioned in the fifth rule—the parties to the rule being present and desirous to proceed.

11. Each court will, on sufficient ground shown upon affidavit, enlarge a rule so entered to a subsequent day in the same Term, or to the following Term, and the Clerk shall alter the entry accordingly, and place the enlarged rule at the foot of the list.

12. All rules entered by the Clerk as aforesaid, which remain unheard at the end of any term, shall be enlarged as of course on filing a motion paper to that effect, to the following term, and shall be forthwith re-entered in the Clerk's book in the order in which they then stand, for hearing in the next ensuing term.

PLEADING SEVERAL MATTERS AND DEMURRING.

In all cases in which a judge's order to plead and demur, or to plead several matters, is rendered necessary according to the Consolidated Statutes of Upper Canada, chapter 22, sections 109 and 110, the original order or a copy thereof shall either be attached to the Nisi Prius record or demurrer book, or shall be copied in the margin thereof; and in case of non-compliance with this rule, the Clerks or Deputy Clerks of the Crown shall not pass the record, nor shall the demurrer be argued.

(Signed) W. H. DRAPER, *C. J.*
WM. B. RICHARDS, *C. J. C. P.*
JOHN H. HAGARTY, *J. Q. B.*
JOS. C. MORRISON, *J. Q. B.*
ADAM WILSON, *J. C. P.*
JOHN WILSON, *J. C. P.*

Michaelmas Term, Nov. 28, 1863.

SELECTION.

THE PRESENT STATE OF THE LAW OF COPYRIGHT IN LITERATURE AND THE FINE ARTS, WITH A VIEW TO ITS AMENDMENT.

[*A paper by Mr. Serjeant Burke, read at a General Meeting of the Society for Promoting the Amendment of the Law, held on Monday, 1st June, 1868, and ordered to be printed.*]

Of all matters connected with legislation, one of the easiest, apparently, would be to give property and protection, in the production of his genius, to the author of a work of literature or the fine arts. And so it has proved in almost all civilized countries except this. In France, that law, which we term the Law of Copyright, has been established and successfully maintained by a few decrees of the Republic and the Empire, and by a few sections of the Code Napoleon and its supplement. The whole French law would not occupy more than a page or two in print. In Belgium, Holland, Austria, Russia, and even Spain, the law is equally brief, explicit, and effective. Unfortunately this has not been the case in this country. The acts of Parliament which form our law of copyright, would fill of themselves a good sized octavo volume, and anything more confusing or conflicting than their contents, can scarcely be imagined. Exceeding the usual defects of piecemeal legislation these acts, with their provisoes, restictions, and contradictions, seem to delight in marring the objects they have in view; and while with one hand they deal out grudgingly benefit and protection to the author, they curtail or spoil the gift with the other. Heavy, constant, I may say, almost unceasing litigation has been the result—litigation in its nature so perplexing and so depressing, that many have preferred to abandon their rights altogether, or to only partially enjoy them, than to incur the difficulties and dangers of a copyright law suit.

In proof of what I advance, I will, with leave of the Society, take a cursory view of our copyright acts of Parliament, and I will then proceed to another evil of our present copyright system, viz., the want of a proper tribunal for ordinary copyright questions, and for obtaining ready redress in cases of piracy.

To place the acts in intelligible order, I will refer to them as respectively relating to the different branches of the copyright law, viz.:—

1. Literature.
2. The Drama, Music, and Lectures.
3. Painting and Photography.
4. Engraving and Prints.
5. Sculpture Models and Casts.
6. Foreign Copyright.

And here, before I go further, I cannot but remark upon the ill luck that has given rise to fourteen or fifteen acts of Parliament,* for what might be included in a single act of no very long dimensions. Now, the literary author has one act for himself only, while the sculptor, the painter, and the engraver are driven each to some other, and sometimes two other acts of Parliament for their protection, and I may add confusion also.

In *Literature*, my first head, I may begin by stating that, for a long series of years after the introduction of printing, authors were without any protection beyond some claims put forward under the Stationery Company and the Licensing Act of Charles II., and beyond a notion of the existence of copyright at Common Law, which, after long litigation, remains very much of a problem to the present day.* At length the first copyright act was passed, the 8 Anne, c. 19, of which, as it is repealed, I need say no more than that from a doubt upon its construction, the great cases of *Millar and Taylor*, 4 Burr., 2303, and *Beckett* v. *Donaldson*, 4 Burr., 2408, ensued when the question of copyright at common law was discussed, and though in the latter case brought to the House of Lords, and the judges' opinion taken, was not definitively settled. In amendment and enlargement of the statute of Anne came the 12 Geo. II., c. 36; the 15 Geo. III, c. 53; the 41 Geo. III., c. 107; and the 54 Geo. III., c. 156; and so the copyright law remained until a comparatively recent date, but its condition was most unsatisfactory. The protection granted—a period of 28 years, or the author's life—was found to be too limited, and not a sufficient boon to the great works with which our writers were enlightening and delighting the world. There was also no protection whatsoever for the dramatist, the musician or the lecturer, in the performance or delivery of his respective productions. A remedy with regard to the drama and operatic music was procured by Sir Edward Bulwer Lytton through the 3 William IV., c. 15, and with regard to lectures by the 5 & 6 William IV., c. 65. Of these acts I shall presently speak. Some few years after that, the literary world obtained their chief Copyright Act, the 5 & 6 Vic., c. 45, repealing the previous literary acts, and stating in its preamble, that it was "expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world." And here I cannot refer to this statute without paying due homage to the memory of that poet, statesman, lawyer, and judge, Thomas Noon Talfourd, whose eloquence and untiring energy in this good cause, both in and out of Parliament, led to the enactment. Unfortunately, Serjeant Talfourd was not in the House when the act actually passed, and much was allowed to creep into it, which he would no doubt have prevented. The act was in the end passed in a hurry, as time pressed to save the works of Sir Walter Scott and others from the then too speedy termination of their copyright. As it is, however, the 5 & 6 Vic., c. 45, is generally admitted to be the best act that has passed in this country on copyright, but it has, in my humble opinion, some serious defects. The obscurity of sec. 18, giving copyright in encyclopædias and periodicals, has given rise to expensive litigation, such as the case of *Sweet and others* v. *Benning and another*, 19 Jur. 543; 20 L. J. R. (N.S.) C. P. 175, and does not yet seem to be capable of clear explanation by the courts. The machinery in the act for the purpose of registration at Stationers' Hall is somewhat cumbrous, and has this further defect, that its management is left entirely to ministerial officers, who, in effect, register any thing brought to them without resorting to investigation, or affording explanation. This defect is the more serious, as from the case of *Cassell* v. *Stiff*, 2 Kay and Johnson's Rep. 279, it would appear that a neglect to register on the part of officials at Stationers' Hall, prevents the author having the benefit of the International Copyright Act, as against the public. It has, I am informed, more than once happened that the same work has been registered by different parties, or under different titles, when a moment's inquiry might have prevented it. True it is, the 14th section provides that persons aggrieved by any entry in the book of registry, may apply to a court of law in term, or a judge in vacation, who may order such entry to be varied or expunged. But that at best, is a remedy after the mischief is accomplished, and after much injury have been done; it is also leaving the innocent party

* It has been very truly remarked, that further and numerous variations of the copyright law have been created by another act, the 10 & 11 Vic., c. 95, which gives power to the Crown to suspend the prohibitions against the admission of pirated books into such colonies as make provision for protecting the rights of British authors.

* *Boosey* v. *Jefferys*, 20, L. J. R. (N. S.) Ex. 354; 6 Exch. 580, "In the United States, copyright rests wholly upon the legislation of Congress; and Lord Brougham, in *Jefferys* v. *Boosey*, said it did not exist at common law: it was the creature of statute."—*Petersdorff's Abridgment, Title, Copyright*, vol. 3, p. 246, *note*.

no resource but a law suit, often when the slightest previous caution from a legal referee would have pointed out and prevented the danger. This defect in the statute might be avoided by appointing at Stationer's Hall, a Registrar of legal standing and acquirement, and with discretionary powers, who would not blindly make entries in the book of registry, but look to the real rights and claims of the parties registering.

But there is another and a very serious defect in the registration enacted by this statute, which is, that, by the 24th section, no omission to make entry shall affect the copyright of a book, but only to sue or proceed at law. Why should this be? Is it not most unfair to thus allow the title to copyright, in itself a thing of all others most incorporeal and invisible, to remain a mystery until infringed? It is unfair in the first place, to the author himself, as it leads him not to attend the registry, and often to omit it even when he begins a law suit. Such omission to register may seem odd, but from some experience I have had in copyright cases, I have seldom found, even after a solicitor has been called in and the work of law has begun, that the book has been registered. The question, "have you made an entry in the book of Registry?" comes usually upon the parties with the utmost surprise. I may add to this the fact, that in the important case of *Sweet* v. *Benning* already alluded to, I, as one of the counsels for the defendant, actually, though counsel and solicitor were engaged for the plaintiff, and the declaration had been delivered, put a stop to the first action, and made the opponents recommence, by causing our solicitor to enquire at Stationers' Hall if there was registration. He thought the omission so unlikely that he would hardly go to the Hall, but when he did so, he found the thing as usual, had been never thought of. But if this is unfair to the author, it is still more so to those who may be led to make use of his book. How are they to know, in many instances, whether they are committing piracy or not? Take for example the case of a book close upon the expiry of its copyright. No information as to the state of its copyright at Stationers' Hall is likely to be got, because no registration of it need be there; but if any one attempt to have recourse to the book—a book, perhaps, in itself of no great value as a whole—out may pop the author from some obscurity and come down upon the party, and bring upon him all the pains and penalties of a proceeding for piracy. Now it seems to me that this injustice might be avoided by simply enacting that no title shall accrue until registration, and that the word "registered," with the date of registration, be imprinted on the title page of every book.

As a specimen of the contradictory character of these copyright acts, by the 7 & 8 Vic., c. 12, the International copyright act, no author is to have the benefit of that act without registration within three calendar months of first publication. Thus a party may make himself at once sure of a copyright in a foreign book, but can know nothing about those at home.

With regard to the procedure under this act and the other copyright acts, I will have something to say when I come to the subject, of a want of a proper tribunal for questions of copyright.

As to my second heading. The *Drama and Music*, as far as performance was concerned, were totally without protection until 1833, when Sir E. Bulwer's Act, the 3 & 4 Wm. IV., c. 15, gave, it would seem, a perpetual copyright in the representation of "any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, not printed or published, and twenty-eight years copyright from time of publication, in the representation of such tragedies, comedies, plays, opera, &c., as should be printed and published.

This was clear enough, but the copyright act, the 5 & 6 Vic., c. 45, in extending the term of copyright in performance to that accorded to literary works, and in giving such copyright to all musical compositions, creates some obvious confusion, and may give rise to the important question as to what is the effect of the two statutes combined, with regard to the exclusive right of performing dramatic or musical productions that have not been printed and published. It is clear that the 1st section of the 3 & 4 Wm. IV., c. 15, gives to their author or his assignee, a sole liberty of performing them, without affixing any limitation of time. By printing and publishing, he exchanges this perpetual monopoly for a new one, viz., the sole right of performance for the author's life, or twenty-eight years from the time of publication. Now the 5 & 6 Vic., c. 45, s. 20, which includes musical compositions, professes to extend the term given in the former act, and this it cannot mean to effect by reducing that which is already perpetual. Yet it would seem to do so when it enacts that "the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this act to the first publication of a book." This I mention, as clearly shewing that the first act could not have been closely consulted when the second was composed.

But there is one hardship with regard to dramatic, or rather literary copyright, which I think should be remedied by a special enactment. It is this. The dramatist or musician, whether he publish or not, has the representation of his play or opera protected, but the author who produces a romance, novel, or tale of a striking character, and dramatic in its form (as indeed many of Sir Walter Scott's productions are) has no protection against his work being, by a mere little mechanical skill, converted into a play, and the profits due to his own genius and labour being at once lessened by his work being presented to the public in another and, to many not given to reading, a far more agreeable form. He, in fact, furnishes the incidents, the characters, and the very language, and another is at perfect liberty to take possession of them and convert them into his own property, (see *Reade* v. *Conquest*, 30 L. J. R., C. P. 209.) It has been asserted that the drama does not interfere with the novel, but gives it greater vogue. This I deny; because where the novel is eminently successful, it needs no help, and where it is moderately so, the dramatic form is far more likely to supersede and shelve the original work. And at any rate, it should be left to the author himself whether he will choose, during the existence of his copyright, to have his work dramatised or not; and if he wish it, then let some certain benefit accrue to him whose genius has in effect given life both to the novel and drama.

With regard to *Lectures*, I leave the Society to judge of the following well intended, but singular act (consequent on the case of *Abernethy* v. *Hutchinson*, 3 L. J. R., ch. 209.) By this statute, the 5 & 6 Wm. IV., c. 65 (an act for preventing the publication of lectures without consent), sec. 1, the author or his assignee, of lectures to be delivered in any school, seminary, institution, or other place, has the sole right of publishing them; and every person who obtains, by taking down in shorthand, or through any other means, a copy of the lectures, and publishes them without leave of the author, or his assignee, and every person who knowingly sells or offers for sale lectures so unlawfully published, shall forfeit the illegal copies of the lectures, together with one penny for every sheet of them found in his custody, one moiety to the crown and the other moiety to the party sueing for it, to be recovered by action. This is all very good; but the 5th section provides that the act shall not extend to lectures of the delivery of which notice in writing has not been given to two magistrates living within five miles of the place of delivery, two days at least before delivery; nor is it to extend to lectures delivered in a university or public school, or college, or on a public foundation or by an individual in virtue of any gift, endowment, or foundation. Now I cannot understand why a lecturer's copyright is made to depend on his hunting up two justices of the peace to serve each with a, to them, useless notice, or why, if he delivers his lecture in the public places mentioned, he is to be deprived of

his copyright. Thus, those recent fine copyright lectures on "Edmund Burke," by Mr. Napier, and on "The Irish Parliament," by Mr. Whiteside, M.P., would be forfeited, were the authors to re-deliver them in a single instance, forgetful of the two justices, or to do so through kindness in the hall of some public foundation or charitable institution.

My third and fourth heading I may include together, viz.: —*Painting and Photography*, and *Engravings and Prints*.

It is a fact no less startling than true, that until the July of 1862, there was no statutable copyright in a painting or drawing. To remedy the defect, attempts were made to establish a copyright at common law, but not successfully. The last endeavour—a case of much litigation and much argument in the courts of Dublin: (*Turner* v. *Robinson and Egg*, better known as the "Death of Chatterton Case," 10 I. Rep. 510) ended in a side-winded and doubtful decision. This glaring wrong has at last in some measure been set right by the 25 & 26 Vict., c. 68, and copyright established in paintings, and in copies and engravings from them; but as framers of that act have not amalgamated it, or even made it tally with the previous engraving acts, the 8 Geo. II., c. 13, the 7 Geo. III. c. 38, and the 17 Geo. III. c. 57, I have my fears that much difficulty of interpretation and no small amount of litigation will ensue.

In the first place, the terms of copyright differ. The last act gives a very uncertain term—the author's life, and seven years after his death—which, in some cases, may not amount to eight years copyright. The former acts give twenty-eight years, and thus as to the engraving, the later legislation gives the painter who engraves his own picture a possibly less benefit than did the former; and it may now happen that the original painting, if unengraved by its author, may have but eight years' copyright, at the expiration of which, any one who engraves it may have a twenty-eight years' copyright in his engraving. By the 25 & 26 Vic., c. 68, a register is to be kept specially at Stationer's Hall for paintings, drawings, and photography, but nothing is said as to engraving from them, nor does it appear whether all the harrassing formalities of the old acts are to be observed with regard to them, or whether they are to be published without any mark upon them to show the existence or non-existence of a copyright. But I need go no further, for I am sure I have only to ask any lawyer to read the 8 Geo. II., c. 13, the 7 Geo. III., c. 38, and the 17 Geo. III., c. 57, the prior engraving acts, and this new painting and engraving act, and he will at once observe how utterly conflicting and contradictory to each other they are.

Of the fifth head, *Sculpture*, I may mention that the first act in its favour, the 38 Geo. III., c. 71, (Godson on Copyright, *Gahagan* v. *Cooper*, 3 Camp. 111,) was found on trial to be so defective, that it was held to be no offence under it to make a cast of a bust, provided it were a *perfect fac simile* of the original. Consequently, the 54, Geo. III., c. 56 was passed, and it is the act now in force on this subject. This act gives the sculptor fourteen years' copyright, and fourteen years more if he be still living at the end of the first fourteen, and have not assigned. There is no registration, and nothing required to secure copyright beyond the name and date of the first publication to be engraved on the piece of sculpture, so that whether the author be living or not at the end of the first fourteen years, or whether he have assigned, are matters his copier may find out as best he can. The power and mode of assignment under this act is not very clear, but few, if any cases have (possibly from the rarity of good sculpture) arisen on the construction of the act, and I should say fortunately so for those who might be litigants.

On my last heading, *International Copyright*, I have only to remark that conventions with foreign countries are not likely to be made, or to be much employed in our favour, once the state of our law, as understood to be decided in *Boosey* v. *Jefferys*, 20 Law Journal Rep., Exchequer 354; *Jefferys* v. *Boosey*, 4 H. of L. C. 815; *Ollerdonf* v. *Black*, L. J. R. (N. S.) C.P. 165, becomes generally known, viz., that a foreign author if resident in this country has a copyright in a work which he, while so resident, first publishes here. Now, as by the American law, a citizen of the United States, and by the French law, a French subject obtains copyright in his own country whenever he publishes there, without regard to prior publication elsewhere, all the American or French author has to do is to come over and make a short stay here, and during his stay first publish his work here, and lo! he has an English copyright. This plan, I may further state, was acted upon by Mrs. Beecher Stowe in the production of "Dred," the copyright of which was never disturbed in this country. Our law being so, the Americans naturally laugh at any idea of an international copyright convention between them and us. One other defect in our International Copyright Act, or rather in its Amending Act, the 15 & 16 Vic., cap. 12—a defect specially unfair to France—is this, viz., that, by sec. 4, it forbids the representation here of unauthorized translations of dramatic works represented in foreign countries. This, under the convention with France, would be, as we well know, a great boon to French dramatists, but section 6 of the same act takes the boon away, by enacting that "nothing herein contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country." Now as most, I might say all, versions of foreign dramas are adaptations rather than translations, the whole of this piece of legislation becomes a simple absurdity.

Having thus shewn not anything like all, but only some of the most striking defects of our copyright statutes as to the title and rights they pretend to establish, I would draw the Society's attention to what is a still greater evil, viz., the utter want of a proper tribunal for the easy settling of copyright questions, and for affording ready redress in cases of piracy. At present, be the question ever so trifling, the only means parties have of establishing their rights is, except in one single instance, by a suit in Chancery, or an action or proceeding in one of the superior courts, or possibly in a few instances by county court plaint. For instance, as I have shewn, an author goes to Stationers' Hall to register; there is no one there to give him any information or instruction beyond a merely ministerial officer; yet if he make the slightest slip, a suit or action may follow that will cost him hundreds, perhaps thousands of pounds.

But if this is hard towards those establishing title, it is downright monstrous towards those seeking protection or redress in most cases of piracy. A copyright pirate is no better than any other pirate, though less dignified. He is, in fact, a mere pickpocket, and, like pickpockets generally, he is a pauper. Well, one of these pauper pirates pounces on and plunders some new work of literature or art; and it is vital—vital, I may indeed say in such matters—that the author or owner of the work should stop him at once; but he cannot do so. Let the rogue be ever so daring, ever so openly unjustifiable, yet there is no remedy to resort to but an action at law or a suit at equity. Just conceive a thief taking your watch or your handkerchief, and you have no redress but to serve a writ or summons upon, or to file a bill against him! I need not go through all these copyright acts again, but I am sure I am quite safe in stating, that with the exception of the new Painting Copyright Act, the 25 & 26 Vic., c. 68, no Copyright Act gives a summary remedy in piracy. The result to authors, artists, and publishers, and to all concerned, has been deplorable, in fact so much so, that it amounts, in nine cases out of ten, to leaving their property unprotected. The action at law or the suit in equity in copyright matters is, moreover, by these acts, encumbered with many extra formalities, and the proceedings are rendered so difficult and complicated, that copyright business has become quite a separate department

of the law, requiring, like patents, agents and counsel specially educated for the purpose; and this, in most cases, to maintain a right that a child might understand. The system is, I am informed, still worse since the recent Bankruptcy Act; for now the pirate defendant has only to resist the action if he sees the shadow of a chance, or to let it go by default if he see none, and then become a bankrupt and set his opponent at defiance; and, may be, before proceedings can be brought to bear upon him, this defendant has made hundreds of pounds by his piracy. That this is now going on, I have only to refer to the case of *Gambart* v. *Ball*, which has ended by Mr. Gambart successfully defeating, at a large expense, a mere pirate, which pirate, unable to pay the taxed costs of £133 against him, comes before the Bankruptcy Court and obtains his discharge. Mr. Gambart, deservedly eminent as a print publisher, has just brought out a pamphlet on the subject, which I recommend every one here to read. But not only Mr. Gambart, but most publishers in London are sufferers from this intolerable state of things. I have the authority of Messrs. Stevens, Son, & Haynes, of Bell Yard, Mr. Harrison, of Pall Mall, Messrs. Hurst & Blackett, of Malborough Street, to state as much with regard to them, and I am certain that if I canvassed all the respectable publishers in the realm, there would be but one opinion amongst them.

I should, however, in fairness, refer to the new act, (the 25 & 26 Vic., c. 68) giving copyright in paintings, drawings, and photographs which does, in its 8th section, provide a summary redress before two justices for piracy; but as the framers of that statute have left the former artistic or Engraving Act (the 17 Geo. III., c. 57) untouched or unreferred to, the curious state of circumstances arises that one act drives you to a suit at law or equity to protect an engraving, while you may go before a magistrate for a photograph. This is graphically shewn in Mr. Gambart's pamphlet:—

"Let me now," says Mr. Gambart, "point out an anomaly, created by the act of last session on this subject, which is so extraordinary as to be beyond belief, had not recent events in different courts of law fully demonstrated its existence. Whereas the engraver has the most precarious protection against the photographer, the photographer can obtain an efficient remedy by summary proceedings in a police court for the infringement of copyright in even so trifling a production as a carte-de-visite. Upon such a thing as this he can bring the offender to instant punishment! Messrs. Southwell, publishers of Miss Lydia Thompson's carte-de-visite, have stopped the career of several persons who pirated it; yet all my efforts to stop piracy of works of high art have been as yet fruitless. Let us see how much further this anomalous state of things will effect a given case, and thus show the extraordinary state of the law. Supposing Messrs. Colnaghi should commission Mr. George Doo to devote a year of his ability to reproducing Miss Lydia Thompson's carte-de-visite by line engraving, they would, when brought before Mr. Tyrwhitt, receive instant punishment for so infringing Messrs. Southwell's copyright. No plea of the value of the artistic skill employed would shield them from this prosecution. But should the offence go the other way, and Messrs. Southwell copy in photography Mr. George Doo's magnificent engraving of S. del Piombo's "Raising of Lazarus," upon which he has been already engaged for six years, Messrs. Colnaghi, the proprietors of that plate, would have to endure all the uncertainty and expense attending my proceedings against Mr. Ball and others, and might be compelled to chase Messrs. Southwell from court to court, having to prove the meaning of an Act of Parliament during the process! If there ever was a case of two ways and two measures, here is one."

"The power," continues Mr. Gambart, "of proceeding by summary process before two justices of the peace granted to publishers of photographs, should also be given to publishers of engravings. It is the greatest evil of the late act, that engravings are not dealt with so favourably as photographs are. Lastly, it is necessary to devise some means of bringing to justice offenders who have no domicile, and hawk piracies from house to house, or station themselves in the public thoroughfares." Mr. Gambart in this is, I am sure, expressing a universal opinion.

I have, I repeat, given in this brief space only the salient defects of our present copyright law; and in so doing, I have not touched on any thing approaching the whole amount of the difficulties and hardships that arise from this law's actual confused condition. Our magazines and perio licals teem with complaints about it, and in particular I would point to many able letters and articles on the subject that have appeared recently in the *Athenæum*. There is, indeed, but one feeling on the part of every one interested in such matters, that the copyright system must be thoroughly reformed, and to effect that, does not seem to be any great difficulty after all. The plan I would humbly sugest is simply this:—

Take the whole of these copyright acts and consolidate them into one statute; form them in fact into a single code. After what has been achieved in this way with the criminal law—a giant undertaking—the consolidation of the copyright law would be comparatively easy. In that consolidation I would further suggest that the following principles and measures be adopted,* viz:—

1st. One term of copyright to be established in all works of literature, the drama, music, and the fine arts.

2nd. One mode of registration for all kinds of copyright, and no copyright to accrue until registration. Some visible mark, such as the word "registered," with the date of registration to appear prominently on all articles enjoying copyright. This may seem difficult in the case of unpublished dramas or musical compositions, but the word "registered" and date might appear on the bills announcing their performance.

3rd. A literary author to have such copyright in his work that it shall not be dramatised without his consent during the existence of his copyright. And as to foreign copyright, no foreign play, of a country in convention with us, to be dramatised or adapted here without the author's consent, while his copyright exists.

4th. No person but a native or naturalised subject of the British empire to have copyright in it, except under an International Copyright convention.

5th. An assessor of legal standing and experience to be appointed at Stationers' Hall, with discretionary and judicial powers as to registration, and the decision of ordinary matters connected with copyright law. There might, in graver questions, be an appeal from him to a superior court.

6th. A summary jurisdiction in all minor copyright matters, and particularly in cases of piracy. Such jurisdiction might be given to the assessor at Stationers' Hall in London, and to the judges of the county courts, and in mere piracy and the seizure of pirated copies to two justices, or one stipendiary magistrate in the country.

7th. A power (under an order from the assessor or the justices) of immediate seizure of printed articles in glaring cases of piracy.

8th. Fine and penal imprisonment in such glaring cases.

9th. A brief summary of the copyright law, together with the rules and regulations to be published by the assessor, to be delivered at Stationers' Hall to any party applying, on payment of a small fee.

* It has been suggested that we should defer this reform until we could, at some international congress, induce all civilized nations to agree on one system of copyright. I fear if we were to wait till then, the thing would never be accomplished. Such delay seems to me much as if it were to defer our conventions for the arrest of criminals in foreign countries, until the criminal law of every state could be assimilated.

A code upon such a basis would, I am sure, be an invaluable boon to that class, which so well merits reward and protection —the men who produce (to borrow from the preamble of our present copyright act) those works which are of lasting benefit to the world. Nay more, genius is proverbially improvident, and as with Otway and Goldsmith, too often but a mere child in the ways of the world. The defensive structure, therefore, wherewith we are to shelter it should be of the plainest build and the readiest access: no labyrinth, no intricate paths should be around it. We in England, at least, should guard and foster that sinew of our greatness—the works of authors and artists—with the same jealous care and intelligible means that characterise copyright legislation in other countries. It is only when we do so, that we can proudly announce in the words of the poet—

"—Sunt hic etiam sua præmia laudi."

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office."

All other Communications are as hitherto to be addressed to "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 289).

[*Correction.*—Add, after "county," 7th line from the bottom of page 289 (*Reg.* v. *Davies*, 8 Cox, C.C. 486)].

SPECIAL PROTECTION OF BAILIFF.

Secs. 195, 196, 197 and 198, contain provisions for the protection of Bailiffs and persons acting in their aid, similar to those in the Imperial Statute 24 Geo. II. cap. 4, for the protection of Constables, slightly altered so as to adapt them to the Division Courts; and the cases decided in the Imperial Statute will for the most part be found authorities in point in the construction of the above named sections of the Division Courts Act.

The leading object of these enactments is to protect the Bailiff in what he has done in obedience to a warrant under the hand of the Clerk and seal of the Court, that he may not be responsible when he acts in obedience to such warrant, shows it and gives a copy of it when required, leaving the Clerk to answer for any defect of jurisdiction or other irregularity in or appearing by the warrant he has issued to the Bailiff for execution (see *Jones* v. *Vaughan*, 5 East. 445; *Atkins* v. *Kelly*, 11 Ad. & E. 777; *Price* v. *Messenger*, 2 B. & P. 185).

Section 195 of the act provides that "No action shall be brought against the Bailiff of a Division Court, or against any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand of the clerk and seal of the Court, until a written demand, signed by the person intending to bring the action, of the perusal, and a copy of such warrant has by such person, his attorney or agent, been served upon or left at the residence of such Bailiff, and the perusal and copy have been neglected or refused for the space of six days after such demand."

The protection is strictly confined to the "Bailiff of a Division Court," or any person acting by his order and in his aid, under a warrant from the Court bearing the Clerk's signature and the seal of the Court. It does not extend to Constables executing a warrant of attachment issued by a Magistrate, nor would it extend to the protection of Constables enforcing a Magistrate's warrant for any penalty made recoverable before them under the Division Courts Act.*

The question came up in a recent case, *Gray* v. *McCarty et al.*, 22 U.C. Q.B. 568. A Magistrate gave a warrant to a Constable, under section 200 of the Division Courts Act, to attach the goods of one E. in the possession of the plaintiff. Under this certain goods were seized, and an action was brought against the Magistrate, the Constable, and the creditor. The Constable pleaded not guilty by the 196th, 197th and 198th sections of the act, and the question whether the Constable was within the protection of these clauses, with others, came up upon an application for a new trial. The particular point does not appear to have been urged in argument, but, on delivering the judgment of the Court, Draper, C. J., observed, "The only doubt that can arise is whether the Magistrate is liable. As to defendant Keys, his plea of not guilty is stated to be founded on the Division Courts Act, sections 196, 197 and 198. These sections, however, are limited to the protection of the Bailiffs of the Division Courts, and of persons acting by the order and in aid of the Bailiffs, '*for anything done in obedience to any warrant under the hand of the Clerk and seal of the Court.*' No such warrant appears to have been issued here; and the warrant of which evidence was given was directed to the defendant Keys, a constable, and there was not any proof offered that he was a bailiff of any Division Court. He does not therefore bring himself within the protection of the sections referred to by his plea of not guilty. He does not invoke the protection of the 193rd and 194th sections of the Division Courts Act, to which, if to anything in that statute, he might have appealed. Nor has he relied on the act to protect justices of the peace and other officers from vexatious actions. (Consol. Stat. U. C., ch. 126, secs. 9, 10, 11, 20.) His case therefore rests simply on not guilty, and the evidence, which is conclusive against Whelan the creditor, is equally so against him."

* In such cases the general law for the protection of Constables, or the provisions in sections 193 and 194 might be made available.

It is quite clear that even the Bailiff of a Division Court is liable if he has not a warrant signed and sealed as required by the 195th section; or if he has acted beyond its authority he is liable for the excess, and no demand of a copy of warrant is necessary. (*Peppercorn* v. *Hoffman*, 9 M. & W. 618; *Postlethwaite* v. *Gibson*, 3 Esp. 26; *Barns* v. *Luscome*, 3 Ad. & E. 589; *Crozier* v. *Cundey*, 6 B. & C. 232.) It has been held that where a justice of the peace, who issued a warrant to a constable, could not be sued for the wrong done, the plaintiff was not bound under the Imperial Act to demand a copy of the warrant before commencing his action, for that the object of the statute in making a demand of the warrant necessary was that the justice might be properly joined or made a defendant. (*Starch* v. *Clark*, 4 B. & Adol. 113; *Crozier* v. *Cundey*, 6 B. & C. 232; *Collar* v. *Kadwell*, 2 N. & M. 399.) And the same principle would apply to the enactment under consideration. If the Bailiff take the wrong person; or if the warrant be to take the goods of A. and he takes the goods of B., or if he execute the warrant beyond the local limits of the jurisdiction, he is not within the protection of the clauses referred to in the act. (*Haye* v. *Bush*, 1 Man. & G. 789; *Crozier* v. *Cundey*, 6 B. & C. 232; *Kay* v. *Grover*, 7 Bing. 312; *Milton* v. *Green*, 5 East. 233.) Although a party injured may proceed against the plaintiff as the immediate wrong-doer for the excess, where he has exceeded the authority given to him by the terms of the warrant; yet if the warrant itself was clearly illegal he can also of course proceed against the clerk, and in some cases against the party also who caused the warrant to be issued.

Assuming that a Bailiff has acted on a proper warrant from the clerk, a written demand of the copy is a condition precedent to any right of action at all. No action shall be brought until a written demand, &c., has been served, being the language of the clause. The demand must be in writing, and signed by the person intending to bring the action, but it has been held that the signature of the attorney on behalf of the party is sufficient. (*Jay* v. *Orchard*, 2 Bos. & P. 39; *Clark* v. *Woods*, 2 Exch. 395.)

DANGER OF NOT SELECTING THE CLERK TO ISSUE ATTACHMENTS.

Under the Division Courts Act, the creditor has a choice in cases of attachment to apply to any Magistrate, or to the Clerk of the Court, to issue the warrant. The divisions are so small throughout the country, and the clerk's office is usually so near a creditor's residence, generally in the same or an adjoining township, that rarely is there any cogent necessity for applying to a Magistrate rather than the Clerk, and the saving of a few miles against the risk of error is rather heavy odds for a plaintiff to take. Applying to a clerk, he comes to an officer experienced in the work, one who has all the forms before him, and whose friendly word of caution will often save a plaintiff from getting himself into difficulty.

It is not so when he applies to a Magistrate, who is not and cannot be expected to be familiar with the Division Court procedure. The propriety therefore of employing the Clerk seems obvious enough. Let no suitor be persuaded by a Magistrate to come to him on such a business, and perhaps it may somewhat damp ardour in this particular if we mention the fact that a Magistrate is not entitled to any fee under the statute for doing the work.

But to come to a case in point, we refer to *Gray* v. *McCarty, Keys and Whelan*, decided in Trinity Term last. (22 U. C. Q. B. 568.) The defendant Whelan applied to the defendant McCarty for a warrant of attachment, who issued it as he thought in the regular manner; but it turned out that the Magistrate had not observed the requirements of the statute, and Whelan as well as the Magistrate was held liable in damages for the seizure made under the warrant.

Chief Justice Draper, in giving judgment in the case, observed, the authority of a Magistrate "is not derived "from the general authority vested in him as being in the "Commission of the Peace, nor from any special authority "conferred on Justices of the Peace by statute, in any "criminal or quasi criminal matter. His power to issue a "warrant of attachment to seize the personal estate and "effects of an absconding, concealed or removing debtor, "is conferred exclusively by the 199th and 200th sections "of the Division Courts Act;" observing afterwards, in his judgment, that until such an affidavit (as required by the statute) was filed with the Justice, "*he has no jurisdiction whatever.*" If creditors, after the decision in this case, go to Magistrates for attachments, they incur the risk with their eyes open to the danger!

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., *Barrister-at-Law, Reporter to the Court.*)

IN RE MCCUTCHON AND THE CORPORATION OF THE CITY OF TORONTO.

Sewers—By-law to regulate—22 Vic. ch. 99 (1858), sec. 290, sub-secs. 18, 20.

Held, that the 22 Vic. ch. 99 (1858), sec. 290, sub-secs. 18, 20, giving power to municipal corporations relating to sewers, applies to sewers already constructed by general taxation, not to those only which might afterwards be built.

The 18th sub-section authorises a by-law to compel the draining "of any grounds yards, vacant lots, cellars, private drains, sinks, cesspools, and privies," and to assess the owners with the costs thereof if done by the council on their default; and the 20th sub-section "for charging all persons who own or occupy property which is drained," or required to be drained into a common sewer, with a reasonable rent for the use of the same. The by-law in question enacted that "all grounds, yards, vacant lots, or *other properties* abutting on any street" should be drained, and fixed the rent to be paid. *Held*, not objectionable as including other properties than those mentioned in the statute, for if the word "property" in the 20th sub-section could include only the kinds of property mentioned in the 18th, it might receive the same construction in the by-law.

The court inclined to think that the owner or occupier of the property might legally be allowed to commute for the annual rent by payment of a fixed sum, and refused therefore to quash the clause authorising such an arrangement.

The sewer rent not being a charge upon the land, *Held* that payment of it could not be enforced by the same means as the ordinary assessments.

The 6th section of the by-law required all grounds, &c., not already drained, abutting on any street with a common sewer, to be drained into the same within fourteen days from the advertising of the by-law for one week; the 7th section imposed a penalty on any one of not less than $1 nor more than $10 for each month he should omit to do so; and the 8th section provided for enforcing payment by distress or imprisonment not exceeding thirty-one days.

Held that these sections must be quashed, for the 18th sub-section above mentioned shewed how the parties should be compelled to drain, *i. e.* by the council doing the work and assessing them for the cost; and the infliction of a penalty for each month, and imprisonment for thirty-one days, were wholly unauthorised.

A subsequent by-law added to the 8th section above mentioned, a proviso that any person thereby required to construct a drain who should not do so, but should be willing to pay the same rent as if he did use the sewer, should be exempt from the penalties. *Held*, that as the penalties were held illegal, this clause, founded on the assumed liability to pay them, must also be quashed.

[Trinity Term, 27 Vic.]

Robert A. Harrison, on behalf of the relator, obtained a rule *nisi* to quash the first, third, fourth, fifth, sixth, seventh, and eighth sections of by-law No. 295, or to quash the said by-law *in toto*, and also to quash the whole of the by-law No. 304 of the city of Toronto, or sections 1 and 2 thereof.

By-law No. 295 is set out as by-law No. 28, in the case of *Moore* v. *Hynes et al.* (22 U. C. Q. B. 107.)

By-law No. 304 was passed to amend by-law No. 295, first, by adding to the third section thereof the following words: "But where a ground, yard, vacant lot, or property is situate at the intersection of two streets, or at the intersection of a street with any lane or alley, upon each of which streets, lanes or alleys there is a common sewer, the front only of such grounds, yards, vacant lots, or property, together with so much of the flank thereof as the said flank exceeds eighty feet, shall be assessed for the rental hereby imposed." And secondly, by adding after the end of the eighth section the following words: "Provided always, in case any person hereby required to construct a drain into any common sewer does not do so, but is willing to pay the like annual rental or sewerage rate as if he did use such sewer, he shall not be liable to the penalties in this act mentioned for not using such common sewer hereinbefore prescribed, so long as he pays such rental or sewerage rate; and every person desirous of paying such rental shall by signing or sealing this by-law, or any copy thereof, be bound to pay such rental, and may be sued therefor as for a debt due to the corporation, or the same may be levied by distress of his goods and chattels as for a rent, or for general taxes and assessments payable to the corporation; and any person failing to pay such rental, or any part thereof, on or before the first day of December in each year, shall be liable to the penalties hereinbefore mentioned, as if this proviso had not been made; and provided also, that nothing in this by-law contained shall repeal or be construed to repeal any sanitary by-law of the corporation, or be held to curtail or interfere with the duties or powers of the Board of Health, or any regulations thereof, or of the corporation relating thereto." This was passed on the 21st of November, 1859.

The rule called upon the corporation to shew cause "why said by-law, No. 295, should not be quashed, with costs, because the statute under which said by-law was passed was not intended to apply and does not apply to common sewers at the time of the passing thereof constructed, the costs of which had been defrayed by general taxation; and because the same is in other respects illegal and informal.

Or why section 1 of said by-law, No. 295, should not be quashed, with costs, because of excess of authority, in this, that while the statute authorises the passing of a by-law by the corporation of a city for compelling the draining of any grounds, yards, vacant lots, cellars, private drains, sinks, cess-pools and privies, the said by-law enacts "that all grounds, yards, or vacant lots, or other properties (which would include properties other than those specified in the statute) abutting on any street, or any portion of any street in the city of Toronto, through which a common sewer has heretofore been constructed, and which is opposite to such common sewer;' and because of uncertainty in this, that "the other properties" intended are not sufficiently specified in the by-law, and because the grounds, yards, and vacant lots intended, are not sufficiently designated.

Why section 3 of the said by-law, No. 295, should not be quashed, with costs, because, if the object of said section is to defray the expense of constructing said sewers, that object, for all that appears, was previously attained by general taxation, and so some citizens would be twice taxed for the construction of said sewers; and because said by-law in said section assumes to charge persons who own or occupy property required to be drained into sewers (whether the drains have been constructed or not by the city council) with a rent for the use of a thing which does not exist, and so cannot be used; and because the rent imposed in said section, instead of being a reasonable one applicable to the case of each particular property, is an arbitrary one, applicable to certain sections of the city and properties therein described.

Why section 4 of the said by-law No. 295 should not be quashed with costs, because, while the statute only enables city corporations to charge persons who own or occupy property which is drained into a common sewer (or which by any by-law of the council is required to be drained into a common sewer), with a reasonable rent for the use of the same, no power is given for the commutation of that rent into a bulk sum, which said by-law in such section assumes to be the case.

Why section 5 of the said by-law, No. 295, should not be quashed, with costs, because, while power is given to city corporations by law to charge persons who own or occupy property which is drained into a common sewer, or which by any by-law of the council is required to be drained into such sewer, with a reasonable rent for the use of the same, and for regulating the time or times and manner in which the same is to be paid, no remedy other than the ordinary one of action is given in the event of non-payment; and certainly not assuming power of distress and sale, as in the case of the collection of ordinary taxes unpaid, which the said by-law assumes to be the case.

Why section 6 of said by-law, No. 295, should not be quashed, with costs, because of objections thereto similar to those enumerated as applicable to section 1 of the same by-law, and because the said section (6) does not direct by whom said grounds, &c., are to be drained, and because the said section is unreasonable, in requiring all grounds, yards, vacant lots, and property mentioned in said section to be drained within fourteen days from the publication of the by-law by advertisement in any public newspaper in the city for one week; and because the said section is in other respects illegal and informal.

Why section 7 of said by-law, No. 295, should not be quashed, with costs, because the only penalty under the statute upon persons neglecting to drain grounds, yards, &c., required to be drained, is that the city council may cause the drains required to be constructed, and assess the parties chargeable therewith with the costs thereof, and it confers no authority upon city corporations to make such neglect a penal offence, punishable by continuing fines for all time to come, for each month that the person chargeable shall omit to do what is required of him, which said section assumes to be the case.

Why section 8 of said by-law, No. 295, should not be quashed, with costs, because the same is dependent entirely upon section 7 of the same by-law, and if section 7 be illegal and quashed, section 8 must follow it, and be likewise quashed.

And why by-law No. 304 should not be quashed, with costs, because the same is dependent entirely upon by-law, No. 295, and a part thereof, and if by-law No. 295 be illegal and quashed, by-law No. 304 must follow it, and be also quashed.

Or why section 1 of by-law No. 304 should not be quashed, with costs, because the same is entirely dependent upon and a part of section 8 of by-law No. 295, and if section 8 of by-law No. 295 be illegal and quashed, section 2 of by-law No. 304 must follow it, and be also quashed."

J. H. Cameron, Q. C., shewed cause.

Draper, C. J., delivered the judgment of the court.

Both these by-laws were passed before the Consolidated Statutes of Upper Canada came into force, and after the passing of the Municipal Institutions Act, 22 Vic., ch. 99 (1858). Sec. 290, sub-sec. 18, of this act gives power to the council of every city to pass by-laws "for *compelling* or regulating the filling up, *drain-*

ing," &c. &c., "of any grounds, yards, vacant lots, cellars, private drains, sinks, cesspools and privies; and for *assessing* the owners or occupiers of such grounds, yards, or of the real estate on which the cellars, private drains, sinks, cesspools and privies are situate, with the costs thereof if done by the council on their default." And sub-sec. 20, "For *charging* all persons who own or occupy *property* which *is drained* into a common sewer, or which by any by-law of the council is required to be drained into such sewer, with a reasonable rent for the use of the same, and for regulating the time or times and manner in which the same is to be paid."

The general objection taken to the whole by-law is, that the statute was not intended to nor does it apply to common sewers constructed at the time of the passing thereof, the costs of which had been defrayed by general taxation.

We do not perceive that the fact (admitting it to be shewn) that there were common sewers constructed when the act was passed, and that the general taxes or funds of the city had defrayed the costs thereof, necessarily or even reasonably leads to the conclusion that the statute does not refer to such existing sewers. The power as expressed refers to property which "is drained or by any by-law is required to be drained." These words may apply to an existing as well as to a future state of things, and may include property drained or required to be drained at the time the act was passed, as well as that regarding which a by-law may be subsequently passed. And if the general funds, to which all rate-payers had contributed, had defrayed the cost of existing common sewers, those general funds would be reimbursed by the reasonable rent, and so the whole body of rate-payers would be proportionally benefited.

The objection taken to the first section of this by-law is not in our opinion tenable. It is true the word property is not used in the 18th sub-section, which gives power to compel draining, but it is used in the 20th sub-section, as to property which by any by-law is required to be drained into a common sewer. The word property as used in the 20th sub-section may perhaps include only the kinds of property enumerated at length in the 18th. If so, it may receive the same construction in the by-law, and if it be attempted to enforce the by-law as against any kind of property not specified in the 18th sub-section, the owner or occupier may raise the question that neither the statute nor the by-law touch him.

The general objection to the whole by-law is again taken to the third section. We confess we do not see what is the meaning of the objection which follows, that this section assumes to charge persons who own or occupy property required to be drained into sewers with a rent for the use of a thing which does not exist, and so cannot be used. This section speaks of property which is drained into any common sewer, or which is required to be drained into such sewer. It seems to us a perverse ingenuity to construe this expression to apply to a sewer *in posse* and not *in esse*, and if it is limited to the latter the objection disappears. And the last objection to this section is founded on a misapplication of the language used in *Aldwell and The City of Toronto*, 7 U.C. C. P. 104.

We have felt more doubt as to the fourth section, which permits the owner or occupier of any property so required to be drained to commute within one year for the payment of the annual rent. The case of *Moore* v. *Hynes* (22 U.C. Q.B. 107), does not expressly decide the point but it apparently recognises the existence of a right to pay off the annual rent by the payment of one commutation sum in gross.

The inclination of our mind is in favour of the legality of such an arrangement, and we therefore think we should disallow this exception also.

The objection to the fifth section should in our opinion prevail. In *Moore* v. *Hynes*, this court held that the sewer rent charged "is not a tax or charge upon the land," but upon the owner or occupier in respect of the land; and therefore it seems to follow that the summary remedy given by the statute for the collection of ordinary rates and assessments cannot be extended to these sewerage rents.

The sixth section is, in addition to objections which we do not think entitled to prevail, also impeached from the unreasonable requirement that all properties not already drained, which abut on any street or portion of a street in Toronto through which a common sewer has been constructed, and which are opposite such common sewer, shall within fourteen days from the publication of this by-law by advertisement in any public newspaper in this city for one week be drained into such common sewer. The seventh section imposes a penalty on the owner or occupier of property who does not comply with section six of not more than $10 nor less than $1 for each month he shall omit to do so; and the eighth section provides for the enforcement of the penalty, to be recovered by distress and sale of the goods and chattels of the offender or by imprisonment in case of non-payment, not exceeding thirty-one days.

In our opinion these provisions taken together are illegal, because the statute, though authorising the passing of a by-law to compel the drainage of the property specified, couples it with a power to assess the owner with the cost thereof, if it be done by the council, on the owner's default—thus pointing out how the "compelling" is to be carried out; and because the payment of rent for the use of the common sewer is a personal charge, creating a debt; and it appears to us to be straining the powers conferred by the statute to hold that the corporation can virtually enforce payment of debts by compelling their creation under a by-law, by monthly penalty, which would or might soon exceed the limit of $50, appointed by the legislature. We do not think that the continued omission to do an act, which the council on such default are authorised to do, and to assess the owner for the costs thereof, authorises the infliction of a penalty or of imprisonment, which by the way, cannot according to the statute, exceed twenty-one days. If there can be a penalty for each month, *pari ratione* there can be an imprisonment also for non-payment of each penalty, a consequence sufficiently monstrous to prevent a construction of the statute which would give such powers. We think the provision compelling drainage within fourteen days an unreasonable requirement not falling within a legitimate use of the powers conferred as to this matter, but designed as the foundation for the two following sections, which we think illegal.

The objections to section 1 of by-law No. 304 rest, first, on the assumption that the whole by-law No. 295 will be quashed, but fails, as the whole by-law is not quashed; secondly on the assumption that section 3 of No. 295 will be quashed, which also fails.

As to section 2 of No. 304, we think it bad. As the penalties imposed by sec 7 and 8 of the by-law No. 295 are held illegal, and those sections are quashed, an alternative founded on the assumed liability to those penalties must fall through. The framer of this section appears to have overlooked the distinction between the authority of municipal councils and that of the legislature, or he would scarcely have drawn up the proviso with which it concludes.

The result is, that so much of the rule as relates to quashing the by-law No. 295 as a whole or the first, third, and fourth sections thereof, must be discharged; and so much relates to quashing the fifth, sixth, seventh, and eighth section thereof must be made absolute. And as to by-law No. 304, so much of the rule as relates to the first section is discharged, and so much as relates to the second section is made absolute.

Rule accordingly.

PATTON V. EVANS.

Overholding tenant—Con. Stat. U. C., cap. 27, sec. 63.

Held, that a tenant whose term can only be put an end to by a notice to quit, is not a tenant for a term within the meaning of the statute.

(T. T., 27 Vic., 1863.)

Leys applied under sec. 63, cap. 27, Con. Stats. U. C., for a precept to the sheriff to place the landlord in possession, the jury having found in his favour.

The application was referred to the full court from Chambers.

F. Osler shewed cause in the first instance, citing *Adverant* v. *Shriver*, Trin. Term, 6 & 7 Wm. IV., (R. and H., Dig., 263); *Adams* v. *Bain*, 4 U. C. Q. B., 157; Con. Stat., U. C., cap. 27, secs. 57, 63.

DRAPER, C. J.—I gather from the evidence that the defendant has been in possession for a considerable time as a tenant to the

plaintiff, paying rent monthly, but not holding for a definite term; for, as I understand, either party could put an end to the tenancy by giving a month's notice, and without a month's notice the plaintiff cannot eject the defendant, nor can the defendant relieve herself from the obligation to pay rent, without a similar notice of her intention to leave, followed by her leaving the premises.

The question then is whether, having received notice to quit in due form, she is to be deemed "a tenant after the expiration of her term" wrongfully refusing to go out of possession upon demand made.

It appears to me, that a tenancy which may be put an end to by a notice to quit, and which, as far as appears, can only be put an end to in that way, is not a tenant for a term within the meaning of the act; that the words "expiration of his term" mean that the term comes to an end by the effluxion of a stipulated period, or, possibly, by the happening of a stipulated event—as a tenant taking for the term of the life of the lessor, who has only a life interest, and dies. I say possibly, because I am not now called upon to say whether the statute would apply in that case.

But a tenancy put an end to by notice to quit seems to me a different thing, such notice being an act necessary to be done, and for doing which no certain date is fixed. The expiration of a term in its plain sense depends on a contract or stipulation made by the parties when the term was created, and the time will arrive when the term will cease, without any further act of either party. Then if a proper notice to quit be given, the right of possession accrues to the landlord without other demand in writing, while the statute speaks of such a demand as a thing to be done at or after the expiration of the term before the special remedy can be claimed.

I think the proper construction of the act is to confine its operation to cases where the tenant holds over after the expiration of his term, and becomes a trespasser and liable to be ejected without notice or demand. I am strengthened in this conclusion by observing that in the special remedy granted to a landlord under the 58th section of the Ejectment Act, the affidavit there must shew "That the interest of the tenant has expired or been determined by regular notice to quit (as the case may be)" drawing the very distinction between an expiration of the term, and a determination of the tenants interest, by a notice to quit.

I think the rule for a precept to put the landlord into possession should be refused.

Per cur.—Rule refused.

COMMON PLEAS.

(Reported by H. C. Jones, Esq., Barrister-at-Law, Reporter to the Court.)

Jacobs v. Henry.

Ejectment—County court—Fi. fa. lands—Division court judgment.

Upon ejectment brought to try the title to land which had been sold and conveyed by the sheriff under a *venditioni exponas*, issued upon a county court judgment based upon a division court judgment, the sale was held void inasmuch as the transcript of the judgment from the division court did not conform to the requirement of the 142nd section of the division court act, by stating the proceedings in the cause in the court below. [T. T., 27 Vic.]

Summons in ejectment, issued the 27th December, 1862, to recover possession of lot No. 87, on Yarmouth street, in the town of Guelph, in the county of Wellington.

On the 13th January, 1863, the defendant appeared, and defended for the whole of the land mentioned in the writ.

The plaintiff stated in his notice of title that he claimed the premises in the summons mentioned under a deed to him from John Harris, the younger, who was the vendee of George John Grange, and by virtue of a deed from said Grange, as sheriff of the county of Wellington, the defendant Harris, in his notice, besides denying the plaintiff's title, asserted title in himself, by virtue of a deed to him from Henry Orton.

The cause was tried before the judge of the county court of the county of Wellington, sitting for Chief Justice McLean, at the last spring assizes for the county of Wellington.

The plaintiff claimed, as assignee of the purchaser at sheriff's sale, under a *fi. fa.* against lands and *venditioni exponas*, issued out of the county court of the county of Wellington. The *fi. fa.* against lands was based upon a transcript of a judgment in the first division court of the county of Wellington, filed in the county court, with the view of issuing a *fi. fa.* against the lands of the defendant thereon.

The transcript was as follows:

Seal of L. S. No. 1, the Div'n Court. "In the First Division Court of the County of Wellington.

Between { *John Harris, Jun.*, Plaintiff, and *Hugh Henry*, defendant.

"I certify that judgment was rendered in this cause against the above defendant, at the suit of the said plaintiff, for fifty-five dollars and eighty-eight cents, for debt, and two dollars and seventy-three cents for costs, on the twenty-sixth day of April, A.D., 1859.

(Signed) Alfred A. Baker, *Clerk.*"

"Execution issued on the above suit on the eighteenth day of July, A.D., 1861. Returned on the twenty second day of July, A.D., 1861. (Signed) Alfred A. Baker, *Clerk.*"

"No. 85.
First Division Court.
Harris v. *Henry.*
Transcript.
Filed 23rd July 1861.
(Signed) J. H."

The *fi. fa.* against lands of defendant was issued on the 23rd July, 1861, directed to the sheriff of the county of Wellington, and as to the return of the writ concluded as follows: "And have you that money before our said judge of our said county court, at Guelph, immediately after the execution hereof, to be rendered to the said plaintiff, for damages aforesaid, and have then there this writ."

The writ was received by the sheriff on the 23rd July, 1861, and was renewed for one year, from 18th July, 1862.

The *fi. fa.* against lands was returned, that the sheriff had levied lands of Henry, to the value of 5s., which remained in his hands for want of buyers, and "no lands" for the residue. The defendant's lands were advertised on 1st May, 1862, under the *fi. fa.*, to be sold on the 2nd of August. The lot now sued for was advertised; that advertisement was in the paper in the town of Guelph; the first advertisement in the *Canada Gazette* was on the 23rd May, 1862. The land was exposed for sale on the 2nd of August, and it was not shewn there were any bidders present.

A writ of *venditioni exponas* was issued on the 5th of August, 1862, to the sheriff of the county of Wellington, which commenced by reciting that whereas he was lately commanded that of the lands and tenements of Hugh Henry he should cause to be made £14 13s. 1d., which John Harris, the younger, had recovered in the county court of Wellington against him in assumpsit, and should have that money before the county judge at Guelph, immediately after the execution thereof, and at a day then past the sheriff returned that by virtue of the said writ he had seized and taken in execution goods and chattels of the defendant to the value of 5s., which remained in his hands for want of buyers, and the sheriff had returned *nulla bona* for residue. The writ then commanded the sheriff to expose to sale, and sell the said goods and chattels of the defendant, for the best price he could get for the same, and at least for 5s., and have the money before the judge, at Guelph, immediately after the execution thereof, to render to the plaintiff. There was then a *fi. fa.* against goods for the residue of the damages. This writ was placed in the sheriff's hands on the 5th August. The sale under the *venditioni exponas* took place on the 13th of October, 1862. The lot was sold for £51 7s. to John Harris, jun. There was an incumbrance spoken of as being on the land.

On the 12th of November, 1862, the sheriff of the county of Wellington executed a deed to John Harris, the younger, of the land in question, reciting that by virtue of a writ of *venditioni exponas*, issued out of the county court, tested the 5th of August, 1862, at the suit of John Harris, the younger, commanding him that of these lands and tenements of Hugh Henry, he should cause to, &c. He had seized the land in question, which since the seizure made by him, by virtue of a writ of *venditioni exponas*, after due notice, was sold on Monday, the 13th of October, 1862, to John Harris, the younger, being the highest bidder, for £51 7s. Then the sheriff, as

sheriff by virtue of the writ of *venditioni exponas*, and by force of the statute, and in consideration of the said sum, granted, bargained, and sold the same to Harris, to have and to hold the same to him, his heirs and assigns, as fully and absolutely as he, the sheriff, as aforesaid, could or ought to grant, bargain, and sell the same by force of the statute, and the said writ of *venditioni exponas*, or otherwise.

The conveyance of the same land from Harris to the plaintiff in fee, in consideration of £104 17*s.* 6*d.*, was put in. The deed was subject to the limitations in the original grant from the Crown, and to certain mortgage debts secured by certain indentures of mortgage made by Henry and wife in favour of the Wellington Permanent Building Society, and which the purchaser was to assume and pay off and satisfy.

Demand of possession signed by plaintiff, served on the defendant on the 2nd of December, 1862.

The defendant was present at the sale. There was over £90 due on the mortgage to the building society,

The defendant at the trial raised the objections to plaintiff's recovering, mentioned in the rule *nisi*.

There was a verdict entered for the plaintiff with leave to the defendant to move to enter a nonsuit on the objections taken.

During Easter Term last *Palmer* moved, pursuant to leave reserved, to enter a nonsuit on the following grounds:

1. That the sale by the sheriff of the lands in question in this cause under which the plaintiff claims title is not founded upon any sufficient judgment to support a writ of execution against lands, or a sale thereunder; the document offered in evidence by the plaintiff as a transcript of a judgment in the division court not being such a transcript as is required by section 142 of the Upper Canada Division Courts Act, nor containing the particulars of the proceedings in the cause as required by that section.

2. That if the document were such a transcript no proof was given that a memorandum thereof had been entered in the proper book by the clerk of the county court as required by section 143 of the same act, and which entry was necessary before the plaintiff could avail himself of the said judgment under sec. 145 of the same act.

3. That the writ of *venditioni exponas* for part, and *fieri facias* for residue was issued in the name of a different plaintiff from the writ of *fieri facias*.

4. That the sheriff's deed is invalid, as it professes to be made solely under a writ which on the face of the deed appears to have been less than twelve months in the sheriff's hands, and recites a seizure and sale under such writ.

Or why the said verdict should not be set aside and a new trial had between the parties on the grounds aforesaid, and on the further ground that the writ of *venditioni exponas* for part and *fieri facias* for the residue produced by the plaintiff and recited in the sheriff's deed as the writ under which the said sale was made, was not a writ of execution against lands and tenements, but against goods and chattels.

This rule was enlarged until Trinity Term, when *M. C. Cameron*, Q. C., shewed cause against, and *Palmer* supported the rule. Sections 142 to 146 inclusive of the Division Court Act, Con. Stat. U.C. ch. 19; *Farr* v. *Robins*, 12 U. C. C. P. 35, and *Roe* v. *McNeill*, 13 U. C. C. P. 189, were referred to.

RICHARDS, C. J.—*Farr* v. *Robins* seems to be a clear authority in favour of the defendant that there can be no sufficient judgment of the county court to bind lands based on a division court judgment, unless the transcript under section 142 of the Division Court Act is filed in the county court, and contains what the section requires. This transcript does not contain a statement of the proceedings in the cause, which is required by that section, and therefore the filing of it did not constitute a sufficient judgment in the county court, nor warrant the *fi. fa.* against lands or the subsequent writ of *ven. ex.* against goods.

This objection seems to me to establish that the title set up by the plaintiff derived through that judgment must fail. It is therefore unnecessary to consider the other points raised in the rule, but it would require great ingenuity to sustain a sale of lands after the return of the *fi. fa.* against lands on the *ven. ex.* and *fi. fa.* for residue produced at the trial of this cause.

As to the third objection, I think in the absence of proof to the contrary, that it would be presumed that the clerk of the county court filed the transcript of judgment, and made the necessary entries to enable the plaintiff to take the same remedies to enforce it as he would have to enforce a judgment of the county court;

The rule will be absolute to enter a nonsuit.

Per cur.—Rule absolute.

CHAPMAN V. BOULTBEE.

Attorney—Negligence—Action against for—Evidence.

B. (an attorney) having been employed by C. to prosecute a suit against M. in the C. C. of Y. & P., undertakes the action, and M. was subsequently arrested and discharged without bail, and the writ of capias and all proceedings set aside for irregularity.

Upon an action brought against B. for negligence.

Held, that the production of the order of the judge of the C. C. setting aside the capias was not sufficient evidence upon which to sustain an action against an attorney for negligence; that the neglience must be gross, and evidence of the negligence itself must be given to entitle the plaintiff to succeed.

(T. T. 27 Vic.)

The writ was issued in this cause on the 14 of May, 1863.

Plaintiff in his declaration alleged the retainer for reward of defendant as an attorney to bring an action in the County Court of York and Peel against one William Morely to recover money due to the plaintiff. And defendant promised to conduct the action with proper care, skill and diligence; and that in the course of the conduct of the action it was necessary to sue out a writ of *capias* to hold the said Morely to bail to answer the plaintiff for the money claimed. Yet defendant did not conduct the action with due and proper care, skill and diligence, whereby after the arrest by the sheriff and the confinement of Morely in the county gaol at plaintiff's suit an application was made to the judge of the county court on behalf of Morely to be discharged form the said arrest and custody without bail, and on that occasion, to-wit, the 2nd of June, 1858, the said judge ordered that the said writ of *capias*, and the arrest made thereunder and all proceedings had thereupon should be set aside for irregularity with costs, whereby the plaintiff not only lost the costs and expenses incurred by him in the prosecution of the action and was obliged to pay the costs incurred by Morely in defending the same, but was prevented from bringing any other action against Morely for other claims that the plaintiff had and has against Morely, and plaintiff has been delayed in recovering the said money and wholly lost the same.

Defendant pleaded the 19th of March, 1863,

1. That he did not promise as the declaration alleged.

2. That he did conduct the said action with due and proper care, skill and diligence, on which pleas the plaintiff joined issue.

The cause was taken down for trial before the late Mr. Justice Connor at the assizes for York and Peel, held in the month of April last, when a verdict was rendered for the plaintiff for £159 7*s.* 6*d.* damages.

In Easter Term last *Eccles, Q. C.* obtained a rule *nisi* to set aside the verdict, and enter a non-suit pursuant to leave reserved on the grounds,

1. That no negligence on the part of the defendant as charged in the declaration was proved at the trial.

2. That if the arrest of the defendant in the county court suit, or the writ under which he was arrested was set aside by the order of the judge of the county court, the grounds of such order or the the defendant's connexion therewith were not shewn.

3. That the order of the judge of the county court was not proved to be signed by him.

4. That the plaintiff's evidence at the trial shewed he had not sustained any damage whatever for the causes assigned in the declaration: or why a new trial should not be had on the ground that the verdict is contrary to law and evidence, and the charge of the learned judge, and on the ground of excessive damages.

The rule was enlarged until Trinity Term last, when *R. P. Crooks* shewed cause and contended that the production of the order setting aside the arrest for irregularity was *prima facie* evidence that such irregularity was that of the attorney, and if he wished to relieve himself from that inference he must shew what the irregularity was, and that he was not guilty of such negligence or want of skill as would render him liable in this action. He further contended that the court would, under Con. Stat. of Canada, ch. 80, sec. 6, take judicial notice of the signature of the county judge to the order which was produced.

That the facts shewn at the trial were sufficient to go to the jury and to warrant the verdict, which therefore ought not to be disturbed. He referred to *Reid* v. *Jones*, 4 U.C.C.P. 424; Con. Stat. of Canada, ch. 80, sec. 6; *Pitt* v. *Yalden*, 4 Burr, 2060; *Keece* v. *Rigby* 4 B. & Ald. 202; *Ireson* v. *Pearman*. 3 B. & C. 812; *Godefroy* v. *Dalton*, 6 Bing. 460; *Long* v. *Orsi*, 18 C. B. 610; *Swannell* v. *Ellis*, 1 Bing. 347; Saunders on Pleadings and Evidence, vol. 1, p. 212.

Eccles, Q. C., contra, contended that the mere fact of the *capias* and subsequent proceedings having been set aside for irregularity, was no evidence that such irregularity arose from the want of care or skill of the defendant.

From the notes of the learned judge at the trial and exhibits put in and the argument of counsel, it would seem that defendant was employed by plaintiff to take proceedings in the County Court of the United Counties of York and Peel, against one Morely to recover a debt amounting to between two and three hundred dollars. That Morely was arrested in May, 1858, in plaintiff's suit, and was about a week after his arrest discharged from custody, and the writ and arrest and all subsequent proceedings in the cause were set aside for irregularity with costs by an order of the learned judge of the county court, dated the 2nd of June, 1858. That subsequently Morely went to England and came back to this country with some two or three thousand dollars in money. He returned to Holland Landing, but was not successful in business, and plaintiff failed to recover the amounts of his demand from him.

It further appeared from the copy of the process served on plaintiff, and the bill of particulars attached thereto, that defendant sued plaintiff in the division court for costs as between attorney and client in a suit of *Chapman* v. *Morely*, in which there were no charges made for issuing a *capias* against the defendant, and in which it appeared a *fi. fa.* had been issued, and the same statement of claim in the division court showed that the now defendant claimed of the now plaintiff the "costs of the previous suit against William Morely, paid by note to Chapman, £14 10s., and interest from date of note November 10, 1858, until May 12, 1862." This document was filed by the plaintiff.

Richards, C. J.—The retainer to bring the action in conducting which the neglience complained of occurred does not appear to be established by very clear evidence so far as the same was taken down, on the judge's notes, or by the bill of costs sued for in the division court. It is probable that the point was satisfactorily established at the trial as it is not suggested that a nonsuit was moved for on that ground. The only evidence to establish negligence on the part of the defendant was the production of the order of the county court judge discharging Morely from the arrest and setting aside the *capias* and all subsequent proceedings for irregularity. I think that evidence fails to establish negligence on the part of the attorney of any kind. We are not now informed nor were the jury, what the irregularity was that was complained of. We cannot say whether it occurred under such circumstances as would show that the attorney had possessed and exercised a reasonable amount of skill in the conduct of the plaintiff's suit or not. It seems to be conceded in the modern cases that the attorney is only responsible for gross negligence. The head note in *Purves* v. *Landell*, 12 C. & F. 91, lays it down in effect that an attorney is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional duties. The declaration must contain an allegation of facts from which the inference is inevitable that the defendant has been guilty of the one or the other.

If the declaration ought to contain allegations from which the inference of negligence is inevitable, *a fortiori* the evidence should shew such facts. But the evidence does not show any act of omission or commission which either the court or jury could say indicated want of skill or want of care. A result was shewn, viz., the setting aside of a proceeding for irregularity; whether such proceeding became improper from any default of this defendant for which he should be held liable we cannot say, for we do not know what the vice in the proceeding was that was complained of. I think we may apply the words of Martin, B., in *Dickson* v. *Jacobs* to this case: "We do not know what the mistake complained of consisted in or under what circumstances it occurred, or whether it amounted to negligence or any thing at all about it." I have therefore no doubt this verdict ought to be set aside. Though it is not noted that leave was given to the defendant to move to enter a nonsuit, yet it was so stated by the learned counsel in moving the rule, and on the argument, and his statement was only met on the other side by the observation that the counsel did not recollect if leave were given or not. From what is noted by the learned judge it is obvious that he entertained strong views against plaintiff's right to recover, and we have no doubt, looking at his notes and from the statement by both counsel, that the leave to enter the nonsuit was given. The case in 12 C. & F. 91, is in some respects like the present, the warrant under which the defendant was arrested in the original action having been declared *void*, and some of the grounds on which it was so declared are shewn, but the judge held there was not sufficient shewn to make out gross negligence. The case, though arising out of an appeal from Scotland, is decided on the principles of law common to both Scotland and England, and is an instructive one as applicable to the subject of the liability of attorneys.

The rule will be made absolute to enter a nonsuit,

Per cur.—Rule absolute.

CHANCERY.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law, Reporter to the Court.*)

Lawrence v. Pomeroy.

Crown patent—Costs—Crown lands department.

It is the duty of parties dealing with the Crown lands department to be fair and candid in all their communications and statements. Where, therefore, a bill was filed to set aside a patent which had been issued to a purchaser of a clergy reserve lot, on the ground that the same had been so issued in ignorance of the opposing claim of the plaintiff, upon the fraudulent misrepresentations of the patentee, and the concealment of the facts by him from the Crown lands department, the court, although unable to afford the plaintiff the relief sought, dismissed the bill without costs as against the defendant, who had thus dealt with the department.

This was a bill to have a patent issued to the defendant Pomeroy rescinded, and the cause came on to be heard before his Lordship the Chancellor, at the sittings of the court held at Cobourg, in October, 1868. The facts material to the points disposed of are stated in the judgment, which was delivered at the close of the argument.

Roaf, for the plaintiff.

Cameron and *Blake*, for the defendant.

Vankoughnet, C.—I think the plaintiff must fail. The only ground on which he, in his own right, could ask to have the patent rescinded is, that he had an equity to the consideration of the Crown, of which they were in ignorance when the patent issued, and which, if known to them, might have influenced their judgment in his favour. I do not understand any of the cases to carry further than this the right of a private individual to question the validity of a patent, and I am not disposed to carry it further, but rather to limit it, as I have a strong opinion that the Attorney-General is the proper party to invite the action of the court. Then was the Crown, when the patent here issued, ignorant of the plaintiff's alleged rights? It seems to me not; all that the plaintiff says here now was then known to the Crown. By petitions and affidavits furnished by the plaintiff and others, and by the report of the local Crown lands agent made some four months before the patent issued, the department of Crown lands was put in possession of all the facts connected with the plaintiff's claim. They knew that one Julius Warner was the original purchaser of the lot (a clergy reserve) in 1837; that he had paid but one instalment, one-tenth of the purchase money; that he had many years ago left the country and, apparently at all events, abandoned the lot; that he had never during a long series of years asserted any claim to it, and only at last by the execution of the assignment of it, in the October previously to the issue of the patent, to one Barnard, from whom defendant Pomeroy obtained an assignment; they knew of the plaintiff's long possession and improvements, and yet with a knowledge of this, the original sale never having been cancelled, and the assignee having paid up the balance of the purchase money in full, a patent was issued to him, and the plaintiff informed of it, and that his claim was rejected. There is no room in this state of facts to infer that the Crown has or may have been deceived, or that they overlooked the plaintiff's claim. Had the defendant desired to show this he should have produced direct evidence of it, as the facts furnished lead in the

opposite direction. But the plaintiff insists that Pomeroy, the defendant, concealed from the Crown the fact that Warner said to him, when he applied to purchase the lot, that he had never intended looking after it, and offered it to him for nothing, and then sold it to him for $30, whereas the assignment expresses $50, and the assignment from Barnard $500, though nothing was ever paid to him, he having been a mere go-between in the transaction. The Crown, however, knew from the report of the Crown land agent, and from the affidavits before it, that Warner had so far abandoned the lot, and knowing this, they recognised his assignment, the sale still standing in his name: they would have learned nothing further if Pomeroy had mentioned to them what Warner said. As to the statement of a false representation in the deed, this I fear is a common, though a very improper practice. All dealings with the department, so much at the mercy of individuals, should be fair and above board, and I cannot too strongly condemn the conduct of the defendant Pomeroy in his attempt to embarrass the department, and keep open the question of the claim to the lot by asserting in a letter written to the department in the name of another party, one Higgins (though with his consent), that he, Higgins, had an assignment from Warner's heirs, when Pomeroy well knew that such an assignment never existed. If the statement of the false consideration could or would have influenced the department had they known the falsehood, I think the Attorney-General and not the plaintiff must seek relief, if any can be had on that ground. On the other head of equity on which Mr. Roaf sought to rest the plaintiff's case, viz., that the defendant Pomeroy had, by means of knowledge derived in confidence from the plaintiff, secured the patent, I think the case is not made out. Even if the pleadings were so shaped (and they are not) as to sustain it, I do not see that the defendant derived any information from the plaintiff's papers of importance to him, or which he in any way used to his own advantage. Those papers merely shewed the plaintiff's case, and were in the possession of the government at the time of the issue of the patent. Nor do I see that the defendant put himself in the position of trustee as to the plaintiff. The plaintiff shewed him his papers, and left them with him to examine, asking (as he alleges) defendant for a loan of a few dollars on the security of them, and defendant returned him his papers, refusing the loan. The defendant learned this much, that the plaintiff was prosecuting a claim to the land; and he immediately sets to work to prevent its success by hunting up the original nominee and purchasing from him, though there is evidence to shew that he had been making some enquiries after him before he saw defendant's papers. There is evidence of a conversation, not the one referred to or stated in the bill, which shews that defendant acted a most disingenuous part towards plaintiff, who had consulted him as a friend upon the sufficiency of his claim. It is sworn that defendant said to plaintiff not to concern himself about his claim, that it was all right, and not to be in a hurry to pay the purchase money to the government, as they would call for it when they wanted it, and yet almost immediately after thus disarming the plaintiff, he sets to work actively to secure the lot for himself. This conduct, and his mode of dealing with the government, are so reprehensible that while I refuse the plaintiff any relief, I dismiss the bill as against the defendant Pomeroy without costs. The other defendant must have his costs, as no case whatever is made against him.

COMMON LAW CHAMBERS.

(*Reported by* ROBERT A. HARRISON, ESQ., *Barrister-at-Law.*)

HAWKINS V. PATERSON ET AL.

Security for costs—When demandable in the case of a plaintiff within the jurisdiction of the court—Rule to be followed in case of conflict of decisions between the English Courts of Common Law.

Held, that if the plaintiff be actually a resident of the province at the time of the application for security for costs, and intend to remain here until trial or judgment in the cause, security for costs ought not to be ordered.

Semble—If a resident in the province were to declare his intention of leaving for abroad at once, and had sold off his property, and made other preparations for an immediate departure, with the intention of residing abroad, that upon these facts being shewn, the party might be called upon to give security, according to the general practice.

Held also, that we are not to adopt as a rule the decisions of the court of Queen's Bench in matters of practice, more than those of the courts of Exchequer or Common Pleas, but exercise our own judgment as to which is the best practice to adopt, and adopt that which will be the most convenient and suitable for ourselves, whether it be the decision of the one court or the other.

Gill v. *Hodgson*, 1 U. C. Prac. R. 331 doubted.

(Chambers, October 5, 1863).

The defendants obtained a summons calling on the plaintiff to shew cause why proceedings herein should not be stayed until sufficient security be given to answer the defendant's costs, in case the plaintiff discontinue, &c., on grounds disclosed in the affidavits and papers filed.

The summons was obtained on the following affidavits, viz.: the affidavit of Mr. Paterson, one of the defendants, who stated—That he was informed and verily believed that the plaintiff was staying merely temporarily in Upper Canada, and would leave permanently before the defendants (if successful herein) could enter judgment for their costs; that since the commencement of the action he (deponent) had spoken to Mr. Doyle, plaintiff's attorney, on the subject of security for costs, and asked for the same, and he said he supposed the plaintiff would give such security, and that he did not see how the plaintiff could get out of it, and he said to the deponent that he (deponent) had, however, better demand it; that such demand had been made, but security had not been given, and that issue was not yet joined. 2. The affidavit of J. O. Heward, who stated—That in a conversation he had with plaintiff in September last, he stated to the deponent that he was about going to England, that he had proceeded as far as Quebec, when he learned of certain proceedings being taken against him, to commit him to gaol for not attending to be examined pursuant to order, that he had merely come back to Toronto to attend to the matter, and that he intended to bring an action in consequence of his arrest; and that plaintiff also gave deponent to understand, from the purport of his conversation, that he was merely staying temporarily in Toronto, in consequence of the matters aforesaid, and in order to institute and prosecute the said action, and would then go to England as soon as he saw the matter through.

Mr. Heward made a further affidavit on the plaintiff's application respecting the subjects contained in his previous affidavit, under the 188th section of the C. L. P. Act, to the following effect—That as near as he could recollect the words made use of by the plaintiff were as stated in the former affidavit, viz.: "I understood him to say he was going to prosecute this action, and see the matter through, and that he intended to stay in the country for that purpose;" that plaintiff had no dwelling-house that deponent was aware of; and that "from what he said I thought he intended to return to this country again; he was in Quebec when he heard of the order made against him for his arrest, and he stated he was determined to come back and face the music, as he had friends in this country as well as in England.

The affidavit of Mr. Kenrick, one of the defendants, sets forth—That before the commencement of this action the plaintiff gave up his house and disposed of his effects, removed his wife and family from Yorkville to Quebec, with the intention of going to England, there permanently to reside, as the deponent was informed and believed; that the plaintiff himself went to Quebec for the same purpose, and shortly before this action returned to Toronto; that the plaintiff in an affidavit made lately stated—"That my residence is not, nor has it since the 18th of July last, been within the united counties of York and Peel, but I am now a temporary sojourner in this city (Toronto) and within the said united counties; that the plaintiff, as the deponent believed, was remaining here to prevent the defendants obtaining security for costs, and that his intention was to leave Canada permanently after he considers it too late to move for such security, or, at all events, before judgment could be entered against him for costs of defence, in case the defendants succeeded in the action; and that he believed the plaintiff was insolvent, and had no property in this country, or had so disposed of it that it cannot be reached by an execution.

The defendants also put in a copy of plaintiff's affidavit, which he filed on applying for the *habeas corpus* which was lately issued on his behalf,* in which the following statements appeared:

"I, Geoffrey Hawkins, of Hitchin, in England, gentleman, make oath and say, &c. "That for some years previously to the last mentioned day (the 11th of June, 1863), my residence had been in

* *In re Hawkins*, 9 U. C. L. J. 206.

the county of York: that before judgment was signed in this action (*Hawkins* v. *Kenrick*), I had, in accordance with my pre-arranged purpose, given up my house and sold my furniture preparatory to leaving this province, returning to England, my domicile, with my wife and children: that in May, and before judgment was signed against me, I sent my wife and children to Quebec, en route for England, and went into lodgings here, intending to follow them so soon as I had arranged some matters of business: that on the 18th of July, I left this city (Toronto) for Quebec, there to rejoin my wife and children, intending to go thence direct to England: that hearing that an order had been made by the judge of the county court for my committal, I returned to Toronto: that my residence is not, nor has it since the 18th day of July been, within the united counties of York and Peel, but I am now a temporary sojourner in this city (Toronto) and within the said counties.

M. C. Cameron, Q. C., shewed cause to the summons, and contended, according to the cases of *Dowling* v. *Harman*, 6 M. & W. 131, *Tambisco* v. *Pacifico*, 7 Exch. 816, and *Drummond* v. *Tillinghist*, 16 Q.B. 740, that security for costs could not be directed, because plaintiff was a resident in this province, and because he had no intention of leaving until the present action was entirely settled.

Robert A. Harrison, contra, insisted that it distinctly appeared the plaintiff's domicile is in a foreign country, and that he was only here temporarily, intending to leave in a very short time, and before judgment (if he should fail in the action) could be entered against him: that under these circumstances it was only reasonable plaintiff should be called upon to give security for costs: that according to the decision of the court of Queen's Bench in England, he was under the circumstances bound to give such security. (*Oliva* v. *Johnson*, 5 B. & Al. 908; *Gurney* v. *Key*, 3 Dowl. P. C. 559; *Drummond* v. *Tillinghist*, 16 Q. B. 740.) That there is a difference between the English court of Queen's Bench on the one side and the English courts of Common Pleas and Exchequer on the other, as to the practice in such a case; but that in this country it had been determined by the late Sir John B. Robinson, that we should follow the practice of the court of Queen's Bench (*Gill* v. *Hodgson*, 1 U. C. Prac. Rep. 381). He also referred to *O'Grady* v. *Munro*, 7 Grant. 106; *Barrett* v. *Power*, 25 L. Eq. Rep. 524; Story's Conflict of Laws, ss. 41-45. He adverted to the fact that plaintiff had not filed an affidavit of any kind in answer to the summons and the affidavits on which it had been granted, and argued that his conduct was most suspicious.

Adam Wilson, J.—The practice with respect to the granting of security for costs has varied a good deal from time to time.

In 2 Sellon's Pr. 570, it is laid down that such security will only be granted in two cases.

First. When an infant sues as plaintiff.

Second. When the plaintiff resides abroad.

The rule is now extended to third persons suing in the names of insolvent plaintiffs, and to convicts under sentence, and perhaps to other cases.

In *Parquot* v. *Eling*, 1 H. Bl. 106, security was refused to be ordered, although the plaintiff resided abroad, because it did not appear he had gone abroad to avoid the payment of his debt. But in *Ganesford* v. *Levy*, 2 H. Bl. 118, the practice was altered and security was ordered, upon the ground of a foreign residence alone.

Several cases have been decided since these cases. The following are the principal ones, and are those which are generally referred to as applicable to this question:

Ciragno v. *Hassan*, 6 Taunt. 20, decides that security for costs will not be exacted so long as the plaintiff remains in the country.

The Anonymous case, 8 Taunt. 737, is to the same effect, even although the plaintiff usually resides abroad.

Oliva v. *Johnson*, 5 B. & Al. 908, determined that where it was shown the plaintiff carried on business abroad, at Quebec, and had no house or permanent residence in England, and was a Canadian by birth, and had permanently resided at Quebec (except during occasional visits to England, on matters of business), that he would be ordered to give security for costs. And the court said the plaintiff's affidavit should state, first, that the plaintiff has been and in now a resident in England; second, that he intends to continue to reside in the country.

In *Gurney* v. *Key*, 3 Dowl. P.C. 559, it appeared that the plaintiff was in England when the action was commenced, but that he was abroad when the application for security for costs was made. The plaintiff stated he was temporarily resident abroad for the education of his children; that he was in England, and had a residence there when the action was commenced, and that he had been in England since, when he made an affidavit describing himself there as of Trevilian House, Tregony, in the county of Cornwall; from which it was agreed that it appeared that he was a resident in England, although frequently abroad, and that he therefore came within the rule laid down in the Anonymous case, in 8 Taunt. 737, and could not be ordered to give security for costs. It was also agreed for the defendant that the plaintiff had not sworn that he resided in England. That in an affidavit which he had lately made for the purpose of getting his discharge from an arrest for debt, on the ground of privilege as a witness, he had stated himself to be resident abroad. Mr. Justice Williams said, "Upon the affidavit, I have no doubt that the residence of the gentleman is now abroad. He does not state himself in his affidavit to be resident in this country, but merely describes himself as of Trevilian House, &c. In his former affidavit to be discharged from arrest, he stated himself to be resident abroad; and in the present case, if he had a domicile here, I must presume he would have stated it. I must therefore take it as a fact that he had not a domicile here, but that he has only been in this country for certain temporary purposes, there being nothing to show that his residence abroad is merely temporary. I therefore think that on that ground he ought to give security for costs."

This case has no particular bearing upon the main question now before me, because the plaintiff in it was residing abroad at the time of the application.

Dowling v. *Harman*, 6 M. & W. 131, shews that although the plaintiff be a foreigner, and be in the habit of frequently going abroad, and was abroad at the commencement of the action, yet, if he be in England at the time of the application for security for costs made, and intends to remain until after the trial, that security for costs will not be ordered.

Tambisco v. *Pacifico*, 7 Exch. 816, maintains the decision in *Dowling* v. *Harman*, 6 M. & W. 131, and the practice of the court of Common Pleas, against the decision of the Queen's Bench in *Oliva* v. *Johnson*, although that case was strongly pressed upon the attention of the court. The Chief Baron says, "the plaintiff states that he came from Greece for the purpose of bringing the action, and that he is now here, and that he intends to remain here until judgment is obtained in it." Alderson, B., says, "it is suggested the plaintiff's affidavit should also have stated that he intends to take up his permanent residence here, but such a statement would have been of very little avail, for he might change his intention the moment judgment had been given. The fact of his being actually resident here is the true criterion by which the question is to be settled."

Drummond v. *Tillinghist*, 16 Q. B. 740, determines that it is not sufficient ground for requiring security for costs, that the plaintiff is a foreigner lately come to England, having no family connexions or permanent abode in it, and likely soon to leave it, if it be not sworn that he has a permanent residence abroad. Lord Campbell, Chief Justice, says, "No case goes beyond this, that a foreigner being in England, but having his domicile out of the country, may be called upon to give security. Here no such domicile is shown. The presumption must be that the party will continue to reside where he is."

In the latter case the plaintiff was a cook on board an American vessel, and was a native of the United States. The vessel came to England. The plaintiff brought this suit against the captain. It was only sworn that the plaintiff had no family connexions in England, and had no permanent residence there, but had merely a temporary residence in Middlesex; and that when the plaintiff's wages were spent he would have no means of obtaining a livelihood but by going to sea; and that after putting the plaintiff to considerable expense, it was believed he would abscond before payment of the costs could be enforced against him, unless he was compelled to give security. Mr. Justice Earle says, in *Oliva* v. *Johnson*, it appeared that the plaintiff had a permanent residence abroad, except during occasional visits to England.

O'Grady v. *Monro*, 7 Grant 106, does not apply, because the plaintiff who was a native of the province, swore he had returned to the province with the intention of becoming a settled resident,

and that he had no idea of withdrawing from the jurisdiction of the court.

Gill v. *Hodgson*, 1 U. C. Prac. Rep. 381, decided in Chambers, shews that upon its being sworn that the plaintiff's residence was in England; that he usually resided there; that he was, at the time of the application, or was quite lately a merchant in business in Manchester; that he had no house or permanent residence in Upper Canada, and had permanently resided in Manchester, and that although at present in Upper Canada, yet he had no intention of permanently residing here; and that he had informed the defendant he had come to Upper Canada solely to attend to the suit; and that he did not intend to reside here permanently, but only until the suit was decided; and that he had only come to Upper Canada within the past few weeks, and had no property in Upper Canada, as it was believed—that it was a fit case for security for costs to be given; although the plaintiff answered this affidavit by shewing that he had been in Toronto for about three months; that he had no intention of returning to England to reside at any definite period; that Toronto was his place of residence; that he had no permanent place of residence; and that he had brought out a quantity of merchandise with which he intended trading in Toronto.

Sir John Robinson pronounced his judgment in the following words:—"Following the authorities in the Queen's Bench in England, as it is proper we should when the courts differ, I order the security to be given; the plaintiff does not contradict what the defendant has sworn; he told the defendant he was only come out to collect the debt and would go home as soon as the case was decided. The plaintiff's affidavit is made in evasive terms."

From the decisions which I have referred to, the rule in the Common Pleas and in the Exchequer seems to be this:—"That security for costs will not be required from the plaintiff, if it appear that he is a resident in the country, even although he is frequently abroad, if it appears he intends to remain in the country until the trial or judgment in the cause."

It is not necessary, according to the decisions in the Exchequer, that the plaintiff should declare his intention permanently to reside in the country, for as Mr. Baron Alderson remarks:—"Such a statement would be of very little avail, for he might change his intention the moment judgment had been obtained Perhaps something more may be required of a plaintiff than his *mere residence* in the country to excuse him from giving security for costs, although the words of Mr. Baron Alderson would seem to imply that mere residence in the country is alone sufficient to preclude security for costs from being demandable; for he says—"The fact of his being actually resident here is the true criterion by which the question is to be settled."

Now, I am inclined to think if a resident of the country were to declare his intention of leaving for abroad at once, and had sold off his property and made other preparations for an immediate departure, with the intention of residing abroad—that upon these facts being shewn the party might be called upon to give security, according to the general practice, notwithstanding the plaintiff was still actually a resident here; for if the plaintiff could not under such circumstances be called upon to give security, neither could he be required to give it, even if he were actually on his journey for abroad, nor until he had passed the boundaries of the province; and this, I think, would be permitting an unreasonable relaxation of the rule which was framed for the benefit of defendants, and which ought to apply as much when the plaintiff is *en route* for abroad, as if he were then actually abroad.

His presence here for some time appears to be the object of the rule, and the declared intention of the plaintiff to absent himself at once and reside abroad should entitle a defendant to call for security, as much so as the declared intention of a defendant to abscond forthwith should entitle him to arrest him to secure his appearance.

If then the plaintiff must not only be a resident at the time when the application for security is made, but should intend to remain in the country for some time after the application is made, the question is for how long should it appear that the plaintiff will be a resident here?

In the Exchequer it is held to be sufficient "that he intended to remain until after the trial, or that he intended to remain here until after judgment."

The rule in the Queen's Bench as collected from what the Chief Justice said in the case of *Drummond* v. *Tillinghist*, 16 Q. B. 740, may perhaps be this, although it is not very clear that any positive rule was laid down in that case—"That a foreigner in England, having his domicile out of the country may be called upon to give security for costs." *Domicile* is probably used rather loosely, and may be intended for "general or permanent residence;" for Mr. Justice Erle says—"*Oliva* v. *Johnson* was the only case supporting Mr. Greenwood's position, but the party was shewn to have had a permanent residence abroad, except during occasional visits to this country."

There may, therefore, be said to be a conflict between the courts in England. The Common Pleas and Exchequer hold it a sufficient answer to a demand for security for costs that the plaintiff, although a foreigner, is an actual resident in England, and intends to remain in England until after the trial or after judgment; while the Queen's Bench may be said to hold that if it appear the plaintiff is an actual resident in England, and has not his domicile or permanent residence in a foreign country, although he has no domicile or permanent residence elsewhere he will not be called upon to give security for costs.

It will thus be seen that in the Queen's Bench a person who has no domicile or permanent residence is in a better position than one who has a fixed domicile or permanent residence; for Lord Campbell says—"The plaintiff seems to have no domicile either at California or elsewhere, which, with much reason, gave cause for the complaint of Mr. Greenwood, that a person having no permanent place of residence or domicile was thus much better off than a person who had one; while the rule, one would think, ought to operate more stringently against a mere vagrant, as the plaintiff seemed to be, than it should against a person having a permanent abode." Mr. Greenwood said—"In reason it cannot be that if a man is brought here from China, and his domicile not known, that should exempt him from giving security, when otherwise it would be required. According to the rule which has been suggested the more a foreigner is itinerant, and the less that is known of his former residence and connexions, the less shall be liable to find the security."

It is better by far to adopt the rule of the two courts, that if the plaintiff be in England and intend to remain there till the trial or judgment no security shall be demandable, than the rule of the Queen's Bench, founded upon the case referred to, which excuses a mere vagrant from giving security at all, simply because he is in England and is not a vagrant. Justly considered, the practice of the Queen's Bench operates more advantageously to defendants than the practice of the other courts does in those cases where security is the most required; and on the other hand it operates more harshly against plaintiffs who are not itinerants and vagrants, but who have fixed domiciles and permanent places of residence abroad, for it compels them to find security for costs, although they may intend to reside in England until the litigation has been entirely finished, merely because they are not permanent residents in the country.

One may say what a permanent residence is, but it may be much more difficult to say what is not a permanent residence; and if it mean for a longer time than the termination and settlement of the particular suit, it is not reasonable that the court should require more than the purpose itself requires.

In every way, then, in which the question can be considered, I think the rule of the Common Pleas and Exchequer is, in this particular the most satisfactory and most reasonable, and the one which I shall feel disposed to follow, unless I am controlled by the practice of our own courts.

The only case which has been referred to as applicable in this country is the case of *Gill* v. *Hodgson* before mentioned, decided before Sir John Robinson in Chambers. Now this, although only a Chambers' decision, is, nevestheless, the decision of a very able judge. The Chief Justice there expressed the conflict of opinion between the courts in England, and felt the difficulty he was under in determining in the face of such difference. He had, therefore, to decide which course of practice he would follow; and he took the rule of the Queen's Bench as the one which, in his opinion, should govern us in this country under such circumstances.

I am not prepared, I must say, to adopt as a rule that we are to follow the decisions of the Queen's Bench in England more than

those of the other courts, and more particularly as the effect there is not to diverge from the decisions of each other, but to reconcile their differences, and to have a common and harmonious rule, decision and practice in every case. I think we should exercise our own judgment as to which is the best rule and practice to adopt, if there be a difference in the English courts, and adopt that which will be the most convenient and suitable for ourselves, whether it shall be the decision of the one court or the other.

It is singular too that in the case just quoted, which was decided in December, 1855, the cases of *Tambisco* v. *Pacifico*, 7 Exch. 816, and *Drummond* v. *Tillinghist*, 16 Q. B. 740, although decided about four years before that time, do not appear to have been cited, which necessarily lessens for the present day the effect of the judgment which was then given. But even in that case it is not at all certain that security was properly demandable according to the decision of the court of Queen's Bench in England, in *Drummond* v. *Tillinghist*, for it was distinctly sworn to by the plaintiff, in *Gill* v. *Hodgson*, "That the plaintiff had no other permanent place of residence than Toronto," which brings the case most expressly within the rule of the English court of Queen's Bench, that upon such a statement security would be refused, and which decision, as has been seen, goes far beyond what is required by the other courts, for the plaintiff to strive to exempt himself from giving security.

I am therefore of opinion that there is no decision in this province binding upon me, or contrary to the view which I have expressed, that if the plaintiff be actually a resident in the province at the time of the application for security for costs, and intend to remain here until after trial or judgment in the cause, security for costs should not be ordered to be given to him.

The question then is, does it appear here that the plaintiff is a resident in the province, and that he intends to remain here until after trial or judgment? Mr. Paterson says the plaintiff is here temporarily, and he believes the plaintiff will leave permanently before the defendants (if successful) could enter judgment for their costs. Mr. Heward says "I understood the plaintiff to say he was going to prosecute this action and see the matter through, and that he intended to stay in the country for that purpose." Mr. Kenrick does not add to this, excepting the fact that the plaintiff has sold his effects and removed his family to Quebec, on their way to England, and that the plaintiff himself also intends to go there. But, he adds, "he believes the plaintiff is remaining here to prevent the defendants obtaining security for costs," which, perhaps unintentionally altogether, disposes of the effect of his affidavit. The defendants further rely on the plaintiff's own affidavit filed on a former occasion, in which he describes himself in this last month as of Hitchin in England, and in which he says he had purposed to go to England, his domicile, with his wife and children. He also says, "My residence is not, nor has it since the 18th of July been, within the united counties of York and Peel, but I am now a temporary sojourner in this city, and within the said counties." From this same affidavit it appears plaintiff's residence has for some years previously been in the county of York, and that, excepting for the time he was absent in Quebec on his way to England, as he had intended, he does not seem to have had any other residence.

The mere description by the plaintiff of himself as of "Hitchin in England" cannot I think operate against him contrary to the facts of his actual residence in Upper Canada, any more than the description by the plaintiff of himself in the case in *Gurney* v. *Key*, 3 Dowl. 559, as of Trevilian Hall, Tregony, Cornwall, was allowed to help him against the fact of his actual foreign residence on the continent.

The plaintiff then speaks of England being his domicile, and probably it is so. But the domicile is very distinct from the place of residence, or even the place of permanent residence of a person One may be many years abroad without ever losing his former domicile, and I cannot therefore lay any stress upon this statement.

The whole case then is reduced to this, whether the statements of Mr. Paterson or of Mr. Heward, or of both together, are sufficient to make out—

1. That the plaintiff is not a resident here, or

2. That he does not intend to reside here until the trial, or until judgment.

My opinion is they do not. It is quite clear the plaintiff is a resident here. I think it does appear very strongly that the plaintiff does intend to stay in this country to see "the matter through" as the witness calls it, which "matter," I understand, means this suit, and "seeing it through," I presume, must mean seeing the end of the suit, which is certainly after the trial, and probably after judgment.

I think, then, upon the whole facts I cannot order security for costs to be given; although it is quite possible plaintiff may see the judgment entered against him, if it be adverse to him, and then remove himself from the country. which (as suggested in *Tambisco* v. *Pacifico*, 7 Exch. 816) a plaintiff may do, even if it had been before shewn that he had intended to be a permanent resident in the country.

In many cases it is, perhaps, of very little consequence whether a plaintiff against whom judgment be entered for costs is or is not within the country. He was formerly required to be personally within it, or to give security in substitution for it, because his person was liable to be taken for the costs of the action. In *Prey* v. *Edie*, 1 T. R. 267, Mr. Justice Buller says the reason why security for costs is given is, that if a verdict be given against the plaintiff (who is abroad) he is not within the reach of our law so as to have process served upon him for the costs. So in *Barrett* v. *Peaver*, above referred to, Baron Alderson says—"The reason why security for costs is required from a person abroad is, that if a judgment is obtained against him, it cannot be enforced against him by process of the court." In *Earl Ferrars* v. *Robins*, 2 D. P. C. 636, security for costs was not ordered, because, as the plaintiff was a peer, the substitution for personal responsibility could not be ordered when the person of the peer was protected from arrest.

A different rule in this respect prevails in Chancery (see *Lord Aldborough* v. *Burton*, 2 M. & K. 401) because it is said, although he cannot from his privilege be arrested for costs, that his absence nevertheless lessens the defendant's chance of getting payment of them.

But if the plaintiff in any action be an insolvent so that nothing can be made upon any process sued out on judgment against his supposed property; and if his person be safe from arrest for costs, as it is in this province, the practical difference to a defendant of such a plaintiff being actually in the country to answer in contemplation of law the costs, in case of a judgment being recovered against him, and of such a person being out of the country and beyond the process of the court altogether is scarcely appreciable, although it would be a great advantage to the defendant if he could procure security in such a case of absence, as it would be equally an advantage to him if he could procure security for his costs against an insolvent plaintiff resident in the country.

Some modification might properly be made in the law on this subject, by which, in certain cases, both plaintiffs and defendants might be ordered to give security against the costs which their litigation may be supposed unjustly to occasion; for if there be such persons in fact as ill-used plaintiffs and honest defendants, the opposites of such persons are not altogether unknown to the law: but I have only to administer in the law as I find it; and what I decide in this case is that, according to my view of the law as it is, the defendants cannot call upon the plaintiff to furnish security for costs upon the materials laid before me; and, therefore, I discharge their summons, and direct that the costs of this application shall be costs in the cause for the plaintiff.

Summons discharged.

Manary v. Dash.

Order postponing trial—Costs—Counsel fee when taxable.

Where, before the commission day of an assize, an order had been obtained to postpone the trial of a cause on payment of costs, and plaintiff afterwards, on taxation of costs, claimed the right to tax against defendant a counsel fee as having been paid to the partner of plaintiff's attorney, without shewing when or under what circumstances it had been paid; and it appearing that the record had not been entered for trial, the master refused to tax the counsel fee; and a summons for a revision of his taxation, by directing him to tax the counsel fee, was discharged with costs.

(Chambers, Nov. 16, 1863.)

This was an action of ejectment. The venue was laid in the county of Wentworth.

On 10th October last defendant obtained a summons calling on plaintiff to shew cause why the trial of the cause should not be

postponed till the next Spring assizes, on the ground of the absence of a material witness.

On 14th October last, upon the undertaking of defendant's attorney to pay costs, an order was made postponing the trial of the cause.

On 15th October the assizes for the county of Wentworth commenced; but the trial having been postponed on the day previous, the record was not entered for trial.

On the same day an appointment for the taxation of plaintiff's costs, under the order, was obtained and served by defendant.

The appointment was twice enlarged.

On the taxation of costs in the principal office in Toronto, an affidavit was produced by the agent of plaintiff's attorney, in which it was sworn that plaintiff had paid Mr. Freeman, the partner of plaintiff's attorney, a counsel fee, but it was not shewn when or under what circumstances the fee had been paid.

The master declined to tax the counsel fee as costs payable by defendant, under the order of 14th October, and made a certificate to that effect.

T. H. Spencer thereupon obtained a summons calling on defendant to shew cause why the master should not be directed to revise his taxation of the costs, with the view to the allowance of a counsel fee or refresher to the plaintiff on such taxation, and why the master should not be directed to allow a reasonable counsel fee or refresher.

Robert A. Harrison shewed cause. He objected that the summons was insufficient, as it did not state the grounds upon which a revision of taxation was desired, and that no affidavits showing the grounds were filed (*Alison* v. *Furnival*, 2 Dowl. P. C. 49; *Clemer* v. *Hargrave*, *Ib.* 689; *Daniel* v. *Bishop*, McClel. 61.) But, assuming that the materials were sufficient, he argued that the question raised was one peculiarly for the master to decide, and that in such a matter there could be no appeal from his decision (*Hingston* v. *Whelan*, 8 U. C. L. J. 72). If the matter were appealable, he argued that, under the circumstances, the master had properly disallowed the counsel fee (*Ib.*) and submitted that, as defendant was upholding the decision of the master, in the event of the summons being discharged, it should be discharged with costs.

T. H. Spencer, contra, in support of the summons, argued that the materials before the court were sufficient; that the subject matter of the master's decision was appealable; and that the fee having been paid to counsel, although the partner of plaintiff's attorney, and although record had not been entered, should have been allowed on taxation of costs against defendant. He referred to *Grindall* v. *Goodman*, 5 Dowl. P. C. 378; Arch. Prac. 11 Edn. 511, 1478, note 2.

Morrison, J., discharged the summons with costs.

Summons discharged with costs.

Biggar v. Scott et al.

Con. Stat. U. C. cap. 42 sec. 23—Action against a maker and endorser of a promissory note—Common counts struck out.

Where plaintiff, the holder of a promissory note made by one defendant and endorsed by the other, sued both defendants in one action, under Con. Stat. U. C. cap 42 sec. 23, and at the same time declared against the defendants on the common counts for money paid and on an account stated, the latter counts, on the application of defendants were struck out of the declaration.

(Chambers, Nov. 20, 1863.)

The declaration in this cause contained a count on a promissory note, made by one defendant and endorsed by the other.

It also contained the common counts for money paid and on an account stated.

M. B. Jackson obtained a summons calling on plaintiff to shew cause why the common counts should not be struck out of the declaration with costs.

John Paterson shewed cause.

John Wilson, J.—It is not pretended that plaintiff has any but the one cause of action against defendants. That cause of action is the promissory note made by the one defendant and endorsed by the other. It is, in fact, a several cause of action, but sued as joint under the statute. None but causes of action joint in substance as well as form can be proved against defendants under the common counts. I do not, therefore, see the necessity of the common counts, and so will give effect to defendant's application to strike them out of the declaration.

Summons absolute. Costs to be costs in the cause.

Adams v. Grier.

Statute 28 Vic. cap. 42 sec. 4—Not applicable to a cause made a remanet.

Where a record had been entered for trial at an assize and made a remanet, it was held that so long as the order for a remanet remained in force, the cause could not, under statute 28 Vic. cap. 42 sec. 4, be sent to the county court for trial.

(Chambers, Nov. 28, 1863.)

This was an action on the common counts for goods sold and delivered, goods bargained and sold, work, labor and materials.

Pleas—never indebted and payment.

The record had been entered for trial at the last assizes for the united counties of Huron and Bruce, and made a remanet.

John Paterson afterwards obtained a summons calling on the defendant to shew cause why the issues joined in the cause should not be tried before the judge of the county court of the united counties of Huron and Bruce at the next sittings thereof.

J. A. Boyd shewed cause, and contended, among other things, that the cause having been once entered for trial at the assizes, and made a remanet, the case was not one within the operation of statute 28 Vic. cap. 42 sec. 4.

John Wilson, J.—The order of the court where the cause was entered for trial is, that the record remain for trial. Until that order be rescinded or discharged the plaintiff cannot, in my opinion, have the cause tried in the county court. I shall, therefore, discharge the summons, but without costs.

Summons discharged without costs.

COUNTY COURTS.

In the County Court of Wellington, before A. Macdonell, Judge.

(*Reported by* Charles Lesson, *Student-at-Law.*)

Sandilands v. Betegarth.

Negligence—Highway—Obstruction by verandah.

In case of damage done to a verandah on a street by runaway horses, the question of negligence is for the jury, but what facts may by them be considered is a question of law.

Plaintiff sued for damages sustained by defendant's horses running away, and knocking down a verandah.

The facts were as follows:—Defendant is a farmer: came into town and drove his waggon up to the sidewalk in front of B's store, and jumped off the waggon and ran inside of the door to make some inquiry, but not losing sight of the horses. Whilst so inside, the horses took fright, by the flapping of an adjacent awning, and ran away down the street some distance, coming in contact with the plaintiff's verandah, knocking it completely down.

Plaintiff declared for that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, a certain messuage or inn and premises in the Town of Guelph, with the appurtenances, was in the possession of a certain person, to wit, one J. L., as tenant thereof to the plaintiff (the reversion thereof then and still belonging to the plaintiff); yet the defendants, knowing the premises, did wrongfully and injuriously, and with culpable negligence, leave in the public highway, near to the said messuage, inn, and premises, with the appurtenances, a certain two-horse waggon or carriage, with two horses yoked and harnessed thereto, without any person being in the immediate proper charge thereof, and without in anywise tying up or fastening the said horses, so as to guard against their running away, whereby the said horses taking fright and being entirely unrestrained did start and run with the said waggon with great speed in the direction of the said messuage, inn, and premises, with the appurtenances; and the said horses and waggon, thereupon, in such running, came into violent collision with the said messuage, inn, and premises, with the appurtenances, and greatly injured and damaged the same.

Defendants separately pleaded not guilty; and for a second plea each pleaded "that the said horses and waggon did not during

any portion of the time in the declaration mentioned leave or depart from the said highway, but continued always in the same as they lawfully might. And that certain posts and a certain verandah, which had been annexed and fastened to the said messuage, inn, and premises, having been placed, and there unlawfully standing, and being on the said highway, the said horses and waggon did slightly and gently and without any great violence, because the said posts and verandah were so placed, and, standing on the said highway, necessarily in passing along the said highway graze against and touch the said posts and verandah, so unlawfully being on the said highway, which are the grievances in the declaration mentioned. And the defendants further say that the said horses and waggon did not come into collision with or touch any portion of the said messuage, inn, and premises, with the appurtenances, lying and being outside the limit of the said highway, and not being then unlawfully thereon.

Issue being joined on these pleas, the case went down for trial in December, 1862, and a verdict was rendered for defendants.

Plaintiff moved for a new trial on the ground that the verdict was contrary to law and evidence in this, that it was shown that the horses were negligently left by the driver, who entered a store, and that the horses ran with the waggon from the road into the sidewalk; and that the verandah in the declaration mentioned was lawfully on the highway, if not by the express authority of the municipal county council, yet, with its leave and license, the negligence being therefore all on one side, the plaintiff was entitled to recover. Secondly, on the grounds of misdirection by the learned judge before whom the case was tried in telling the jury that if they found that the posts of the verandah were unlawfully on the highway that the plaintiff had no right to recover notwithstanding negligence on the defendant's part was proven, and in refusing to direct the jury that even if they found that the verandah was unlawfully constructed upon the highway, and that it was no obstruction to the defendants in the proper and ordinary use of the street for horses and vehicles, that then the defendants had no right, being private persons, to treat it as a nuisance, and abate it. And in refusing to tell the jury that the fact of the verandah being where it was, was no answer to the charge of negligence; and that if the verandah and posts could have been avoided by reasonable care it was evidence of negligence having been struck at all, and that the negligence was all on the side of the defendants, the plaintiff not having contributed in any degree, much less an equal degree. And the further ground that there was no evidence to sustain the defendant's second plea.

Messrs. Fergusson & Kingsmill, in support of the rule.

Lemon & Peterson, contra.

MACDONALD, Co. J.—This case was tried before me. The following were the objections made to the charge:

1st. That the jury should have been directed that if the horses left the roadway, and were on the sidewalk (as was the case with one of them) under the town by-law, they had left the highway.

2nd. That the horses being left, and not being tied, the defendant going inside the store door was guilty of an act of negligence, and that the question of negligence should not have been left to the jury.

3. That the construction of the verandah, and the tacit acquiescence of the council as against a party guilty of negligence it was lawfully there.

4. That as the verandah and posts could have been avoided by reasonable care, having been struck is evidence of negligence.

On the first point I had told the jury that the whole roadway was the highway, and, under the by-law, the owner driving on the sidewalk might be fined; on the second point I left it for the jury to say if the defendant was guilty of negligence in leaving the horses untied as he did, he being a short distance from them. On the third objection I told the jury that the supposed acquiescence of the town council to the verandah being built if it was unlawfully on the highway. As to the fourth objection, that the plaintiff claimed damages for an act of negligence, committed previous to the arrival of the horses and waggon at the plaintiff's property, the fact that there was room enough to pass with reasonable care could not affect the question of previous negligence.

The damages are claimed as the result of a previous act of negligence. It would be different if the defendants were in charge at the time of the collision. If they were in charge at the time, and could have passed if they had used ordinary care, it would be negligence if they came in collision with the obstructions in the road.

The case of *Quarman* v. *Burnett* (6 M. & W. p. 499), is cited to show that the defendants were guilty of negligence, but the case of *Lynch* v. *Nurdin* (1 Q. B. 29) shows that it is proper to leave the question of negligence to the jury, who would inquire "whether "the horses were vicious or steady; whether the occasion required "the servant to be long absent from his charge; whether no "assistance could be procured; whether the street at that hour "was likely to be clear, or thronged with a moving multitude."

In this case the whole facts were left to the jury to say, whether the defendants were guilty of culpable negligence, in consequence of which the horses had started off. They were told to consider the natural dispositions of the horses, whether requiring more or less care. The evidence of Massey, who saw the defendant drive up in front of his store, and, on the sidewalk, spoke to him about plaster. Massey told him where to go, and he would send a man. Massey went in at one of the front doors, and defendant went into the shop at the other front door to inquire about the man, when the horses started. A clerk was putting up an awning at the shop adjoining, when the wind suddenly raised one end of it. This might have been the cause of their starting, but it was still for the jury to consider whether it was not necessary to guard against such accidents to horses, which might be quiet in the country but requiring more care in the town.

The verdict was generally for the defendants. On the plea of not guilty is the verdict contrary to law and evidence? As the case went to the jury it is a question whether they should not have found for the plaintiff on this plea. I left it for the jury to say if the cause of the horses starting might not have been the sudden flapping of the awning which was being put up, and whether it was not necessary to guard against such accidents happening to horses, which might be quiet enough ordinarily, but requiring more care in the town. (*Illidge* v. *Goodwin*, 5 C. & P., 190.) If the injury resulted from circumstances over which defendants had no control, they are not answerable. *Wakeham* v. *Robinson*, 1 Bing., 213, cited for the defendants, admitted the rule laid down in *Gibbons* v. *Pepper*, 1 Ld. Raym. p. 38, which is against defendants in this case, as the accident was occasioned by the default of the defendant, he being in charge at the time, and not managing his horses properly.

No doubt the question of negligence is one strictly within the province of the jury, but what facts may be considered by the jury in determining the negligence is a question of law. *Gibbons* v. *Pepper* is not authority to show that if the horse had been left unfastened that the defendant would have been relieved from the risk of any damages which might be done if frightened by the clap of thunder, for he would not be without blame. In this case the starting of the horses may have been attributed by the jury to the sudden flapping of the awning by the wind, and may have considered that the defendant was thereby relieved from blame, but they should have been directed that the defendants were not thereby relieved from blame for not tying or fastening their horses where they left them, for when they left them they saw the risk of all mischief which might follow, even though it might result from the act of a third party.

As to the grounds of misdirection the jury were not directed as requested, because the act complained of was not wilful. The damage complained of was in consequence of defendant's alleged previous negligence. The jury were given to understand that if the defendants had been driving they could have avoided the plaintiff's structure.

The case of *Davies* v. *Mann* (10 M. & W. 546) is relied on to show defendants' liability. There it was held that although the ass was wrongfully on the road, the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods in the public highway, or over a man lying asleep there, or purposely running against a carriage going on the wrong side of the road. There ordinary care in driving would have avoided the mischief. In the present case nobody was in charge at the time, and it was not the defendants' intention that the horses should be put in

motion. Admitting that horses got off by his negligence, they came against an unlawful obstruction, put up without protection against accident.

The plaintiff has taken issue on the second plea of each defendant, which admits the negligence in leaving the horses unfastened. In considering the question whether the second and fourth pleas were proven at the trial I was of opinion that the plea in effect set up the right to pass along any part of the highway, although it may be unlawfully obstructed, not, however, wilfully to destroy such obstruction, but, as in this case, when, by negligence, horses may have escaped against the will of the owner, they had a right to the whole roadway, unobstructed by a permanent erection. If that was a proper construction to put on the second and fourth pleas, they were proved—and, taking that view of them at the trial, they were, in my opinion, a good defence, and in my charge to the jury I so stated the law. On consideration of the cases cited, and of the *Mayor of Colchester* v. *Brook* (72 B. 339. E. C. L. R. 38) and *Dimes* v. *Petley* (15 Q. B. 276) I think this charge was wrong. In this case, the property could not be damaged wilfully without being responsible for the damage, so the defendants must be held responsible for damage, although occasioned by his negligence.

It is laid down, as to nuisances in a public highway, that an individual cannot abate it, unless it does him special injury. If he cannot abate it wilfully he cannot justify damage to other property, a nuisance on the highway, if avoiding it he might have passed on with reasonable convenience. I think the second and fourth pleas were not proved. To sustain them it would be necessary for the defendants to show that the horses and waggon touched the posts unavoidably, and so caused the damage. As there was no one in charge or control the posts were not avoided as they might have been, as there was plenty of room to pass along the highway. I think the pleas in this case sufficiently bring in issue the necessity of defendants' horses passing over that part of the highway where the posts were placed. No such necessity appears, as there was ample room to have avoided them.

I think there must be a new trial, as the verdict is set aside on the ground of misdirection. Following the usual course it will be without costs.*

PARLIAMENTARY ELECTION CASES.

Reported by THOMAS HODGINS, ESQ., LL. B. *Barrister-at-Law.*

WEST ELGIN ELECTION.

(Committee:—JOHN CRAWFORD, Esq., M. P. P., for East Toronto, *Chairman;* ALEXANDER MCKENZIE, Esq., M. P. P., for Lambton, GEORGE JACKSON, Esq., M. P. P., for Grey, MICHAEL HARCOURT, Esq., M. P. P., for Haldimand, and FRANCIS JONES, Esq., M. P. P., for North Leeds and Grenville.)

Held, 1st. That the Assessment Rolls and not the Voters' Lists are binding upon Election Committees, in all contested elections, and that the votes of persons entered upon such lists who have not the property qualification required by law entitling them to vote, may be struck off the Poll-books by such Election Committees.

2nd. That in the "list of voters intended to be objected to," the several heads of objection must be clearly and specifically set forth and distinguished against the names of the voters excepted to.

3rd. That naturalized subjects are not required to procure certificates of naturalization in order to entitle them to vote.—[Quebec, 2nd session Parliament, 23rd February, 1863.]

The Petition in this case was presented by John Scoble, of Glenbanner, in the County of Elgin, Esquire, one of the candidates at the General Election held in July, 1861, alleging that at the election of a member to represent the West Riding of the County of Elgin in the Parliament of Canada, one George Macbeth, of London, Esquire, and the Petitioner were candidates; that the said George Macbeth was declared elected by a majority of thirteen votes; that said majority was only colorable, inasmuch as the votes of divers persons were received and recorded in favor of said George Macbeth who had not the necessary qualifications in respect of property, separate interest in partnership or joint property, subjects of Her Majesty, &c.—(See Petition in Journals, Legislative Assembly, 1862.) The sitting member, after an unsuccessful attempt to contest the validity of the recognizance, and to compel the petitioner to prove his qualification to be returned as a member, answered the petition, alleging bad votes in favor of the petitioner.

The petition was presented in March, 1862, and in June of the same year was referred to a select committee.

Upon the petition being read, the sitting member filed a preliminary answer, which was overruled, and he then asked for time to file his lists of objected votes owing to their non-receipt from his agent. The Committee required him to file an affidavit accounting for the delay, which he accordingly did, and annexed to it the following telegram:

"ST. THOMAS, 6th June, 1862.

"To G. Macbeth, Quebec:—Fowler promises list to-morrow; I expect Munro's also from Aldboro, and Dunwich list at same time; will forward at once.

"(Signed) C. C. ABBOTT."

Upon reading the affidavit and extracts, the Committee directed the lists of both parties to be filed in the office of the clerk of the Contested Elections, on or before the 1st July, 1862.

On the re-assembling of Parliament, in February, 1863, the Committee met on the 18th, and proceeded with the case until the 23rd February, when their report was presented.

During the session of 1862 but little was done, except the appointment of the Committee.

Hodgins (of the Upper Canada bar), for the petitioner, contended that by the several sub-sections of s. 4, Election Act, cap. 6, Con. Stats., Canada, the qualifications of electors were determined; that by sec. 61, the votes of unqualified persons were declared null and void; that in this case, the votes of persons not possessed of the requisite property qualification ($200 assessed value, or $20 yearly assessed value) had been received in favor of the sitting member; also the votes of persons described as partners, joint tenants, &c., who had not established their right to their separate part or share in such joint property before the Court of Revision or County Judge, as required in sub-section 3 of section 4 of said Act. That the validity of all such votes must be determined by the Assessment, Roll as provided by sub-section 6 of section 6 of the Election Act.

Irvine (of the Lower Canada bar) argued that the Committee were bound by the voters' lists, and that the votes of all entered there could not be questioned as to property qualification or otherwise.

The Committee, after deliberation, sustained the petitioner's argument, and ordered that the votes of all persons who, according to the assessment rolls, had not the requisite property qualification should be struck off the poll-books. Under this resolution the petitioner struck off 65 names from the votes in favor of the sitting member.

The petitioner being now in a majority of 52, called upon the sitting member to prove a majority in his favor; and the sitting member under the same resolution struck off 31 from the votes in favor of the petitioner.

Irvine, for the sitting member, then offered to proceed with that portion of his list entitled "List of persons irregularly and improperly assessed—names not given in full—consequently ineligible and objected to by Mr. Macbeth," and to show that the persons so objected to were similar to those described in Mr. Scoble's list in class III., "as partners, joint tenants, tenants in common, &c.

Hodgins, for the petitioner, opposed the application. An offer had been made at the opening of the case to withdraw the petitioner's class III. if the sitting member would withdraw this, but

* The case was again tried at the last June County Court sitting, and a verdict was again given for the defendants. In July term following plaintiffs again moved for new trial, and a rule *nisi* was granted on the grounds that such verdict was contrary to law and evidence and the judge's charge in this, that under the said charge the negligence of the defendants was proven, and the verdict should have been for the plaintiff. Macdonald, Co. J., in giving judgment said (after commenting upon *Illidge* v. *Goodwin* (5 C & P. 190), *Robinson* v. *Bletcher* (15 U. C. Q.B. 159), *Gibbons* v. *Pepper*, and other cases before alluded to) "I cannot say that the evidence of negligence on the part of the defendant, who drove the horse in this case, is so clear as to warrant an interference by the court. In this case, the question of negligence or no negligence admits of a good deal of argument and which it is proper for the jury to determine. I cannot come to the conclusion that there are proper grounds for interference with the verdict of the jury." Rule discharged.

the offer was refused. The petitioner's lists had been prepared in accordance with precedents, and he had set forth his objection to this class of votes thus: "These voters are objected to on the ground that the parties so represented as voting in favor of the said George Macbeth at said election were, before and at the time of their so voting, entered upon the Assessment Rolls of the Townships forming the West Riding of the County of Elgin as partners in business, joint tenants, or tenants in common, or *par indivis*, and were assessed jointly with one or more other persons or owners, tenants or occupants of real property, but the value of whose share or interest had not been determined, and was not sufficient to entitle them or any of them to vote or be entered upon the list of voters in respect of the property for which they were jointly rated; and because they had not previously established their right to vote at said election, or their right to their part or share in said real property before the Court of Revision or County Judge, according to the provisions of the election and assessment laws, so as to entitle them to be entered on the Assessment Rolls and Voters' Lists as by law required, and because they were not in any manner entitled to vote at said election." He cited Warren, p. 277, 324, and *Erdsforth* v. *Farrer*, 4 C. B. 9; and *Woollett* v. *Davis*, 4 C. B. 115.

Irvine, in reply, contended the list was sufficient, inasmuch as it appeared from the names given in that the parties were joint owners.

The Committee then deliberated for several days, when the learned chairman delivered the following judgment, which was unanimously concurred in by the Committee:—

THE CHAIRMAN.—The list of voters intended to be objected to by the sitting member has unquestionably not been prepared with that care and accuracy which the petitioner's list exhibits: but notwithstanding this the Committee have up to the present time been able to do substantial justice without giving effect to technical objections; and I must say that I am not disposed to give effect to such objections unless I find the law regulating the proceedings of election committees in this respect, as construed and expounded by able text writers and by legal authority in analogous cases, to be clear upon the point. It would certainly have been an easy matter for the party preparing the sitting member's list to have introduced into the heading of this class the objections that are now raised to the legality of such votes, viz.: that the voters are not qualified by reason of the parties being assessed as joint tenants or partners only, and the interest of the party voting in the joint estate has not been defined and his name entered separately in the assessment roll. The heading of this class of objections appears to me vague and uncertain, and unless we import into it words of explanation I do not see that we can make out precisely what is meant. To assess two or more persons jointly cannot be said to be an irregular or improper assessment. It is the usual and proper course followed by assessors and is not open to any objection that I can perceive. To have the interest of joint tenants or partners in the joint estate defined and entered on the assessment roll, for the purpose of qualifying such persons to vote, is another matter.

I refer to the proceedings of this Committee in scrutinizing votes objected to on both sides to shew that in our judgment the names of voters need not be given in full, and the contraction of of a Christian name does not of itself render the voter ineligible. No reference whatever is made in the whole list to joint tenants or partners, nor any objection made to votes on the ground that joint tenants or partners voted on the joint estate without having their interest defined and entered on the assessment roll, are at liberty now to supply omissions or import into this document language to define its meaning. The law as construed by those who have given to questions of this kind the most careful attention, and who have considered and written upon it, without reference to party prejudice and party feeling, appears to me to be clear upon the point; and if we are to be guided in our proceedings by authority and precedent we are bound to give effect to the technical objection and refuse to go into any scrutiny of these votes. To support this view of the case I cannot do better than quote from Warren's Law and Practice of Election Committees. He says: "The 'list of voters intended to be objected to,' is a document of equal importance with the petition, and requires great care in the preparation of it. The fundamental statutory requisite as to the character of it is that in the said lists must be given the several heads of objections, distinguishing the same against the list of voters excepted to." After stating what are substantially the provisions of the Election Petitions Act, Mr. Warren proceeds as follows: "It is necessary, therefore, for a petitioner first to consider whether a proposed objection be a valid one in point of law, and whether in point of fact it can be sustained by evidence. Secondly, to specify and distinguish it against the voter's name on the list. In these requisites are involved correctness of the name and description of the voter, and especially in respect of his number on the Register, together with a printed and precise statement of the objection intended to be insisted on. This is for the purpose of at once guiding the Committee and of enabling the opponent to meet the case fairly and fully, and deprive him of any pretence for alleging that he has been resisted by a vague defection or erroneous statement; one, moreover, which may have been, perhaps, designedly such. It is better to be over-scrupulously precise than hazardously compendious, for it is a logic often strenuously urged in committees that it is hard for a voter to be disfranchised on technical grounds not brought forward with technical sufficiency, and if there be any leaning it ought surely to be in favor of the franchise. Were committees to be lax in enforcing accuracy in these cases, they would fritter away the great and beneficial provisions of the statute, open the wide door to fraud, and offer a premium on negligence." Apply the language used by the distinguished writer whom I have quoted to the case before us, and in my judgment it disposes of the question and sustains the technical objection which has been made. All text writers on the subject concur in this view of the practice. There are also cases which have been decided by the Court of Common Pleas in England bearing strongly in favor of this objection, the force of which sustained and supported as it has been by such authority I have felt myself unable to resist. On behalf of the sitting member no case has been cited by his counsel in favor of the argument he addressed to us when endeavoring to uphold the sufficiency of this heading; and from the careful consideration which he has given to his client's case, I am persuaded that could such a case have been found he would not have overlooked it. The objection that partners or joint owners of property cannot vote unless their interest in the joint estate be defined on the assessment roll—although qualified in all other respects—I regard as a technical objection, and we are I think not called upon to disfranchise voters on technical grounds not brought forward with technical sufficiency. For these reasons I feel myself compelled to uphold the objection of the counsel for the petitioner.

The petitioner then withdrew his list of objected votes under this head.

The sitting member then offered to strike off certain votes in favor of the petitioner, on the ground that the said voters "had not obtained certificates of naturalization." The Committee resolved that such was not a valid objection. He then applied for a Commission to show that the petitioner was ineligible, and that a voter had been intimidated by the petitioner or his agents, and that intimidation would, under the Election Act, disentitle the petitioner to the seat. On reading the 23 Victoria, cap. 17. the Corrupt Practices Prevention Act, the Committee determined the point against the sitting member. This exhausted the sitting member's list, and the petitioner (John Scoble, Esq.,) being in a majority, was declared duly elected and took his seat accordingly.

IRISH REPORTS.

(*From the "Law Times."*)

HUGHES v. MURRAY.

Attorney—Costs—Reference to taxation after twelve months—Special circumstances.

Where an action had been brought by an attorney for a sum of 68*l.*, balance of untaxed costs, more than twelve months after the delivery of the bill thereof; and it appeared that before action brought, the attorney had offered to take a sum of 40*l.*, in full:

Held, that it was a proper case for a reference for taxation, and the special circumstances were sufficient, under the 12 & 13 Vict. c. 33. s. 2.

O'Driscoll, on behalf of the defendant, moved that the proceedings in the action be stayed, and for a reference to taxation of the bill of costs, the subject of the action, the defendant offering to

lodge the money. The costs were incurred, and the bill duly delivered, upwards of twelve months prior to the commencement of the action; but it appeared from the affidavit of the defendant, that prior to the bringing of the action, the plaintiff had offered to take 40*l.* in full of the amount claimed, and had afterwards served his summons and plaint for the full balance, viz., 68*l.* The affidavit also relied on the ill-health of the defendant, and his absence on that account from town; but this was contradicted by the plaintiff's affidavit, but the offer to settle for the 40*l.* was not denied.

Lawless, Q. C. (with him *McKenna*), submitted that no special circumstances were shown, sufficient to justify an order under the statute 12 & 13 Vic c. 56. *Re Barnard*, 2 DeG. M. & G. 359; *Re Whicher*, 13 M. & W. 549, were cited. They also urged that, if the order should be made, it should provide that the plaintiff should have the costs of taxation and the costs of the motion, even though more than one-sixth should be taken off.

MOWAT, C. J.—The mere circumstance of the attorney here offering, just before he brought his action, to take a sum of 40*l.* in full, of a sum of 68*l.* and then bringing his action for the latter sum, is, in my judgment, amply sufficient "special circumstance" to bring the case within the statute. Let further proceedings be stayed; the defendant to bring in and lodge the sum of 68*l.* within a week; refer the bill of costs to taxation; and reserve the costs of taxation and of the motion for the court.

GENERAL CORRESPONDENCE.

Absconding debtors—Land only—Division Courts—Costs.

TO THE EDITORS OF THE LAW JOURNAL.

St. Thomas, 23rd November, 1863.

DEAR SIRS,—I take the liberty of asking your views on the following case.

B. owns a valuable farm in the county of Elgin, but no chattel property of any description. He absconds to the United States, having first let his farm for three years, being paid the rent for the whole term in advance. He leaves various creditors behind, to whom he is indebted in sums from $40 to $90, none as much as $100.

Have the creditors any remedy in the Division Courts? (See Form of Attachment, page 180 Consol. Stat. U. C.; also section 199, page 182, same statute.)

It does not appear to me that a creditor can make the affidavit necessary to take out an attachment where lands only, and not goods, are left behind the absconding debtor.

Is not the only remedy through the County and Superior Courts?

If so, could the Clerk tax County Court costs? or could the Judge properly grant a certificate for costs?

Your answer through the *Law Journal* will much oblige.

Yours respectfully, H.

[It does not appear to us that upon the facts stated by our correspondent a Division Court would have power to issue an attachment.

It would however, we apprehend, under sec. 4 of Con. Stat. U. C., cap. 25, be within the jurisdiction of the County Court to do so.

If attachment were issued from the County Court, though the amount be under $100, we should think that the Judge would, under the circumstances, certify for County Court costs.—EDS. L. J.]

Staying second action till costs of first paid.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—I believe it is the established practice for the court to stay a second action of ejectment between the same parties, till the costs of the first are paid. But I have some doubts as to whether this practice is applicable to actions other than ejectment. If not too much trouble, I should like to know if in an action for slander, where plaintiff (a worthless man) accepts a nonsuit, and afterwards brings a second action for the same slander without paying the costs of the first, his proceedings can be stayed till the costs of the first are paid? Your opinion will greatly oblige

Yours, &c., AN OLD SUBSCRIBER.

Kingston, Nov. 27, 1863.

[Where a second action is oppressive and vexatious, the court has a discretionary power to stay it till the costs of the first action be paid. But it does not necessarily follow that because a plaintiff failed in his first action, his second must be oppressive. The circumstances under which he failed in the first action must be known to the court on an application to stay the second action. If the first action were withdrawn from the jury on the eve of a verdict for defendant, and plaintiff be wholly unable to pay costs, the court no doubt would stay the second action (See *Prouse* v. *Lowdale*, 8 L.T.N.S. 314). It is impossible, however, to lay down a rule which will apply to all cases. The application is one to the discretion of the court, and each case must depend on its own peculiar circumstances (*Ib.*). The application, however, to be successful, must be made with reasonable promptitude (*Ib.*).—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Q. B. BAILEY AND OTHERS v. EDWARDS.

Bill of exchange—Consideration—Accommodation—Renewal.

Defendant being indebted in a certain amount, gave his creditor acceptances for a large amount, which the creditor endorsed to third parties for their accommodation, and they endorsed them to the plaintiff's for value. One of them was dishonoured and twice renewed, and while the last renewal was in the plaintiff's hands, they were parties to a deed of arrangement with their endorsers, in which they covenanted, not to sue any of the other parties on bills upon which, as between such parties and their endorsers, such parties would not be liable. Previously to the last renewal, the defendant had paid the bills to the amount he owed the drawer, and the plaintiffs then sued upon the last renewal of the bill.

Held, that the question was, not whether there was value for the original acceptance, but whether it was a bill on which, as between the endorsers and the plaintiffs, the endorsers would be liable.

Q. B. PINARD v. KLOCKMAN.

Bill of exchange—Foreign bills—Drawn in "sets"—Loss of first "set"—Liability of endorser.

Where a foreign bill is drawn in sets in the usual way, and the first "set" is lost by the holder, he cannot sue a prior endorser, who neither endorsed to him, nor has the other sets in his possession, although he may be entitled to recover them from any party who has possession of them, and

Semble, that any remedy he may have, if any, is against his own immediate endorser.

EX. CAINE AND ANOTHER V. COULSON.

Contract—Payment—London banker's draft—Attorney—Costs.

In support of a plea of payment it was proved, that the plaintiff's attorney wrote to the defendant, requesting the remittance of a debt, and 13s. 4d., for the attorney's costs. The defendant sent a banker's draft for the amount of the debt, but took no notice of his attorney's charges. The attorney kept the draft. The jury found a verdict for the defendant on the plea.

Held, that the evidence was sufficient to support the plea.

Q. B. MORGAN V. BOULT AND ANOTHER.

Award—Arbitration—Umpire—Election by lot—Award agreed to in the absence of one arbitrator.

Where the umpire and one of the arbitrators, in the absence of the other (without any default on his part) arrived at a decision, though they informed him of it, and afforded him an opportunity of objecting thereto, before finally and formally making their award.

Held, that it was bad.

Although the election of an umpire by lot, may not be necessarily bad, where the arbitrators have previously agreed, that either of two parties proposed, are fit and proper persons for the office; yet this must be made out plainly and clearly, or the ordinary rule will be adhered to.

EX. THORPE V. THORPE.

Devise—Right-heirs of testator's name.

Under a devise of an estate, after the death of a testator or of a tenant for life to testator's right-heirs of his name, if any such there be, a person not right-heir at the time of the death of the testator or tenant for life cannot take, but the estate in default of a right-heir of the testator's name will then vest in the right heir.

EX. DAVIES AND ANOTHER V. JONES.

Bill of sale—Interpleader—Apparent ownership—Actual delivery—Continued possession of grantor.

Where there is an assignment, with actual delivery, and visible change of ownership and possession, the Bill of Sales Act does not apply, and although some portion of the assignor's family remain on the premises, that is only evidence on the question of possession, which is for the jury.

EX. HELLIWELL V. HEYWOOD.

Sheriff—Execution—Extortion—Possession money—Valuation.

It is extortion for a bailiff on a *fi. fa.* to charge costs of a second man in possession, and of a valuation of the goods.

EX. IN RE AN ATTORNEY.

Attorney—Practice—Irregularity—Criminal imputations—Form of will.

On an affidavit imputing criminal conduct to an attorney, the form of the rule in the first instance is to show cause why he should not be struck off the rolls, or be suspended from practice for so long a time, as the court shall think fit.

EX. HOWARTH V. BROWN.

Costs—Pleading—Jurisdiction—Continuance—22nd and 23rd rules of pleading.

Where the defendant, after pleading by leave of a judge, withdraws his plea, and pleads a matter of defence arising afterwards, and the plaintiff confesses such plea, the plaintiff is entitled under the 22nd and 23rd rules of pleading, Hil. 7, 1853, to his costs up to the time of pleading such plea, although it is neither pleaded together with pleas of defence arising before the commencement of the action, nor contains any allegation that the matter of defence arose after the last pleading.

Q. B. BINGHAM V. CORBETT.

Guarantee—Taking security from debtor—Discharge of surety.

The defendant having given to the plaintiff a continuing guarantee for goods, to be supplied on a credit of two months, and a liability having accrued thereon, the plaintiff, the creditor, took from the debtor (without the privity of the defendant) a legal mortgage of certain property as security, not only for the sum then due, but for any further sums which might become due on the guarantee, with a covenant by the debtor, to pay the same within six months after they should have so become due. In an action brought to recover sums which became due subsequently—

Held, that the subsequent supplies were under a new contract, on an extended credit, and that the defendant as surety, was not liable.

Q. B. REG V. PEARCE.

Perjury—Indictment—Jurisdiction—Judgment in County Court—Judgment summons—Amendment of—Effect of adding husband's name.

A woman having obtained judgment against the defendant, in a County Court, married, and afterwards, in her maiden name, took out a judgment summons against him in another district, which on the hearing, the judge amended by inserting her husband's name, and the defendant was then sworn and examined, and was afterwards indicted and convicted for perjury at that hearing.

Held, that he was improperly convicted, as he had been sworn in a cause in which there was no judgment, and in which the County Court judge had no jurisdiction.

C. P. CHAMBERS V. MILLER AND OTHERS.

A cheque payable to bearer, was presented for payment at a bank. The cashier placed the money on the counter and went away. The bearer commenced counting the money, and while so doing the cashier returned, and said the money could not be paid. The bearer refused to refund the money. It was thereupon taken from him. In an action for assault and trespass, it was

Held, that the property in the money passed at the time the cashier placed the money on the counter, and therefore an action would lie.

Q. B. WATKINS AND ANOTHER V. FIGG, EXECUTOR.

Promissory note—Payable on demand—Memorandum on back of the note—Extending time for payment—Effect of—Statute of Limitations.

A promissory note was given more than six years before action, with a memorandum indorsed on the back, by the payees, to the effect that they undertook, that no demand should be made for payment during the life of the maker. An action being brought, within six years after the death of the maker, against his executor, he pleaded the Statute of Limitations.

Held, that the plaintiff's were entitled to recover, if not upon the note itself, at all events, on a special court setting forth the effect of the arrangement.

EX. FLEMING V. FLEMING.

Devise—Latent ambiguity—Admissibility of parol evidence.

On a devise to the testator's son for life, and at his death to descend to the testator's grandson Henry, it appearing that there were two grandsons of that name, parol evidence was held admissable to show which of them the testator meant.

EX. WALKER V. OLDING.

Interpleader order—Sale under—Liability of execution creditor.

Where goods have been wrongfully seized under a *fi. fa.*, and are afterwards sold under an interpleader order, the execution creditor is not liable for any loss that may accrue by such sale, or by any proceedings subsequent to the interpleader order.

CHANCERY.

V. C. S. CLARKE v. MACINTOSH.
MACINTOSH v. CLARKE.

Vendor and purchaser—Misrepresentation—Caveat emptor.

If there be anything in the nature or circumstances of the representations made by a vendor, calculated to excite suspicion, or to require explanation or investigation, the purchaser is bound to be on his guard, and must bear the consequence of any negligence on his own part.

If the purchaser, not satisfied with the representation, proceeds to investigate and inquire for himself and has a fair opportunity of testing the accuracy of what the seller has represented, he must abide by the consequences. C. advertised a brewery and leasehold property for sale, and M. with a view to purchasing the same, visited the brewery, saw the books, signed an agreement to purchase, accepted the title, and paid part of the purchase money. Subsequently, on taking further advice, he refused to complete on the ground of misrepresentation. Previously to the agreement, conflicting statements of the value had been made.

Held, that the statements were such as to put the the purchaser on inquiry, and specific performance was decreed.

V. C. W. RE ERA ASSURANCE SOCIETY.
WILLIAMS CASE.
ANCHOR COMPANY'S CASE.

Joint stock company—Amalgamation—Object and scope of company—Acquiescence—Creditors representative—Costs.

Although an amalgamation and purchase of the business and liabilities of one joint stock company by another established for similar purposes may be *ultra vires*, as a transaction not within the general scope and purpose of the business of such a company, and unauthorised by the deed of settlement; there may have been such an amount of subsequent acquiescence as to render the attempted amalgamation, though invalid in its inception, binding as between the two companies.

Observations upon the creditors representative and his costs of appearance.

M. R. CLARKE v. MALPAS.

Practice—Taxation—Costs between party and party—Expenses of witnesses summoned but not examined—Attendance of county solicitor—Shorthand-writer's notes—Enrolment of decree.

Where the costs of a suit were ordered to be paid by the defendant as between party and party, they were held to include the expenses incurred by the plaintiff, in bringing up the defendants witnesses to be cross-examined in court, when their attendance was reasonably necessary, notwithstanding they were not cross-examined, and also the expense of the shorthand-writer's notes of the evidence given in court, taken at the suggestion of the judge; but they were held not to include the expenses of the attendance in town of the county solicitor, for the purpose of superintending the cross-examination, in court, of the plaintiff's witnesses, nor the costs of the enrolment of the decree by the plaintiff.

L. C. THOMAS v. JONES.

Power — Survivorship — General equitable power—Appointment by married woman—General devise—Will act (1 Vic. ch. 26) ss. 8, 24, 27.

A general equitable power of appointment over real estate, was given to the survivor of A and B.

A, who was a married woman (with testamentary capacity under her settlement) by her will made in 1838, in the lifetime of B, who afterwards died in A's lifetime, made a general devise of her real estate.

Held, that the general devise by A, was to be taken as if executed immediately before her death, and was a good execution of the power given to the survivor of A and B.

The effect of the will's act ss. 8, 24, 27, on such a devise by a married woman, considered.

V. C. S. WARNER v. SMITH.

Partnership—Division of profits—Parol agreement.

Where two persons carrying on business together, and one carrying on business alone, agreed by parol to join in a particular adventure which was carried out by contracts, in which they were described as of their respective houses of business.

Held, that in the absence of any stipulations or evidence of dealing to the contrary, that the three individuals were entitled to participate equally in the profits.

V. C. W. KNIGHT v. CORY.

Practice—Security for costs.

A defendant before moving that the plaintiff be ordered to give security for costs, is bound to make inquiries of the plaintiff's solicitor, as to the plaintiff's address, a refusal by the solicitor to give such information, being a material reason for inducing the court to make the order.

An accidental mistake in the address given by the plaintiff, without any intention to mislead, will not entitle a defendant to security for costs, especially where the plaintiff has a fixed place of residence which might have been obtained from the solicitor upon inquiry.

M. R. LANCASTER v. ELCE.

Deed of arrangement with creditors—Admission by trustees of creditor to execute deed—Evidence before execution—Refusal to pay dividends after execution—Suit to compel payment—Costs.

Although trustees of a creditor's deed may refuse to allow any creditor to execute the deed until he has produced satisfactory evidence of the existence of his debt, yet, after they have permitted a creditor to execute, they cannot refuse to pay him his share in the dividends, except upon grounds such as fraud or forgery, which would be sufficient to justify them in coming to this court to have the name of such creditor expunged from the list of creditors executing the deed.

In a suit by a creditor who had been allowed to execute a creditor's deed against the trustees, to have the trusts of such deed carried out, the trustees having, as the court thought, without sufficient reason, refused to allow him to participate in the dividends declared in respect of the estate, the court made the trustees pay so much of the costs of the suit as had been occasioned by their having contested the plaintiff's right as a creditor.

L. C. TALBOT v. STANIFORTH.

Expectant heir—Contingent reversionary interest—Inadequate price.

This was an appeal from a decision of Vice-Chancellor Wood. The object of the suit was to set aside a sale by the plaintiff of his reversionary interest in certain real estates, on the ground of inadequacy of price. The Vice-Chancellor held that the sale must be set aside. The defendant, whose interest it was to uphold the sale, appealed.

V. C. K. BLAKE v. PETERS.

Will—Construction—Waste—Fully estated—Timber leaseholds—Dilapidations.

A., testator, by his will devises freehold, leasehold, and copyhold property to his sister E, absolutely, on condition that she dispose of it by deed, will, or otherwise, and a devise of the property in default of due disposition to J. W. P., with an executory devise over in a certain event, with a restriction upon cutting timber, except for necessary repairs. E., by her will, disposes of the property in question, with other property, and gives certain portions to J. W. P., with a like devise over, and a like restriction against cutting timber, and also a proviso that he shall keep the leasehold property fully estated with three lives. J. W. P. remains in possession for twenty-eight years, and commits various acts of waste by cutting large quantities of timber, suffering the buildings to become dilapidated, and omitting to renew leases. On bill filed by the person taking under the executory devise over,

Held, that J. W. P.'s estate was liable for the timber cut, beyond what was necessary for repairs, and also for omitting to renew the leases, but not for the permissive waste, and inquiries as to portions of the buildings alleged to have been taken away, and as to whether the property could be kept fully estated.

M. R. SHARP v. LEACH.

Voluntary settlement—Undue influence—Unmarried woman—Cancellation—Burden of proof—Sale of reversion—Inadequacy of price—Lapse of time—Relationship between the parties.

A voluntary settlement, executed by a lady under the influence of her brother, she having no independent professional advice, by which the property was settled upon herself for life, remainder to her children, and, in default of issue, upon her brother and his family, set aside at the instance of the lady and a husband with whom she afterwards intermarried.

The Court considered that independently of the relation in which the parties stood to each other, the contracts of the deed threw the burden of proof upon the defendant to prove its fairness.

A purchase by the other brother of a reversionary interest of his sister at an undervalue, set aside after the lapse of upwards of ten years, the Court considering that the lapse of time which would have been most material if the transaction had been among strangers, was not a bar to relief in consequence of the influence exercised by the brother over the sister, which did not cease till about two years before bill filed.

M. R. GOSLING v. GOSLING.

Will—Construction—Bequest of residue—Trust of reference—Remoteness—Executory trust.

The testator, by his will, directed certain estates to be purchased by his trustees, and the trusts thereof, in a certain event, were declared to lie to his nephew A. for life; remainder to his first and other sons in tail male; remainder to the younger brothers of such nephew successively for life; remainder to their respective first and other sons in tail male; remainder to the testator's brother for life; remainder to his first and other sons in tail male; remainders over.

The testator then bequeathed his residuary personal estate to his trustees, upon trust, to invest and hold the same upon the same trusts as were declared of the estates to be purchased, or as near thereto as the rules of law and equity would permit. Then followed the following proviso:—"Provided, nevertheless, and I hereby declare, that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years." There was no trust to invest and accumulate the intermediate income.

Held, that the proviso was an integral part of the gift of the residuary personal estate, and was not simply a superadded limitation, inconsistent with the previous absolute gift, and that as the trusts under it were not limited to take effect within twenty-one years after the testator's death, the whole gift was void.

A trust to invest property and hold the same upon the same trusts as are previously declared of other property directed to be purchased, so far as the rules of law and equity will permit, is not an executory trust.

V. C. K. ELLISON v. THOMAS.

Settlement—Construction—"Except an eldest or only son for the time being."

E. C., by two deeds of settlement of even date, limits lands to himself for life, with remainder to his eldest son, R. E. C., for life, with remainder to R. E. C.'s sons in tail male, with like limitations in succession to his second, third, and every other of his (E. C.'s) sons and their issue in tail male. There is then a limitation of the D. estate for 1,000 years to trustees to raise £13,000 for portions for younger children, the words being "upon trust for all and every the children of R. E. C. then born and hereafter to be born other and besides an eldest or only son, for the time being entitled under the indenture, &c., to the estates thereby settled in possession or remainder immediately expectant on the decease of E. C. and R. E. C." The eldest son of R. E. C. having died, his fifth son became his eldest son, and the question arose between the younger children and the representatives of the deceased eldest son of R. E. C. whether such representatives were excluded under the words of the clause.

Held, that words applied not to a single individual, but to more than one, and not to a single period, but to a succession of periods, and that therefore the representatives of the eldest son of R. E. C. were excluded.

REVIEWS.

A HANDY BOOK OF THE LAW OF DOWER, WITH STATUTES, FORMS, PLEADINGS, &c. By W. G. Draper, Barrister-at-Law. Toronto: W. C. Chewett & Co., King-street East.

The law of Dower is of more importance in Upper Canada than in England; for in England the husband may and generally does destroy his wife's right to dower by a declaration to that effect, with or without her concurrence. So far from this being the case in Upper Canada, the right of the widow to dower is strictly preserved, and the remedies to enforce it have of late been facilitated.

The want, therefore, of a handy book on the law of dower was a want which we could not expect to be supplied by a writer in the mother country. It has, however, been supplied, and well supplied, by Mr. Draper, in the small volume that is now before us.

The volume contains only 140 pages, and yet, so far as we can ascertain, omits nothing that is really pertinent to a work of the kind. The references to Upper Canadian statutes and Upper Canadian decisions are numerous. The work is in fact thoroughly Upper Canadian in its purpose, and should receive a thorough Upper Canadian support.

The main body of the work is divided into twelve chapters. These are headed "Dower," "Marriage," "Seisin," "Death of the husband," "Of what estate a woman is dowable," "How dower may be barred or defeated," "The measure of damages on dower," "Of assignment of dower," "Practice on Dower," "Costs." Then follow several useful Forms, Rules of Court, Statutes, and an article from this journal on the Act for the better Assignment of Dower. The whole is preceded by an ample and well arranged Index, and a Table of Cases. No less than 125 cases are noted.

We are much pleased with the practical style of the author, and we are no less pleased with the mechanical execution of the work by its publishers. The book itself is creditable to Canada, and we hope the day is near at hand when such works can be said in Canada to be not only honorable but profitable to the authors. The circulation hitherto of law books has been anything but encouraging. With the steady and continued increase of the number of the profession, there must be a corresponding increase in the number of those who purchase law books.

We do not imagine that the prefix of "handy" (so common of late) will give to a law book in Upper Canada any circulation beyond the limits of the profession. Attempts to convert law books into light literature for use on railways and steamboats, have not been successful. Those who want amusement consult books of a different class. Those who need information on questions of law, if not themselves lawyers, find it to their advantage to take the advice of those who are competent to give it.

We can safely recommend Mr. Draper's work on the law of dower to the patronage of the profession in Upper Canada. It is well written, well arranged, and well got up. The price is $3. We have tested the work, and can with confidence say that it is reliable. It is designed to supply a want long felt, and is equal to its design. We congratulate its author upon having so creditably acquitted

himself, and having produced a work that will prove of real service to the profession to which he belongs.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworths, 7 Fleet-street.

The number for November is received. Its contents are, 1, "The Rights, Disabilities and Usages of the Ancient English Peasantry;" 2, "Indefeasibility of Title;" 3, "Criminal Procedure;" 4, "On the Economical effects of the Patent Laws;" 5, "On American Secession and State Rights;" 6, "Gifts in Equity;" 7, "International Law;" 8, "On Legal Procedure;" 9, "Bankrupt Law of Scotland;" 10, "Extract from Lord Brougham's Letter to the Earl of Radnor." The first is a continuation of a series of papers of much interest to the curious. The second deals with a subject of great advantage in theory, but most difficult in practice. The third advocates several reforms in the administration of criminal justice, including the appointment of county Crown attorneys—a step which we in Canada took in 1857, and which we have since had no cause to regret. The fourth is a valuable paper, read at Edinburgh on the 9th October last, before the National Association for the Promotion of Social Science, by W. Hawes. The fifth is a letter from Judge Redfield of the United States, combatting many arguments contained in a recent article of the Law Magazine in favor of the right of secession. The sixth is an elaborate and really valuable paper, on the subject of gifts in equity, or rather the application of the rule that equity will give no assistance to a volunteer in the case of an incomplete or imperfect gift. The seventh is a letter from the Hon. Wm. Beach Lawrence, of the United States, which was intended to be read at the meeting of the National Association for the Promotion of Social Science, in Edinburgh, but through some accident did not reach the hands of the Secretary till the meeting had closed. The eighth is a paper which was read before the Association by Robert Stuart, Esq., barrister-at-law. The ninth is a paper which was read before the same Association by James McClelland, Esq., President of the Institute of Accountants and Actuaries, in Scotland. The tenth is an extract from Lord Brougham's annual letter to the Earl of Radnor, wherein the veteran law reformer laments the death of Lord Lyndhurst, and shows to what a great degree he was indebted to the deceased for important law reforms that he carried. The number is replete with good reading from talented pens. We recommend all who take an interest in things beyond the mere routine of the profession, to become subscribers to this most useful and most able magazine.

THE WESTMINSTER REVIEW. New York: Leonard, Scott & Co.

The number for October is received. The titles of the different articles are sufficiently indicative of the contents These are, "The French Conquest of Mexico;" "Romala;" "Miracles;" "Gervinus on Shakspeare;" "The Treaty of Vienna;" "Wit and Humour;" "The Critical Character;" "Victor Hugo;" "Mackay's Tubingen School." We have read the paper on "Wit and Humour," and greatly admire the train of philosophic thought which pervades it. The lover of philosophy will also find much to admire in the article on "Critical Character."

THE EDINBURGH REVIEW. New York: Leonard, Scott & Co.

The number for October of this standard Review is also received. The contents are, "Queensland;" "Gregorovius-Mediæval Rome;" "Cadastral Survey of Great Britain;" "Macknight's Life of Bolenbroke;" "Austin on Jurisprudence;" "The Royal Academy;" "Chinchona Cultivation in India;" "Phillimore's Reign of George III.;" "Tara, a Mahratta Rule;" "The Colonial Episcopate." The latter covers ground recently occupied by us, when we discussed the validity of commissions appointing bishops in this colony. The writer points out the difference between the English Church in England and the English Church in the colonies. In England it is the church of the state, supported by the state; in the colonies it is a voluntary association of Christians of a particular denomination, having no greater legal rights than those enjoyed by other denominations. Indeed the writer goes farther than we conceived it necessary to go. He argues that the act of the Imperial Government in constituting bishoprics of the English Church in a colony, in no manner differs from the act of the Roman see in recently parcelling out England into territorial dioceses—an act which at the time excited much comment in the mother country. He shows, however, that English bishops in the colonies have no more coercive powers than Roman Catholic bishops in England, or Anglican bishops in Scotland; and the sooner the Church of England realizes its true position in the colonies, the better will its members work, and the better will it be supported.

THE LONDON QUARTERLY REVIEW. New York: Leonard, Scott & Co.

The number for October of this standard Review is also received. The first paper in it is a very learned and interesting essay on the Progress of Engineering Science. The second paper does honor to the memory of the talented but unfortunate Thomas Hood. It is said by the reviewer that in spite of poverty and pain, Hood shed on the world such a smile of fun and fancy as will be a merry memory forever. The third is a learned dissertation on the much vexed questquestion of the antiquity of man, according to the evidences of geology. The remaining papers are headed "Co-operative Sciences;" "Japan;" "Anti-Papal Movement in Italy;" "Froud's Queen Elizabeth;" "The Church of England and her Bishops."

GODEY'S LADY'S BOOK.—We acknowledge the receipt of the December number of this popular magazine. It has now been in existence for more than thirty-three years, and during all that period has been under the control of the present publisher. His connection with the magazine has resulted in a yearly increase of subscribers, so that at present we believe it has the largest monthly list of any magazine published in the United States. The number now before us opens with a brilliant Fashion plate, containing seven figures, among which are a dress for a bride and dresses for bridesmaids. The steel engravings are, "The Daily Governess," "Telling Christmas Stories," "Juvenile Amusements," "Youth," and "Old Age." Besides these are "An Opera Hood," printed in colors, "A Skating Frame," and other things most suitable for the present season. The annual subscription for one copy is only $3, for two copies $5, and for three copies $7.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

THOMAS F. McLEAN, of the Town of Goderich, Esq., M.D., to be Associate Coroner for the United Counties of Huron and Bruce. (Gazetted Oct. 31, 1863.)

COUNTY CROWN ATTORNEY.

DONALD FRASER, of the Town of Perth, Esq., Barrister-at-Law, to be County Crown Attorney for the United Counties of Lanark and Renfrew, in the room of Daniel MacMartin, Esq., superseded. (Gazetted Oct. 31, 1863.)

NOTARIES PUBLIC.

WILLIAM HAMILTON JONES, of Prescott, Esq., Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted Oct. 31, 1863.)

TO CORRESPONDENTS.

"H."—"AN OLD SUBSCRIBER."—Under "General Correspondence."

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